The Twilight of the Gods: Independence of the Judiciary and the Rule of Law in Europe

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1 Introduction

Gazing upon today's European judicial landscape, one may have the feeling that the final battle of the ancient gods of democracy is about to make itself heard. When that gaze extends itself through History, as the title of this paper suggests, we might even hear the notes of Wagner's *magnum opus* and all that comes with it, including the eternal return of the same, but strangely different. Different actors in different situations but with the same type of utterances.

Maybe the battle is already lost. Who knows? Not even the gods. So let us leave the land of the old gods (if possible) and let us look closer at what is happening across Europe, taking the independence (or lack of) of the judiciary as a symptom for the social unrest that anxiously awaits some kind of deliverance.

Attacks on the independence of the judiciary are self-evident in more than one European country and have been for almost a decade now. In some countries this collective event does not seem to be slowing its pace but maintaining its momentum or even increasing it. As we shall see, the two main European Courts, the European Court of Human Rights (hereinafter "ECtHR") and the Court of Justice of the European Union (hereinafter "CJEU) have been frequently confronted with these attacks and, albeit their natural differences, their discourse has much in common.

It should also be noted that, although the attacks have become more obvious in some countries than in others, we think that this common discourse should be used to strengthen judicial independence all across Europe and not only in this or that country. Maybe the real battle is against overlooking, where justice is concerned, that there is still much to do. If Democracy is to be not only morally superior but an important factor in improving our collective performance, it is required that all public institutions overcome their natural biases and partiality, in a continuous learning process. The institution of an independent justice system, even if it fails in this or that particular case, serves society as a whole. It does so by counteracting the volatile variations of individual sympathies with calmer and more stable points of view. The rules of law and our institutions embody those common values and remind each and everyone of us of the public interest. This interest is often more remote than our personal preferences and, due to that distance, is all the more impotent in the determination of our actions. It is by creating and maintaining

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tribunals, with their inherent independence and impartiality, that we make sure there are persons whose immediate interest is to uphold those laws when we go astray. In David Hume's wise words, it is "in the *execution* and *decision* of justice [that] men [and women] acquire a security against each others weakness and passion, as well as against their own".[1]

2 A Positivized System of Natural Law

As we all know, after the second world war and the atrocities of the Nazis, a process for the institutionalization of Human Rights took place all around the world, giving birth from within the United Nations to the Universal Declaration of Human Rights (1948). Shortly after, in Europe, the Council of Europe was established (1949). Two years later, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") was opened for signature by the members of the Council of Europe (hereinafter "CoE"). As has been readily recognized, the institutionalization of Human Rights by the ECHR is even deeper than that of the Universal Declaration and, in trying to state basic rights clearly, "the ECHR goes into considerably greater detail than most such instruments".[2]

Furthermore, the European Union's primary law added strength to the ECHR, for entry into the Union and continuing membership thereof is conditional upon the commitment to due observance of human rights, as laid down in the ECHR and result from the constitutional traditions of the member states.[3] This commitment is reinforced by the Charter of Fundamental Rights of the EU (hereinafter "CFREU"), that came into force in 2009 along with the Treaty of Lisbon.[4]

Even for the most entrenched positivistic mindset, these forms of institutionalization of Human Rights have significantly transformed the old natural rights debate. If in 1945 Hans Kelsen could write that "Legal norms may have any kind of content"[5] and that proposition could uphold its claim of validity at least in the realm of sovereign nation states, with the advent of the institutionalization of Human Rights at an international level and, in particular, at the European regional level or at the EU transnational level, such a claim can only be read in the context of the ECHR and EU primary law, its Treaties and the CFREU.

Where Europe is concerned, it then becomes obvious that no national law is legitimately binding, regardless of the amount of popular support the executive or the legislature have, if it is judged by the European Court of Human Rights (hereinafter "ECtHR")

[1] D. Hume (1739) 589.

[2] N. MacCormick (2007) 196.

[3] Cf. Article 6(3) of the Treaty of the European Union. Sustaining the interpretation exposed in the text, Neil MacCormick, ibid. To the same effect, judgement of the CJEU in Case C-791/19, Commission v. Poland [2021] ECLI:EU:C:2021:596, para 52.

[4] Article 52(3) of the Charter states, "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

[5] H. Kelsen,(1945) p. 113. As is well known H.L.A Hart, as late as 1961, also stood by this bold assertion (H.L.A. Hart (1994) p. 207).

or by the Court of Justice of the European Union (hereinafter "CJEU") to infringe the rights enshrined in the aforementioned regional and transnational legal instruments. Of course this may cause some natural discomfort, for a previous democratic majority, which adopted or signed up for those legal instruments, may not be in accord with a future and present majority. Albeit this possible state of affairs, derived from the mere passage of time and sociological variations, the (institutional) fact remains that, as MacCormick puts it, "Only states willing to cut themselves loose from the Council of Europe and the European Union, and to forgo the advantages that membership brings, can evade this positivized system of natural law".[6] Of course, if these States do cut loose, that would leave their populations, in particular their minorities, even more exposed to the follies of power.

Notwithstanding such considerations, in the referred positivized system of natural law we "naturally" encounter in article 6(1) of the ECHR the fundamental right to a fair and public hearing by an "independent and impartial tribunal established by law". On the other hand, in the field of EU primary law, article 2 of the Treaty on the European Union (hereinafter "TEU") clearly states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the *rule of law and respect for human rights*, including the rights of persons belonging to minorities. These values are declared to be common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. As the CJEU has impressively stated, "it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".[7] Furthermore, according to the first paragraph of Article 49 of the TEU, the respect of these values and a commitment to promote them are necessary conditions to become a member of the EU. Article 19(1) of the TEU, obliges Member States to provide for remedies sufficient to ensure effective legal protection in the fields covered by Union law. To that effect, in accordance with article 47(2) of the CFREU, everyone is entitled to a fair and public hearing by an "independent and impartial tribunal previously established by law".

3 The Separation of Powers and the Independence of the Judiciary and the Rule of Law, as Fundamental *De Jure* Principles

Even taking into account the above-mentioned positivized system of Human Rights, a purely positivistic perspective may still be insufficient to understand the complexities at issue in the independence of the judiciary. We will try to make this point clear in what follows.

The independence of the judiciary is inevitably intertwined both with the principle of separation of powers and the rule of law, sometimes referred to as the *Rechtsstaat*, *l'Etat de droit* or law-state. As we all know, since Montesquieu, this most basic of principles was

[6] N. MacCormick (2007) p. 274.
[7] Case C-156/21, Hungary v Parliament and Council [2022] ECLI:EU:C:2022:97, para 232.

conceived to be essential to the maintenance of a free government and to avoid despotic power. It is hard to conceive an unbiased application of the Law without the separation of powers. It could be stated, in a Kantian vein, that the separation of powers is an *a priori* condition of the possibility of justice. However, where the principle of separation of powers is concerned, as noted by the CJEU, "the European Court of Human Rights has repeatedly stated that, although the principle of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law, neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction".[8] It follows from the case-law of both these Courts (the CJEU and the ECtHR), in what is here relevant, that Member States have "discretion" as regards the principle of separation of powers. The principle is therefore not binding in itself as would be expected from the point of view of a positivist, who may even question if it forms part of Law at all.

On the other hand, according to the rule of law, laws should be previously enacted instruments of general application. Furthermore, these laws, so as to avoid arbitrariness and promote legal certainty, should be clearly defined and, as the ECtHR puts it, "foreseeable in [their] application".[9] Obviously, it is not always easy to establish general rules in a clear and foreseeable manner. That is why it is difficult to conceive a legal system as a mere body of rules telling us, for example, if in situation X, then do P or Q. Many a time it is necessary to make the rule clear or even, when it was not thought of beforehand, to make the rule itself, deriving it from well-established principles.[10] Of course it is in these cases that the borders between the juridical and the political may become controversial and the rivalry for the power of decision most visible. This situation then begs the question on what differentiates Law from Politics.

In addition, the rule of law poses other important problems. First, the rules themselves, although clear and foreseeable, may be invalid. But invalid in relation to what standard, one may ask. On the other hand, if the rules pertain to a certain national system, one may ask who has the power to recognize their invalidity? Thirdly, rules may suffer changes in the middle of an ongoing case, by the hand of a strong legislature, by interpretations of national Constitutional Courts or even, as we shall see, by way of the Constitution-maker. This is where the mentioned system of positivized natural law and the primacy of the ECHR and EU law show themselves to be all the more problematic. Here, as may be recalled, for some authors, *de facto* acceptance of authority is the ultimate binding force or "rule of recognition" of Law.[11] As we shall also see, the acceptance

[8] Joined Cases C-585/18, C-624/18 and C-625/18 A.K. and Others [2019] ECLI:EU:C:2019:982, para 130.

[9] Guðmundur Andri Ástráðsson v. Iceland App no 26374/18 (ECtHR, 1 December 2020), para 238.

[10] R.M. Dworkin(1977).

[11] This rule of recognition, as is well known, cannot be valid or invalid. See H.L.A. Hart (1994), 107–110.

of the mentioned primacy is in fact problematic, at least for some Member States.[12] But, taken from a different perspective, if the ultimate test of what is the Law is not *de facto* acceptance but its *de jure* grounding in well-established principles that, although not positivized, form part of the Law, then its attractiveness and force lies within itself and not elsewhere in its mere acceptance. And therein lies its important difference from the Political.

4 Independence and Impartiality: Institution-Agencies and Institution-Arrangements

If independence means to be solely under one's own jurisdiction, in the case of the judiciary's independence, it cannot be understood without the principles of separation of powers and the rule of law. The independence of the judiciary is therefore necessarily a complex guarantee with a multiplicity of aspects. For example, the well known Recommendation CM/Rec(2010)12 of the Venice Commission,[13] wishing to promote the independence of judges by Member States of the CoE, divides itself into seven broad categories: (i) external independence; (ii) internal independence; (iii) Councils for the judiciary; (iv) Independence, efficiency and resources [of judges and judicial systems]; (v) status of the judge; (vi) Duties and responsibilities [of judges]; (vii) ethics of judges.[14]

On the other hand, in the case-law of the ECtHR, it is common to distinguish between "independence", including the appearance of independence, and "impartiality", including objective and subjective tests of evaluation.[15] From our point of view, "independence" has more of an objective character, more to do with institutional architecture (external and internal), that is to say the way the courts (the adjudicating bodies) have been constructed to relate to other "outside" bodies and between themselves. "Impartiality" is more related to personal qualities of the judge (bias). One may say that independence is a precondition of impartiality and that for a judge to be impartial or at least have an (objective) appearance of impartiality it is foremost necessary, but not sufficient, for her to be independent. Albeit these abstract distinctions, in actuality, it is admittedly difficult to isolate "independence" and "impartiality" so they are mostly conceived of as an *ensemble*.[16]

[12] Maybe due to this problem, some decisions of the Courts observed below, in particular those of the ECtHR, instead of powerful utterances of juris dictio that aim at bringing about transformations in the institutional order, seem to fall short of the finishing line.

[13] The Venice Commission is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. For more details < https://www.venice.coe.int/WebForms/pages/?p=01_Presentation > accessed 27 January 2024.

[14] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, < https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 > accessed 27 January 2024.

[15] See Denisov v. Ukraine App no 76639/11 (ECtHR, 25 September 2018), paras 60–64.

[16] Cf. S. Guinchard (2021) 876.

In this paper we will first focus our attention on institution-agencies (or bodies),[17] for example High Councils for the Judiciary or special disciplinary chambers, so as to make visible the courts perviousness to external forces. As we shall see, this potential influence occurs through the way these specific bodies, including special sections of the courts themselves, have been composed by the legislature or executive. Here our focus will therefore be on the institutional agencies concerning the judiciary that at least in appearance open it up to the influence of other powers, in particular to the legislature or executive, but also to any other *de facto* powers (for example, political parties, the media, corporate entities or even experts).

We will then move on to institution-arrangements, in particular rules that are directly aimed at the judge as a professional and a person, such as disciplinary offences, criminal proceedings and personal liability, thus relating to the status of the judge and the inherent principles of irresponsibility and irremovability. Obviously, institution-agencies and institution-arrangements are more often than not bundled together, for the agencies act through the legal arrangements that have been enshrined in the laws of the land and thus serve as power tools or institutional weapons, to be wielded between their holders, whatever the specific motivation or strategy may be.

Thirdly, we will focus our attention on what seems to us to be a highly atypical procedure, enacted through the ordinary law and the national Constitution, to silence one single judge in Hungary, due to his defence of the independence of the judiciary.

Last but not least, we further deepen our analysis relating to the appointment of judges to strategic courts, in particular, to Courts of Appeal and Constitutional Courts, that is to say to positions in the adjudicating bodies themselves.

Of course, the essential purpose of the guarantee of independence of the judiciary is to avoid any risk of pressure on the content of judicial decisions and thus to dispel, in actuality and in the minds of individuals and the public, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them. Although the immediate effect of the lack of judicial independence may be the lack of public trust in the judicial system,[18] when combined with other phenomena, like encroachments on the freedom of the press and the downgrading of certain citizens based, for example, on their gender, sexual orientation or religion, the long-term effect becomes the elimination of difference and freedom and the occultation of the true nature of power. On the other hand, by not ensuring an independent judiciary (courts and public prosecution), the state forfeits the means that may serve to fight, inter alia, high-level corruption. Without independence, instead of the judiciary assuming its "natural" place in the play of checks and balances, it becomes the extension of a friend or foe policy. Through the bridling of the multitude, democracy a ghost in the shell, justice a charade.

[17] Obviously we are here indebted to Neil MacCormick's legal theory.

[18] Evidently this lack of trust may be caused by other factors, like the inefficiency of the courts, for example when handling high level corruption cases. These kinds of factors also have a high potential to cause public dissatisfaction and may be used as triggers for the interference of a given executive. Inefficiency may be due, among others, to the lack of resources afforded to the judiciary, legal loopholes or human mistakes.

5 Institution-Agencies: The Indirect Control of the Judiciary Through the Composition of Related Bodies

It is quite common in Europe to find Councils of the judiciary with important powers, in particular, concerning the appointment, disciplining and dismissal of judges. Due to the sensitive nature of these functions, the composition and mode of appointment of the members of Councils of the judiciary, in view of accessing their independence, have been questioned in cases before the ECtHR and the CJEU.

A clear-cut case in this respect was *Oleksandr Volkov v. Ukraine,*[19] adjudicated by the Fifth Section of the ECtHR. The same standards for evaluating the independence of these bodies were later reiterated by the Grand Chamber of the same Court in the case *Denisov v. Ukraine.*[20] In the first of these cases, the applicant, a Supreme Court Judge, had been dismissed from the post of judge by a recommendation of the High Council of Justice later confirmed by Parliament. In the second case, the applicant had been dismissed from the position of president of a court of appeal also following a recommendation of Ukraine's High Council of Justice in disciplinary proceedings.

While evaluating if the Ukraine's High Council could be considered a "independent and impartial tribunal" under article 6(1) of the ECHR, the ECtHR found very serious structural deficiencies in the composition, modes of appointment and administrative and financial workings of that institutional agency.

Where the deficiencies concerned the composition of the High Council, the ECtHR underlined the small minority of judges represented in the High Council in contrast with half of the High Council being composed of members directly originating from the political or prosecution authorities. In particular, of a total of twenty members, in addition to the Minister of Justice and the Prosecutor General being *ex officio* members, six members were chosen by Parliament and by the President of the Republic (three each) and two were chosen by the All-Ukrainian Conference of Prosecutors. Only three members were chosen by judges, in addition to the President of the Supreme Court being an *ex officio* member.[21] But, as further pointed out in *Oleksandr Volkov,*[22] even if half of the members of the High Council were to be judges, that fact alone would not be enough to guarantee the independence and impartiality of that body. On this point the ECtHR stressed the importance of judges being appointed by their peers and not by external powers.[23]

The ECtHR further noted that the weighty presence of elements originating from prosecution authorities was a manifest vulnerability of the High Council, in view of the functional role of prosecutors in domestic judicial proceedings, namely where criminal

[19] Oleksandr Volkov v. Ukraine App no 21722/11 (ECtHR, 9 January 2013).

[20] Denisov v. Ukraine (n 14).

[21] The remaining six members were designated by the Assembly of Advocates of Ukraine, and the Assembly of Representatives of Higher Legal Educational Establishments and Scientific Institutions.

[22] Oleksandr Volkov v. Ukraine (n 18), para 112.

[23] According to the Venice Commission's Recommendation CM/Rec(2010)12, not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.

investigations are concerned. Indeed, underscoring the presence of authorities responsible for criminal investigations in a body where the disciplining of judges is an important part of the job, might not be such a good idea.

Finally, the ECtHR pointed out that the fact that members of the disciplinary body participated in the final determination of disciplinary cases, after playing an important role in the preliminary inquiry of those same cases, could also cast doubt on the impartiality of those members.

In another case, *Ramos Nunes de Carvalho e Sá v. Portugal*, first brought before a Chamber of the ECtHR (Fourth Section), the independence and impartiality of the Portuguese High Council of Judges (*Conselho Superior da Magistratura*, hereinafter, CSM), was also evaluated in connection with disciplinary procedures.[24] Here, the Chamber concluded that the independence and impartiality of the CSM "may be open to doubt".[25] These doubts were related to the fact that the CSM was composed by the President of the Supreme Court and another 7 judges elected by their peers, in contrast with 9 members of which 2 were designated by the President of the Republic and 7 elected by Parliament (in accordance with Article 218 of the Constitution of the Portuguese Republic). In this respect, the Chamber underlined "the majority of non-judicial members appointed directly by the executive and legislative authorities".[26] This reasoning is in line, it must be noted, with Recommendation no 6 of the evaluation report on Portugal by the Group of States against Corruption (GRECO), adopted on 4 December 2015, where it was recommended that "the role of the judicial councils as guarantors of the independence of judges and of the judiciary is strengthened, in particular, by providing in law that not less than half their members are judges elected by their peers".[27]

The case of *Ramos Nunes de Carvalho e Sá v. Portugal*, on the request of the Portuguese Government, was subsequently adjudicated by the Grand Chamber of the ECtHR.[28] However, on the specific point of the alleged lack of independence and impartiality of the CSM, the Grand Chamber considered that it lacked jurisdiction to adjudicate on it, due to the untimely manner in which this particular complaint had been brought to the Court.[29] In spite of this, it is interesting to hear Judge Pinto de Albuquerque on this matter, in his concurring opinion: "It is my firm belief that the CSM's composition, according to the constitutional framework from 1982 to 1997 and the subsequent presidential practice of appointing one judge, is in line with the role of judicial councils as guarantors of judicial independence. The moral authority and political representativeness of the President of the Republic are in and of themselves a solid guarantee of a

[24] Ramos Nunes de Carvalho e Sá v. Portugal Apps nos 55391/13, 57728/13 and 74041/13 (ECtHR, 21 June 2016).

[25] Ibid, para 80.

[26] Ibid, para 77.

[27] GRECO, Evaluation Report Portugal, adopted on the 4 December 2015, para 96 < https://www.coe.int/en/web/greco/evaluations/portugal >, accessed 27 January 2024. GRECO reiterated its view in its Second Interim Compliance Report, adopted on the 25 March 2021, paras 45–49 < https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a21605 > accessed 27 January 2024.

[28] Ramos Nunes de Carvalho e Sá v. Portugal Apps nos 55391/13, 57728/13 and 74041/13 (ECtHR, 6 November 2018).

[29] Ibid, paras 106–107.

fair balance between the democratic and judicial components in the Portuguese judicial governance body".[30] To fully understand this statement, it helps to recall that the Portuguese President of the Republic is elected by universal and direct suffrage (in contrast with systems where the President is chosen by Parliament) and is therefore conceived of as an autonomous body (from the executive and legislative).[31]

Despite the position of Pinto de Albuquerque regarding the CSM, this judge, together with judges Yudkivska (Ukraine), Vučinić (Montenegro), Turković (Croatia), Dedov (Russia) and Hüseynov (Azerbaijan), were of the opinion that the decision of the Grand Chamber had fallen short in respect of the lack of independence of the Judicial Division of the Portuguese Supreme Court, regarding its jurisdiction on appeals against disciplinary decisions taken by the CSM. To put it into context, the decisions of this High Council were subject to an appeal to the Judicial Division of the Supreme Court. The President of the Supreme Court could thereby participate in the decisions of the High Council under appeal and, although not participating in the referred Judicial Division, could determine, to a certain extent, the composition of that division. Due to the shortcomings of this institutional architecture, the appearance of impartiality could not be said to have been obtained and the composition of the tribunal (in this case the Supreme Court viewed in its relation to the CSM) did not pass the test of objective impartiality. Indeed, hierarchical or other links could not be ruled out *a priori*, even if no subjective bias was to be found in the specific members of the adjudicating body. The dissenting opinion therefore stressed the importance of complete institutional integrity of the bodies whose powers included the disciplining of judges, starting at the level of objective appearances.[32] This separate opinion further underlined that the High Council was simultaneously the body with jurisdiction to decide on disciplinary actions concerning Supreme Court judges, that is to say that the judicial review of disciplinary sanctions was performed by judges who were also under the disciplinary jurisdiction of the body whose decisions were being reviewed. As had been noted in *Oleksandr Volkov* this also jeopardised the "independence and impartiality" of the reviewing court. On this last point, however, the Grand Chamber considered that the standards applied in *Oleksandr Volkov* should not be applicable to the case at hand for no serious issues had been established in terms of structural deficiencies or an appearance of bias within the Portuguese CSM. This last argument comes somewhat as a surprise for, as we may recall, earlier in its reasoning, the Grand Chamber had considered that it had no jurisdiction to rule on the alleged lack of independence of the CSM.[33]

At this point it will be interesting to turn our attention to the EU and case-law of the CJEU, starting with the Grand Chamber's judgement of 19 November 2019, in the preliminary ruling procedure under Article 267, Joined Cases C-585/18, C-624/18 and

[30] Ramos Nunes de Carvalho e Sá v. Portugal (n 27), concurring opinion of Judge Pinto de Albuquerque, para 21.

[31] See J. J. Gomes Canotilho (2003) 620.

[32] Ramos Nunes de Carvalho e Sá v. Portugal (n 27), joint partly dissenting opinions of Judges Yudkivska (Ukraine), Vučinić (Montenegro), Pinto de Albuquerque (Portugal), Turković (Croatia), Dedov (Russia) and Hüseynov (Azerbaijan), paras 4–7.

[33] Ibid, para 9.

C-625/18, *A.K. and Others*.[34] The questions to be answered here by the CJEU, by referral of the Polish Supreme Court, the *Sąd Najwyższy,* were primarily related to the creation of a new Disciplinary Chamber within that "same" Supreme Court. This new Disciplinary Chamber had been provided with a somewhat extensive jurisdiction, including not only the exclusive jurisdiction to adjudicate on disciplinary proceedings concerning Supreme Court judges, but also for proceedings in the field of labour law and social security and those regarding the already controversial issue of the retirement of those judges.[35] Not surprisingly, at the centre of the main proceedings, were cases related to the compulsory retirement of three Supreme Court judges.

The issues relating to the (lack of) independence of this new Disciplinary Chamber were, in turn, connected to the question of the (lack of) independence of the Polish High Council for Justice, the *Krajowa Rada Sądownictwa* (hereinafter "KRS"). This connection with the KRS was necessarily raised for the judges of the new Disciplinary Chamber were all, without exception, to be appointed by the President of the Republic by proposal of the KRS.

It should be noted that the CJEU, due to the very nature of the preliminary ruling procedure (where it is only called upon to resolve problems of interpretation concerning EU Law), did not have the power to declare that the KRS was not independent and that this lack of independence necessarily affected the independence of the new Disciplinary Chamber, for that power belonged to the national courts. Within its legitimate powers, however, the CJEU did not miss the chance to advance legal interpretations that would allow the referring Court to form a correct understanding on this issue.[36] Indeed, on the point relating to the concept of an "independent and impartial tribunal", foreseen in the second paragraph of Article 47 of the CFREU, the CJEU underlined that the interpretation of that concept should safeguard a level of protection that does not fall below the level of protection established in Article 6 of the ECHR, as interpreted by the European Court of Human Rights.[37] In its understanding of the independence and impartiality requirements, the CJEU therefore aligned itself with the case-law of the ECtHR, stressing the importance, *inter alia*, of the mode of appointment of the members of a given body, the existence of guarantees against outside pressures, and the appearance of independence.

[34] Joined Cases C-585/18, C-624/18 and C-625/18 (n 7).

[35] The CJEU on the 24 July 2019, in an infringement procedure under Article 258 TFEU, declared that the Republic of Poland, by lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland), notably without any transitional provisions and, at the same time, giving discretionary powers to the President of the Republic to allow certain judges to continue in duties after the new retirement age, had failed to ensure effective legal protection in the fields covered by Union law as foreseen in second subparagraph of Article 19(1) TEU (Case C-619/18, Commission v Poland [2019] EU:C:2019:531). On the unequal treatment of women and men where the retirement age of Polish judges and Public Prosecutor's were concerned, see Case C-192/18, Commission v Poland [2019] ECLI:EU:C:2019:924.

[36] On the CJEU's assertion of its own powers on the subjects of the rule of law and the independence of the judiciary, under Article 19(1) of the TEU, beginning with the case Associação Sindical dos Juízes Portugueses (Case C-64/16, EU:C:2018:117), see A. T. Pérez (2020).

[37] Joined Cases C 585/18, C 624/18 and C 625/18 (n 7), para 118.

In this context, and regarding the role of the KRS in the appointment process - a role that, in the absence of judicial review of its decisions, surely necessitated its own independence -, the CJEU could not but underline certain alleged facts that clearly indicated risks of influence from the legislature and the executive. In the first place, as it was newly composed (following amendments to the law in late 2017), the KRS was formed by reducing the ongoing four-year term in office of the former members of that body. In other words, the KRS had been expunged of its former members. Secondly, whereas previously the 15 members of the KRS belonging to the judiciary were elected by their peers, they were now elected by a branch of the legislature. In sum, members directly originating from or elected by the political authorities now amounted to 23 of the 25 members of that body.[38]

The CJEU also stressed the potential for irregularities, which could have adversely affected the process of appointment of certain members of the newly formed KRS, namely the lack of transparency and possible illegality of the election.[39] In this regard, according to the CJEU, particular attention should also be taken to the actual conduct of the newly formed KRS, specially its silence regarding the independence of the judiciary, in spite of very controversial ongoing legislative reforms.[40] In addition to that silence, according to what was stated by the referring court, the KRS, or members thereof, had instead publicly criticised members of the *Sąd Najwyższy* (Supreme Court), including for having referred questions to the CJEU for a preliminary ruling.

A little more than a year after this ruling (2 March 2020), in Case C-824/18, *A.B. and Others*,[41] another preliminary ruling procedure, the Grand Chamber of the CJEU was confronted with similar issues concerning the KRS. This case related not to disciplinary issues but to appeals lodged before the referring court, the Polish Supreme Administrative Court, by candidates for judicial positions within the Civil and Criminal Chambers of the *Sąd Najwyższy* (Supreme Court). These candidates were now challenging resolutions by which the KRS did not accept their applications and, instead, submitted, to the President of the Republic, other candidates for appointment to those same positions.

As pointed out in this case, the act by which the KRS put forward a candidate for appointment to a position of judge at the Supreme Court was an essential condition for such a candidate to be appointed. The situation was even more problematic due to the fact that neither the decisions of the KRS nor of the President of the Republic were subject to an effective judicial review. In effect, regarding the appeal regime applicable to the resolutions of the KRS (forwarded to the referring Supreme Administrative Court), it was constructed in such a way to be a mere travesty of a right. Indeed, any individual appeal did not prevent another candidate to be appointed for the same vacancy if all the other candidates had not also appealed, including the successfully proposed candidate. In other words, candidates would have to appeal against their own interests for the appeal to have any real effect.

[38] Joined Cases C 585/18, C 624/18 and C 625/18 (n 7), para 143.

[39] Ibid, paras 43 and 143.

[40] It should be recalled that according to Article 186(1) of the Polish Constitution, the KRS "shall be the guardian of the independence of the courts and of the judges".

[41] Case C-824/18, A.B. and Others [2019] ECLI:EU:C:2021:153.

These issues were all the more important because the recent legal reforms (for the most part advanced during 2018) included a law that reduced the retirement age of the judges of the Polish Supreme Court, from 70 to 65 years, while making the possibility of continuing to hold office beyond that age subject to authorisation by the President of the Republic.[42] Put in simple and concise terms, by compulsively retiring judges of the Supreme Court and, at same time, giving powers to the KRS (which was now under the influence of the legislature and the executive) to propose new judges for positions in the Supreme Court as well as judges to sit in the Disciplinary Chamber (which, in its turn, had the power to adjudicate on cases related to the compulsory retirement of Supreme Court judges), the Government was turning the highest ordinary court of the land, at least in appearance, if not in substance, notoriously pervious to outside influence. The Supreme Court would therefore lose any hope of being an independent and impartial tribunal within the meaning of EU Law and the ECHR.

Lastly, it should also be mentioned that the jurisdiction of the referring Supreme Administrative Court to adjudicate on cases of appointment of judges to the Supreme Court was subsequently declared unconstitutional by the Polish Constitutional Court, entailing the termination of all pending cases. This decision led to a further amendment of the Law on 26 April 2019, that stated that there was to be no future right of appeal in individual cases regarding the appointment of Supreme Court judges. In other words, the powers of the referring Court to decide on the ongoing cases had been taken away, including the power to pose preliminary questions to the CJEU. These new (institutional) facts obliged the CJEU to go even further in its interpretation of EU Law, leading it to state that the Constitutional Court's judgment did not call into question the need for judicial review of appointments to judicial positions at the Supreme Court and, in particular, of the resolutions of the KRS adopted in the framework of such a process. Moreover, noted the CJEU, in light of the principle of primacy of EU Law, not even constitutional provisions could be allowed to undermine the unity and effectiveness of EU Law and, if need be, the jurisdiction of the referring Court should thus be maintained, in spite of the Constitutional Court's decision and subsequent amendments of the law depriving it of that same jurisdiction.

The principle of primacy of EU Law was reaffirmed by the Grand Chamber of the CJEU in its judgement of the 6 October 2021, in the preliminary ruling case C-487/19, also regarding Poland. In this case, at issue in the main proceedings was a decision to transfer a judge to a lower capacity, that is, from a position of appeal to functions of first instance. That decision had been taken by a president of a court appointed, through the use of discretionary powers, by the Minister of Justice. Furthermore, the judge to be transferred belonged to the former composition of the KRS and was known for public criticisms of the ongoing judicial reforms. The transfer decision was contested by the targeted judge before the KRS, who brazenly ruled that there was no need to adjudicate on the case. The concerned judge then appealed the KRS´s (non) ruling to the Supreme Court, just to find that his case was to be decided by the newly created Chamber of Extraordinary Control and Public Affairs. At this point the appellant requested that the judges of that Chamber be recused for they did not offer sufficient guarantees of independence and impartiality. Indeed, those judges had been appointed to the Chamber,

[42] On this particular aspect see Case C-619/18, Commission v Poland (n 34).

following a resolution of the KRS that, in turn, had been subject to an appeal by candidates whose applications had been ignored in the very same way as in the proceedings underlying Case C-824/18*, A.B. and Others*. In spite of the pending appeal against the appointment of the judges to the Chamber, a single judge of that Chamber dismissed the case on inadmissibility grounds, without even having access to the respective case-file (that was at the court adjudicating on the recusal application). Here, the CJEU expressively stated that the primacy principle entailed that an order given by a "court" should be considered null and void if it could not be considered to have emanated from an "independent and impartial tribunal previously established by law".[43] In short, if the legislature were to create so-called "courts" to bypass the rule of law, the orders emanating from such puppet entities should be considered of no legal value by the "real" courts.

Coming back to the case-law of the ECtHR (in judgements given by the First Section), due to what has already been described, it may come with little surprise that both the aforementioned Disciplinary Chamber and Chamber of Extraordinary Review and Public Affairs of the Polish Supreme Court have been found not to be "tribunals established by law".[44]

As the patient reader most certainly has gathered by now, all these highly technical juridical discussions echo the hammering of godly instruments forged not out of steel, but with equally devastating effects for the integrity of the institutional agencies whose purpose is to uphold the rule of law. But let us further ourselves even more into the mist of the surrounding battlefield.

6 Institution-Arrangements: The Intimidation of the Judiciary Through Disciplinary Offences, Criminal Responsibility and Personal Liability

The considerations relating to the KRS, put forth in cases *A.K. and others* and *A.B and others*, were reiterated by the Grand Chamber of the CJEU, on 15 July 2021, in Case C-791/19, *Commission v. Poland*.[45] The principle novelty here being that the judgement was no longer related to a preliminary ruling procedure but to an action brought against Poland by the Commission, under Article 258 of the TFEU, regarding that Member State's failure to fulfil its obligations under the Treaties. This CJEU judgement further analysed other legal provisions of the ongoing reforms, most notably, the possibility of the content of judicial decisions, including decisions to make a preliminary ruling request, to be considered disciplinary offences.

Where disciplinary regimes were concerned, it was not overlooked by the CJEU that these are necessary exceptions to the principle of irresponsibility, which, in justified extraordinary cases, may contribute to the accountability and effectiveness of the judicial system. The problem was the lack of clarity of the provisions concerning what was to

43 Case C-487/19, W. Ż. [2021] ECLI:EU:C:2021:798.

44 See, respectively, Reczkowicz v. Poland and Dolińska-Ficek and Ozimek v. Poland, Apps nos 43447/19, 49868/19 and 57511/19 (ECtHR, 22 July 2021 and 8 November 2021).

45 Case C-791/19, Commission v. Poland (n 3).

be understood as a disciplinary offence, in particular regarding judicial decisions. In effect, instead of opting for the concept "obvious and gross violations of the law", already consolidated in its meaning by the existing case-law of the Polish Supreme Court, the national legislature had now opted for the expression "obvious violation of the law", eliminating thereby the term "gross". This less demanding condition, specially when applied to mere "findings of error" in judicial decisions, therefore raised particular concerns regarding the new disciplinary regime forming a part of a system of political control of the content of judicial decisions.

The clear determination of what should be considered a disciplinary offence was all the more important in the context of the ongoing legal reforms that included, as we have seen, the early retirement of Supreme Court judges, a new composition of the KRS with powers to propose new judges for positions in the Supreme Court and choose the judges who were to sit in the new Chambers, in addition to powers now conferred upon the President of the controversial Disciplinary Chamber to discretionarily designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts.

Various disciplinary proceedings relating to preliminary ruling requests, in the short time after the creation of the new disciplinary bodies, had already been brought against Polish judges. In addition, a Polish judge had been suspended for ordering the *Sejm* (the Lower House of the Polish Parliament) to produce documents relating to the process for appointing the members of the KRS in its new composition. In addition, the defence rights of the judges submitted to disciplinary proceedings, such as the right to be heard and of access to a lawyer, had been significantly restricted by the new laws.

The CJEU thus explicitly declared that these legal reforms were all failures of the Republic of Poland to fulfil its obligations under the Treaties, in particular, to guarantee the independence and impartiality of its justice system.

As we all know by now, the story of the crisis of the rule of law in Poland is still far from seeing an end to it. If the above mentioned legal reforms undermining the imperviousness of Justice and opening it up to the influence of the executive and legislative were not already enough, at the time of writing, still pending is Case C-204/21, *Commission v. Poland*.[46] What's at stake in this action, brought on the 1 April 2021, is the exclusive jurisdiction conferred upon the Extraordinary Review and Public Affairs Chamber to examine complaints based on the lack of independence of a judge or tribunal, therefore preventing other national courts to review compliance with the EU standards of independence and impartiality. Simultaneously, such a review when done by another domestic court may be classified as a disciplinary offence. This action also seeks to declare that the Republic of Poland has further failed to fulfil its EU obligations by conferring decision-making powers to the Disciplinary Chamber of the Supreme Court (whose independence and impartiality are allegedly not guaranteed), regarding cases which have a direct impact on the status and tenure of office of judges and assessors (trainee judges), such as allowing judges and assessors to be criminally prosecuted or detained, in addition to cases relating to the retirement, employment and social insurance of Supreme Court judges.

[46] Case C-204/21, Commission v. Poland [2021], report not available at the time of writing.

With all these recent reforms, including specific criminal provisions for judges and prosecutors, one cannot but have the impression - however hard it is to admit in relation to a EU Member State - that the situation in Poland has certain traces that remind us of the Turkish judicial crisis that began in 2016 and where more than 4500 judges and prosecutors have been sacked and at least 2450 jailed.[47]

Apparently to counteract such dangerous tendencies, in case C-204/21, the Vice-President of the CJEU ordered, on the 14 July 2021,[48] interim measures determining the suspension of new powers conferred to the Extraordinary Review and Public Affairs Chamber and the Disciplinary Chamber.

However, on the very same day the Polish Constitutional Tribunal adjudicated that, insofar as the CJEU acts *ultra vires* (exceeding its scope of powers) and thereby imposes obligations on the Republic of Poland by prescribing interim measures pertaining to the organisational structure of Polish courts, certain provisions of the Treaties are deemed inconsistent with the Polish Constitution and are thereby not covered by the principles of precedence and direct application.[49] Shortly afterwards, in line with the Constitutional Tribunal's decision, the Republic of Poland, alleging that the order of the 14 July was contrary to the Polish constitutional order, requested the CJEU to cancel it. The CJEU promptly dismissed this request on the 6 October 2021,[50] recalling once again that not even national laws of constitutional level could undermine the principle of primacy of EU Law. In turn, on the day after (7 October 2021) the Polish Constitutional Tribunal adjudicated on an application lodged by the Polish Prime Minister, asserting that certain provisions of the EU Treaties (mainly article 19(1), second subparagraph, TEU), were inconsistent with Poland's Constitution, for the following reasons: 1) such provisions allow the EU authorities to act outside the scope of competences conferred upon them by the Republic of Poland in the Treaties; 2) under those provisions the Polish Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application; 3) they prevent the Republic of Poland to function as a sovereign and democratic state.[51] Indeed, according to the Polish Tribunal's reading of the Treaties, the EU, namely the CJEU, has no competence regarding the organisational structure of Polish Courts.[52] On the other hand, the Constitution of the Republic of Poland, expressing the sovereignty of the Republic and its national identity, establishes the framework of the legal guarantees for the independence of judges. It follows that

[47] These judges and prosecutors (and their families), had no right to a trial (not even an unfair one) and whose property was confiscated, were thereby condemned to being social outcasts. On this subject, see J. I. Matos (2021).

[48] Order of the Vice-President of the Court [2021] ECLI:EU:C:2021:593.

[49] Judgement of the Polish Constitutional Tribunal, ref n P 7/20 < https://trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-ksztaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa >, accessed 27 January 2024.

[50] Order of the Vice-President of the Court [2021] ECLI:EU:C:2021:834.

[51] With two dissenting votes, filed respectively by Judge Piotr Pszczółkowski and Judge Jarosław Wyrembak.

[52] Judgement of the Polish Constitutional Tribunal, ref no P 3/21 < https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej >, accessed 27 January 2024.

where the decisions of the CJEU are concerned, in particular, allowing domestic courts to bypass the national legal order, including its Constitution, so as to review the legality of the procedure for appointing a judge or to determine the defectiveness of the national process of appointing a judge and, as a result, to refuse to regard such a person as a judge, the legal provisions of the Treaties, as interpreted by the CJEU, are inconsistent with the Polish Constitution. In sum, Poland's constitutional standards regarding the organisation of its courts may not be replaced with the CJEU's interpretative guidelines and, if this is to be the case, such case-law is subject to assessment by the same Tribunal to evaluate its conformity with the Polish Constitution.

As we can see, the legal arguments of the Polish Constitutional Court essentially rest on the assumption that the EU has no competences regarding the independence and impartiality of the judiciary of Member States or, as the Polish Constitutional Tribunal phrases it, the "organisational structure and functioning of Polish courts". It is true that the Treaties do not confer such a competence on the EU in an explicit fashion. Furthermore, it has been acknowledged by legal scholars that the CJEU has made a "bold interpretation" of the second subparagraph of Article 19(1) TEU so as to afford itself such competence.[53] In spite of these considerations, we must admit that limiting the mechanism of the preliminary ruling procedure before the CJEU, through disciplinary arrangements, as we have seen above when analysing case C-791/19, is manifestly contrary to the EU legal order and understandably can not be tolerated by the CJEU.

It is in this context that, after the Polish Constitutional Tribunal's openly defying stance, on the 27 October 2021, a third interim measure in case C-204/21 was ordered by the Vice-President of the CJEU, this time applying a penalty payment of € 1.000.000,00 per day, until Poland complies with the obligations arising from the order of 14 July 2021, that is to say, until the suspension of the new powers conferred to the Extraordinary Review and Public Affairs Chamber and the Disciplinary Chamber.[54]

Unfortunately, Poland is not the only EU Member State to recently be involved in these kinds of controversies. In the CJEU preliminary ruling procedure of 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*,[55] Romania was the envisaged state, by the judgement of 18 May 2021. The controversies revolved around legal amendments made during 2018 and 2019 to the various justice laws, which had been adopted within the framework of negotiations for Romania's accession to the European Union with the purpose of improving the independence and effectiveness of the judiciary, in particular in regards to the rule of law and, *inter alia*, the fight against corruption. Those legal reforms were most apparently against that framework (the Treaty of Accession, the Act of Accession and Decision 2006/928). At issue were Government (interim) appointments to management positions in the new "Judicial Inspectorate", through an emergency ordinance so as not to follow the ordinary appointment procedure. This body was responsible for conducting disciplinary investigations relating to judges and prosecutors. Questions were also raised concerning the controversial *SIIJ*, a specialised section of the Public Prosecutor's

[53] See A. T. Pérez ' (2020) (n 35).

[54] Order of the Vice-President of the Court [2021] ECLI:EU:C:2021:878.

[55] 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 [2021] ECLI:EU:C:2021:393.

Office with exclusive competence for criminal proceedings brought against judges and prosecutors. Finally, the judgement also looked at the power given to the executive (the Ministry of Public Finance) to assess the personal liability of judges for judicial error, and subsequent limitations in those judge's defence rights, in particular the right to be heard. In this case, once again, the CJEU was obliged to reaffirm the EU standards regarding the rule of law and the principle of primacy of EU Law, as it has repeatedly done in relation to Poland, showing deep concern that these new bodies and procedural rules were to be used as instruments to exert pressure on, or political control over, judges and prosecutors, specially the ones that were dealing with ongoing high-level corruption or organised crime cases.[56] The Court further noted, on the issue of the principle of primacy of EU law, that this principle precluded legislation of a Member State, including legislation with constitutional status as interpreted by the respective constitutional court, according to which a lower court is not permitted to disapply a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the CJEU, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU (point 7 of the operative part of the judgement).

More recently, in the judgement of 22 February 2022, case C-430/21, the CJEU was obliged to go even further regarding the principle of the primacy of EU law.[57] Indeed, in this case criminal proceedings against judges were being carried out by the controversial *SIIJ*. It followed from the case-law established in *Asociaţia Forumul Judecătorilor din România* that the independence of the *SIIJ* needed to be evaluated by the referring court (the Court of Appeal) against EU Law standards. However, a judgement given by the *Curtea Constituțională* (the Romanian Constitucional Court) on 8 June 2021 had rejected as unfounded a plea of unconstitutionality concerning the *SIIJ*. The Constitutional Court, in that same judgement, stressed the need to respect national constitutional identity and the supremacy of the Romanian Constitution on Romanian territory. Moreover, it stated that the CJEU had exceeded its jurisdiction when deciding these issues, allowing it to disrespect the preliminary ruling given by the CJEU. It went on to adjudicate that, although an ordinary court had jurisdiction to examine the conformity with EU law of a provision of national legislation, such a court had no jurisdiction to examine the conformity with EU law of a national provision which had already been found to comply with that principle by the Constitutional Court.[58] In turn, the CJEU responded that EU law precludes national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with the principle of the primacy of EU law. Furthermore the CJEU stated that any disciplinary liability of a national judge, on the ground that he or she had applied EU law, as interpreted by the CJEU, thereby departing from case-law of the constitutional court of that Member State, was also incompatible with the principle of the primacy of EU law.

[56] Ibid, paras 214 and 218.

[57] Case C-430/21, RS [2022] ECLI:EU:C:2022:99.

[58] Ibid, paras 18–19, 68.

7 The *Pouvoir Constituant* and How (not) to Silence a Judge

Surprisingly enough, designing disciplining bodies with backdoors to the executive and legislature and providing for ambiguous provisions on judge's responsibility are not the only ways to maintain the judiciary in check.

Most interesting here is the case *Baka v. Hungary*, adjudicated by the Grand Chamber of the ECtHR.[59] This case essentially revolved around the premature termination, on the 01–01-2012, of Mr. Baka's mandate as President of the Supreme Court of Hungary (and of the National Council of Justice). Albeit this central fact, we would like to underline the context in which this occurred due to its importance.

In April 2010 the alliance of Fidesz – Hungarian Civic Union and the Christian Democratic People's Party (hereafter Fidesz/KDNP) obtained a two-thirds parliamentary majority. Making use of its majority, in the course of 2011 the Fidesz/KDNP alliance drafted and adopted in Parliament what it called a new Constitution,[60] to come into effect on 01-01-2012. Among many other things, the "new" Constitution foresaw that the highest judicial body would be the *Kúria* (the historical Hungarian name for the Supreme Court), which would be considered as the legal successor to the existing Supreme Court. In the same year, Fidesz/KDNP drew up a new "Organisation and Administration of the Courts Act", which would also come into force on 01–01-2012. This bill established that the National Judicial Office would replace the National Council of Justice in the administration of the courts.

Between February and October of 2011, Mr. Baka, in his capacity as President of the Supreme Court and of the National Council of Justice, on several occasions and through multiple channels, like the media or the Parliament, expressed deep constitutional concerns over the ongoing legal reforms, in particular regarding the independence of the judiciary. Some of these concerns related to provisions of the Bill on the Fundamental Law of Hungary (the "new" Constitution) that targeted the judiciary. Under Mr. Baka's scrutiny was also a proposal to reduce the mandatory retirement age of judges (from 70 years to the general retirement age of 62). No less important were his concerns regarding the abolishment of the National Council of Justice and its replacement by a National Judicial Council and a National Judicial Office, the later having "unprecedented powers, with no adequate accountability" (powers to appoint judges and court executives, to issue normative orders and to designate a specific court in a given case). In

[59] Baka v. Hungary App no 20261/12 (ECtHR, 23 June 2016). This case was first adjudicated by the Second Section of the ECtHR (27 of May 2014) after which the Hungarian Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention.

[60] Hungary's prior Constitution dated from 1949 and it was the country's first and only written Constitution. Before its new Constitution, Hungary was the only former Central and East-European country that did not adopt an entirely new Constitution after the fall of Communism (cf. Venice Commission, Opinion on The New Constitution of Hungary, Opinion no 621/2011, CDL-AD(2011)016). The new Constitution states, in its Preamble, "We [the members of the Hungarian Nation] do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid". This proclamation entails a legal paradox of the highest order, as noted in the referred Venice Commission's Opinion (p. 9), for "an illegitimate or even non-existent Parliament cannot enact a new Constitution".

addition, in August of 2011, Mr. Baka challenged a bill on the amendment of certain legislative acts (including the Code of Criminal Procedure) before the Constitutional Court. Subsequently, in December 2011, the Constitutional Court declared the unconstitutionality of the impugned provisions and quashed them (notably, a provision concerning the Attorney General's right to establish the competence of a court in derogation from the default statutory rules).

Against this background, in November 2011, Hungary introduced the "Transitional Provisions of the Fundamental Law", to take effect on 1 January 2012. These provisions, which stated that they were part of the Fundamental Law, foresaw that the mandates of the President of the Supreme Court and of the President and members of the National Council of Justice would be terminated upon the entry into force of the Fundamental Law. As an effect of the entry into force of all these legal reforms, Mr. Baka's mandate as President of the Supreme Court terminated on 1 January 2012, three and a half years before its expected date of expiry. He remained in office as president of a civil-law division of the *Kúria*.

It was in this particular context that Mr. Baka, a former judge of the ECtHR, complained before the ECtHR, alleging that he had been denied access to a tribunal to defend his rights in relation to his premature dismissal as President of the Supreme Court. He contended that his dismissal was the result of legislation at constitutional level, thereby depriving him of any possibility of seeking judicial review, even by the Constitutional Court. In addition, he argued that the termination of his mandate as President of the Hungarian Supreme Court had been caused by the expression of his opinion on the legislative reforms, and therefore constituted a serious and completely unjustified interference with his freedom of expression.

In spite of the Hungarian Government's allegations, in particular that the case was not a human rights case, for it didn't involve either "civil rights or obligations" held by the applicant or a "criminal charge" against him, the Court, after carefully going through the *Vilho Eskelinen* test to determine the existence of a "civil" right protected by Article 6(1) of the ECHR, concluded that both of the applicant's claims were grounded and that violations of Article 6(1) (right of access to a court) and Article 10 (freedom of expression) had occurred. It thereby ordered the respondent State to pay a sum of € 100.000,00 to the applicant.[61]

Notwithstanding that final decision, it is interesting to pay notice to the opposing Government's main allegations that the case dealt with problems of public law and that, therefore, the preconditions that were necessary to trigger the right to a fair trial as foreseen in Article 6(1) of the ECHR were not met.

The Government's arguments are clearer if we consider the dissenting opinion of Judge Wojtyczek (Poland). According to this illustrious jurist, the aim of the European Convention on Human Rights, and of other international human rights treaties, is to protect the subjective rights of individuals against public authority. In the case at hand, however, what was in dispute was not the applicant's subjective right to an independent tribunal nor a subjective right to freedom of speech, for he acted not in a private capacity,

[61] With similar issues, regarding the premature termination of the chief prosecutor's mandate in the Romanian National Anticorruption Directorate, see Kövesi v. Romania App no 20261/12 (ECHR, 5 May 2020).

but as President of the Supreme Court. As underlined by the opinion, "[d]eprivation of public power may adversely affect the legal position of a State organ, but it does not affect, *per se*, the human rights of the holder of public power".[62] Furthermore, the applicant's legal position had been terminated through the Constitution, and was therefore an expression of a new constitutive power, the *pouvoir constituant*.[63] The exclusion of constitutional measures from judicial review thus served the purpose of preserving popular sovereignty. As this judge eloquently puts it, the President of the Supreme Court may have enjoyed protection from the executive and legislative branches of State, but he did not enjoy protection from the Constitution-maker. All these important issues had been insufficiently analysed by the majority. In sum, Judge Wojtyczek's dissenting opinion obviously partakes of a more individualistic conception of human rights.

Interestingly, on the other side of the barracks, one might say, we find the joint concurring opinion of Judges Pinto de Albuquerque (Portugal) and Dedov (Russian Federation). This separate opinion, although agreeing with the conclusions of the majority, is also of the view that the Court left too many things unsaid, in particular the direct supra-constitutional effect of the ECHR, so as to override national provisions, including ones of Constitutional nature. Not least, the ECtHR, by presuming its "natural" or "legal" *Kompetenz-Kompetenz*, acted as if it were the Constitutional Court of Europe, while not explicitly stating it. In the opinion of these judges, these implicit assumptions should have been made explicit. Furthermore, in spite of the ideological discontinuity between the Hungarian Constitution of 1949 and the "new" Constitution of 2012, they argued for its continuity where the basic principles of the rule of law and the independence of the judiciary, including the irremovability of judges, were concerned. This continuity necessarily entailed the unconstitutionality of the controversial constitutional provisions determining the end of the applicant's mandate as President of the Supreme Court. As a result, the Court should have left it clear that the controversial provisions terminating the applicant's mandate were *ab initio* null and void and, in consequence, Hungary could not but reinstate the applicant as President of the Supreme Court.

8 The (Undue) Political Interference in the Appointment of Judges

As we have seen regarding the appointment of judges to positions in the Polish Supreme Court, independence may be indirectly compromised due to the lack of independence of the body with powers to propose the candidates for such positions. In this section we

[62] Baka v. Hungary (n 58), dissenting opinion of Judge Wojtyczek, para 9.

[63] Baka v. Hungary (n 58), dissenting opinion of Judge Wojtyczek, para 13. With the use of this terminology by Judge Wojtyczek, one cannot but recall a certain XVIII century revolutionary tone, as attributed to Sieyes's inaugurating writings, for example in the opening statement of the 1789 French Constitution, "Les Représentans de la Nation Françoise, réunis en ASSEMBLÉE NATIONALE, reconnaissent qu'ils ont par leurs mandats la charge spéciale de régénérer la Constitution de l'Etat. En consequence, ils vont, à ce titre, exercer le POUVOIR CONSTITUANT…" (l'Abbé Sieyes, Préliminaire De La Constitution Françoise. Reconnaissance Et Exposition Raisonnée Des Droits de L'Homme et du Citoyen, 17 < https://gallica.bnf.fr/ark:/12148/bpt6k41690g.texteImage > accessed 27 January 2024.

go a step further to observe how concrete appointments have affected the independence of the judiciary, by directly illegal or unconstitutional procedures.

Indeed, pre-established objective criteria in the selection of judges or, in the wording of Article 6(1) of ECHR and the second paragraph of Article 47 of the CFREU, a court "established by law", is an essential condition to form an independent and impartial adjudicating body in the first place.

In the specific domain of the appointment of judges, the ECtHR and CJEU have both stated that the appointment of judges by the executive or the legislature is not, *a priori*, impeded by the ECHR or EU Law, provided that, as the ECtHR states, "appointees are free from influence or pressure when carrying out their adjudicatory role"[64] or, in the words of the CJEU, "if, once appointed, they are free from influence or pressure".[65] This ambiguous consequentialist criteria, however, may fall short of guaranteeing the essence of independence.

To stress this point, it will be interesting to first look at the judgement of the Grand Chamber of the ECtHR in case *Guðmundur Andri Ástráðsson v. Iceland.*[66] In this case, the applicant, who had been convicted of a low-level criminal offence, claimed that the appointment of one of the judges to the new Court of Appeal, that had intervened at the appeal level, had breached the law and, as a consequence, the applicant's right to a tribunal established by law had not been safeguarded. This led the Court to scrutinise the appointment of the aforementioned judge to the newly created Court of Appeal.

According to the preestablished legal procedure of the appointments to that Court, the decision of the Minister of Justice was to be preceded by a list of the most qualified candidates, authored by an independent administrative body, the Evaluation Committee (hereinafter "EC"). Any divergence of the Minister from that list would have to be duly justified before the respective Parliament and needed its approval. The Minister of Justice was therefore entitled to propose her own candidates to Parliament, based on an independent investigation of all the elements necessary to substantiate her divergence. As concisely stated in the separate opinion of Judges O'Leary (Ireland), Ravarani (Luxembourg), Kucsko-Stadlmayer (Austria) and Ilievski (North Macedonia), "[s]he [the Minister] consequently had to ensure that her own investigation and assessment were based on expert knowledge, on a par with that of the EC, and that the instructions concerning the evaluation procedure as set out under the applicable rules on the work of the EC – rules that had been put in place by the Ministry of Justice to guide that work – were taken into account in her assessment".[67] In reality, the Minister deviated from the Evaluation Committee's list regarding 4 of the 15 proposed judges, which were later confirmed in a Parliament dominated by the Government's party.

In the ECtHR's assessment of the case, it took for granted the conclusions of the Icelandic Supreme Court with regard to the existence of a breach of national law concerning the appointment procedure of the 4 judges, including of the judge in the main

[64] Maktouf and Damjanović v. Bosnia and Herzegovina App no 2312/08 and 34179/08 (ECtHR, 18 July 2013), para 49.

[65] Case C-896/19, Repubblika v. Il-Prim Ministru [2021] ECLI:EU:C:2021:311, para 56.

[66] Guðmundur Andri Ástráðsson v. Iceland (n 8).

[67] Guðmundur Andri Ástráðsson v. Iceland (n 8), joint partly concurring, partly dissenting opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski, para 46.

proceedings involving the applicant. The breach of law in question consisted, foremost, in the failure of the Minister to carry out an independent evaluation of the facts or to provide adequate reasons for her decision to choose 4 judges that had not been advanced by the Evaluation Committee. Surely, she had invoked reasons, such as the superior judicial experience of her preferred judges and, furthermore, the aim of gender balance. However, these were visibly ungrounded reasons, for it was most apparent, as the Court pointed out, that these variables had not been applied to all the chosen judges with the same weight, permitting her to cherry-pick the appointed 4 in detriment of 4 others. All this with the most uncomfortable background fact that the directly envisaged judge (Judge A.E.) was the wife of a parliamentarian belonging to the same political party as the Minister, who had given up the first place in the party's constituency list in Reykjavik in favour of that Minister, immediately before the beginning of the judge selection process.

After recognizing the described breach of law, the Court quickly moved on to evaluate the consequences of the breach regarding the right to a tribunal established by law. In this context, the ECtHR made use of a new threshold test to determine whether the breach in question was "of such gravity as to entail a violation of the right to a tribunal established by law".[68] This test basically consists of three steps. In the first place, a positive one that consists in the recognition of a manifest breach of the domestic law. Secondly, a teleological step, consisting in an evaluation of whether that breach translated into a real risk that the other governmental bodies, in particular the executive, could exercise undue discretion in relation to the domestic court. Thirdly, a step concerning the effective review conducted by national courts, if any, and whether effective remedies were so provided.

After verifying the three conditions of the test, the ECtHR concluded that there had been a violation of the right to a tribunal established by law, as foreseen in Article 6(1) of the ECHR, but came short of determining the proper legal consequences of such a violation under Article 46 of the Convention. Indeed, instead of sustaining the reopening of the applicant's case and all similar cases, due to the simple absence of a "tribunal established by law" adjudicating those cases, the Court concluded that the mere finding of the violation should be regarded as just satisfaction by the applicant. As pointed out by Judge Pinto de Albuquerque in his separate opinion, the consequences thereby sustained by the Court or, better said, the lack of any actual consequences, made this ECtHR judgement a mere "paper tiger".[69] One must admit that this kind of non-result, begs the question on how decisions of a non-tribunal may subsist in the legal order. We should also ask if the result would be the same if, instead of a low-level criminal case, a high-level one was at hand involving, for example, corruption. At any rate, if decisions of a non-tribunal are to subsist in a legal order, who is expected to take that legal order seriously?

On the other hand, it is important to point out that the Icelandic selection procedure, scrutinised by the ECtHR in case *Guðmundur Andri Ástráðsson v. Iceland*, although faulty, did permit an adequate review of its lawfulness. That is due to the fact that the *apriori* rules established by the Government, were indeed clear criteria for the selection

[68] Guðmundur Andri Ástráðsson v. Iceland (n 8), para 243.

[69] Guðmundur Andri Ástráðsson v. Iceland (n 8), joint partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, para 16.

of the judges. It was the deviance from those well known set of rules that permitted the ulterior evaluation of the procedure by the Court. But what happens where no such *apriori* rules exist (or are unclear)?

When we take into account this last observation regarding the lack of known criteria for the selection of certain judges, many appointment procedures throughout Europe may not pass the test of democratic transparency. Indeed, it is almost a paradox that in the lack of known preestablished and well determined criteria, even the appointment of judges to the CJEU do not allow for a comparable level of scrutiny that was applied, for example, in *Guðmundur Andri Ástráðsson v. Iceland*. This issue has even come up before the CJEU itself and may demand new levels of transparency for all Tribunals and not just for some.[70] Here we may recall that in case C-619/19, in face of Poland's allegations that the procedure for the renewal of the mandate of its judges were similar to those in place regarding the CJEU, this Tribunal, in response to those objections, most interestingly felt the need to invoke the appointment and renewal procedures foreseen in Articles 253 and 255 of the TFUE. However, the problem with the criteria set out in Article 253 is that it merely states what is awaited and not the means to get there. In effect, Article 253 states, in essence, that judges of the CJEU are chosen between persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. Obviously, what is sought are unequivocally independent judges but the question remains on how does the appointment procedure guarantee such an essential attribute? One may answer, following the same Article, that it is guaranteed by the fact that those appointments depend on the common accord of the governments of the Member States and is preceded by the opinion of an independent panel as foreseen in Article 255. However, the problem with such an answer is that the workings of the independent panel are far from transparent.[71] Unfortunately there are no public hearings during the appointment processes.[72] In addition, the opinion of the independent panel is not binding and, in contrast to the procedure for the appointment of judges to the new Icelandic Court of Appeal, the appointment procedure of CJEU judges does not demand a reasoned decision when the selection deviates from the opinion.[73]

[70] Case C-619/18, paras 119–121 (n 34). See also Case C-192/19, paras 132–133 (n 34). Regarding the ECtHR, according to paragraph 21 of the joint concurring opinion of Judges Pinto de Albuquerque and Dedov, the Hungarian Government's arguments casted "doubt on the very independence of this Court" (para 44).

[71] See M. S.-O.-l'E. Lasser (2020) 60–62.

[72] See A. H. Zhang (2016).

[73] A similar point could be made regarding the procedures for the appointment of European Prosecutors as foreseen in Articles 14(3) and 16 of Regulation (EU) 2017/1939 of 12 of October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's. Indeed, the referred Articles 14(3) and 16, combined with the provisions of Council Decision 2018/1696 of 13 July of 2018, on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939), although requiring a reasoned opinion of an independent selection panel for the approval of three candidates and their ranking and order of preference, considers this opinion to be non binding on the Council. The Council is, in the last instance, who decides on the appointment of a given European Prosecutor. These legal instruments, however, do not make it mandatory for the Council to motivate its divergence

As we leave these delicate but urgent issues, we turn our attention to the judgement of the First Section of the ECtHR in case *Xero Flor w Polsce sp. z o.o. v. Poland.*[74] First of all, this case is of particular interest because it concerns the composition not of an ordinary court but of a Constitutional Court. Focusing on the right to a tribunal established by law, and to make another long and complicated story as short as possible, we recall that this case revolved around the election of 5 judges to the Polish Constitutional Court, for upcoming positions, by the last session of the seventh-term *Sejm* (as you may recall, the lower house of Parliament), on 8 October 2015. In light of a new majority in the *Sejm* that took office on 12 November 2015 (the eighth-term *Sejm*), primarily formed by the Law and Justice Party, another 5 judges were appointed for the exact same positions. In spite of the Polish Constitutional Court' findings –that the legal provisions sustaining 3 of the appointments of the outgoing *Sejm* were consistent with the Constitution (because the opening of the positions had occurred under the term of this *Sejm*, specifically on 6 November 2015) but that the other 2 were not (openings that occurred on 2 and 8 December)[75], through a concatenation of behaviours from the President of the Republic, the executive and the legislature, the 3 validly appointed judges by the outgoing Sejm were never allowed to take office. Indeed, the "new" Sejm declared the former appointments invalid and the President of the Republic, also from the Law and Justice Party, refused to take the oath of service from the judges appointed by the outgoing *Sejm.* Instead, the President took the oaths from the subsequently appointed 5 judges. In addition, several legal amendments were made underlining the importance of that oath, also in spite of findings of the Constitutional Court stating otherwise. Later on, a chamber of 5 judges of the Constitutional Court, including 2 of the controversial "judges" appointed by the "new" *Sejm* (M.M. and H.C.), one of which served as the presiding judge of that chamber, issued an innovative judgement finding that the preceding Constitutional Court' rulings had not determined the legal status of any of the judges of the Constitutional Court,[76] obviously his and his "friends" included. It further concluded that the legal provisions that sustained the election of judges of the Constitutional Tribunal by the (eighth-term) *Sejm* and who took the oath of office before the President of Poland, were consistent with the Constitution.

Without losing its composure, the ECtHR carried on with business as usual, notably taking for granted that the Constitutional Court was to be considered foremost a tribunal under Article 6(1) of the ECHR. This first proposition was not without controversy, as acutely pointed out in the separate opinion of Judge Wojtyczek.[77] Subsequently, the ECtHR applied the three-step test developed in *Guðmundur Andri Ástráðsson v. Iceland,*

from the reasoned opinion of the selection panel. On the other hand, the legal procedures for the internal selection of the candidates by each Member State is left to their own discretion.

[74] Xero Flor w Polsce sp. z o.o. v. Poland App no 4907/18 (ECtHR, 7 May 2021).

[75] Judgment of the Polish Constitutional Court of 3 December 2015, ref no K 34/15, < https://trybunal.gov.pl/en/hearings/judgments/art/8866-ustawa-o-trybunale-konstytucyjnym >, accessed 27 January 2024.

[76] Xero Flor w Polsce sp. z o.o. v. Poland (no 73), paras 61–62.

[77] Xero Flor w Polsce sp. z o.o. v. Poland (n 73), joint partly concurring, partly dissenting opinion of Judge Wojtyczek, para 15.8.

and once more it concluded that the applicant, a company whose main proceedings concerned a relatively straightforward case of State civil responsibility, had been deprived of its right to a tribunal established by law. Notwithstanding the seriousness of this violation, once again the Court shied away from any actual consequences to be deduced from its conclusions. Indeed, it even concluded that it was not necessary to examine the admissibility and merits of the applicant's complaint under Article 1 of Protocol 1 to the Convention, concerning a violation of the right to private property, which was, from the very beginning, the disputed right in question and the whole point of the main proceedings.

In turn, in the wake of the ECtHR's judgement in *Xero Flor w Polsce sp. z o.o. v. Poland,* by way of an application lodged by Poland's Prosecutor General, the respective Constitutional Court adjudicated, on the 24 November 2021, that article 6 § 1 of the ECHR (the right to a fair trial) was unconstitutional, when interpreted as granting jurisdiction to the ECtHR to review the legality of the election of Constitutional Court judges.[78] This decision, given by a panel of 5 judges and concluding that the Polish Constitutional Court cannot be subsumed to the concept of a "tribunal" as foreseen in article 6 § 1, echoes the doubts expressed in the separate opinion of Judge Wojtyczek in *Xero Flor*. Where the term "tribunal" was concerned the Constitutional Court of the Republic of Poland pointed out that, unlike common Courts, it does not implement the administration of justice, construed as settling individual civil, criminal or administrative cases. Even when considering a constitutional complaint, the Constitutional Tribunal adjudicates on the law, and not on the individual rights of the complainant. On the other hand, the Constitution Court argued that, when assessing the legality of the process of electing a judge to that same Court, the ECtHR had devised a procedure for reviewing the composition of the Constitutional Tribunal that is unknown to the Polish Constitution (not even the Constitutional Court itself has such powers) and, in an unauthorised way, interfered in the constitutional powers of the Polish state authorities – the *Sejm* and the President of the Republic.

These two contradictory decisions (*Xero Flor* and K 6/21) remind us of Bertrand Russell's famous paradox on self-referentiality, for the Tribunal would thus seem to be simultaneously a tribunal established by law but not a "tribunal established by law". In other words, it would belong to the set of tribunals established by law that cannot be established by law (the legitimacy of its composition depending, so it seems, on a political and not juridical evaluation). On the other hand, the contradiction reminds us of the double nature, either political or juridical, of a Constitution (in its material sense) and the historical debate on how best to guarantee it, most notably illustrated by the debate between Schmitt and Kelsen. What is clear is that the Polish Constitutional Court, as it had already proclaimed in relation to the CJEU decisions on the organisation and structure of its Court system as a whole, intends to draw a sovereign red line where itself is concerned now in relation to the ECtHR, appealing to its formal Constitution to do so. Such a position would be quite understandable if its composition was exempt of

[78] Judgement of the Polish Constitutional Tribunal, ref no K 6/21 < https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11711-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny >, accessed 27 January 2024.

grave illegalities. But, as we have seen, that simply is not the case, depriving it of any credibility.

This lack of credibility of the Polish Constitutional Court becomes ever more noticeable through the most recent decision of the ECtHR. In effect, on the 15 March 2022, in case *Grzęda v. Poland*, the Grand Chamber of the ECtHR issued its first ruling in regards to what has come to be known as Poland's rule of law crisis.[79] This case dealt with the premature termination of the term of office of a judicial member of the KRS, who was a judge of the Polish Supreme Administrative Court. Th ECtHR concluded, as it had done in *Baka v. Hungary*, that there had been a violation of article 6 § 1 of the CEDH based on the fact that the judge in question, having a "civil" right to serve a four-term mandate in the KRS (under article 187 § 3 of the Polish Constitution), had not had access to a tribunal established by law to question the premature termination of his public office and that that exclusion had not been founded on objective reasons in the State's interest. To arrive at such a conclusion, the Court evaluated the admissibility of the claim and thereby its jurisdiction, applying and further developing the *Eskelinen* Test. While doing so, the ECtHR reiterated grave doubts regarding the validity and legitimacy of the Constitutional Court when adjudicating through panels of judges that included persons elected to positions already filled (by the seventh-term *Sejm*). Such panels "naturally" contradicted former judgements of the same Court without any "cogent explanation".[80] Overall, in the context of the recent judicial reforms authored by the Polish Government, the ECtHR, extensively citing the case-law of the CJEU, could not but strongly underline the manifest harm caused to the independence of the judiciary.

One final note on the judgement of the Grand Chamber of the CJEU in joined cases C-748/19 to C-754/19 (preliminary ruling procedure), issued on the 21 November 2021.[81] In this case, also related to Poland, the CJEU clarified that EU law precludes provisions of national legislation pursuant to which the Minister for Justice of a Member State (in Poland and since 2016, simultaneously the Public Prosecutor General) may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

The mere fact that the Minister of Justice can be the same person as the Public Prosecutor General may come as a surprise to many European jurists. In addition, the criteria applied by the Minister for Justice for the purpose of seconding judges to higher criminal courts were not even made public. And if all this was not enough to question such appointments and the manifest lack of independence therein, the Minister of Justice had the power to terminate such secondments at any time, without the criteria associated with that power being known and without the reasons for such a decision having to be expressly stated.[82] By now it will go without saying that flagrant violations of the principle of irremovability of judges and the potential use of terminations as covert

[79] Grzęda v. Poland App no 43572/18 (ECtHR, 15 March 2022).
[80] Ibid, paras 314–315.
[81] Joined cases C-748/19 to C-754/19, WB and Others [2021] ECLI:EU:C:2021:931.
[82] Ibid, para 79.

disciplinary sanctions were at cause, all with evident consequences for the independence and impartiality of the judiciary.

We have by now observed many judicial cases, enough, to paraphrase Hamlet and the most notable of English playwrights, to say that something seems to be rotten in the "kingdom" of Europe.

9 Conclusions

We live at a turning point of History where the independence of the judiciary is being, in some European countries, ostensibly under attack. In particular and presently, as known through the case-law of the ECtHR and the CJEU, in Poland, Hungary and Romania. That does not mean that insufficiencies in the guarantees of independence of the judiciary do not coexist in other countries. Indeed, as we have shown, the composition of the Portuguese High Council for the Judiciary and the architecture of the Judicial Division of its Supreme Court, are still open to controversy. On the other hand, many appointments to judge positions occur in relative opacity in other European countries and even at the EU level, as is the case, for instance, of the CJEU itself.

We would also like to point out that one thing is a clear breach of law or rules of procedure, as happened in the selection of judges scrutinised by the ECtHR in *Guðmundur Andri Ástráðsson v. Iceland*, and another, the enactment of laws that purposively seek to create vulnerabilities in the judiciary, be it through the composition of High Councils, be it through legal mechanisms of disciplinary, criminal or personal liability.

Obviously freedom of speech is part of the essence of Democracy but has been under attack, even when the speakers are part of the judiciary and only express their opinions in relation to the independence of the courts. Hungary, in this aspect, went to the extent of enacting unconstitutional constitutional provisions, to prematurely terminate the mandate of the then President of the Supreme Court, just to silence his criticism of the undermining of the independence of the Hungarian judiciary.

In the specific domain of the appointment of judges to strategic judiciary positions, in particular, to the Polish Supreme Court and Constitutional Court, the cases have shown that the executive and legislature will engage in extreme (il)legal measures for the control of the judiciary, namely by picking certain candidates over others and making it impossible to obtain judicial review of such choices. Where the referred Constitutional Court is concerned, the legislature went to the extent of declaring former valid appointments by Parliament invalid, against the findings of the "same" Constitutional Court. As an effect of such reforms, the present composition of the Polish Constitutional Court has substantially changed to incorporate at least 3 judges (in a total of 15) invalidly appointed by the current legislature.

The ECHR and EU law are vital legal instruments to protect the independence of the judiciary against legal manipulations, including ones enacted at the highest level, due to their inherent primacy over national laws, including national Constitutions. Both the CJEU and ECtHR are ultimately responsible for upholding those legal instruments and have frequently been confronted with hard cases concerning the referred manipulations. Where standards of independence of the judiciary are concerned, the CJEU has aligned itself with the case-law of the ECtHR and vice-versa. In spite of this mutual alignment,

while the CJEU has been unequivocal in stating the primacy of EU law as a fundamental principle directly related to the independence of the judiciary and rule of law, the ECtHR sometimes seems hesitant on drawing consequences from the primacy of the ECHR, falling short of stating its powers and determining that actual consequences take place in the legal orders concerned. The ECtHR seems, at times, more focused on the political acceptance of its decisions than on the binding force of the legal principles that sustain them.

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