

Matteo Mastracci

Ph.D. researcher at Koç University (Istanbul, Turkey)

<https://orcid.org/0000-0002-0318-420X>

**JUDICIARY SAGA IN POLAND: AN AFFAIR TORN
BETWEEN EUROPEAN STANDARDS AND ECTHR
CRITERIA**

Abstract: Judicial independence is a cornerstone of contemporary constitutional systems within European legal orders that Poland, among many other European States, codified the principle at a constitutional level through Article 173 of the Constitution of the Republic of Poland. Nonetheless, the concrete implementation of the theoretical framework remains a bone of contention between the national States and the main international actors. The latter faction, based on the acknowledgement that no single political model could ideally comply with the principle of the separation of powers and secure complete independence of the judiciary, has developed an impressive number of legal tools that are part of a more diffuse European trend of interpretation, which should be labelled as European standard or European *corpus* aiming at preserving the judiciary order from outward interferences by the legislative and executive powers.

In Poland, after the extensive victory earned by the Law and Justice (PIS) party in the Parliamentary election of 2015, the executive branch propelled a series of interlock reforms with the aim of reshuffling the whole judicial asset of the country. In the first place, the way forward was marked by a compound diatribe concerning the Constitutional Tribunal, and the essence of the dispute concerned the mandate's legitimacy of three

sitting judges after the Court's reinterpretation of the K 34/15 ruling that ended up on 2.12.2015 with the election of five new judges appointed *ex novo* by the ruling party. Afterwards, the attention shifted towards the rethinking of the National Council of Judiciary (KRS), a mixed judicial body guardian of the independence of the judiciary, asserting, firstly, the unconstitutionality of its statute and, subsequently, planning a new method of appointment for the judicial members previously elected by the judiciary itself. Ultimately, as a closing step, the spotlight turned in the direction of the Supreme Courts judges, where the most spectacular sweep was the provision aimed at lowering the retirement age for the sitting judges on a scheme similar to the proposal made by the Hungarian government in 2011, where voices were raised, respectively, by the Hungarian Constitutional Court, the European Court of Justice and the European Court of Human Rights, and where, regrettably, the judicial independence standard played a minor role in the Courts' reasoning. This concluding phase convinced the Commission to launch an expedited procedure against Poland before the Court of Justice, thus forcing the Polish government to retract previous law through the adoption of a repealing law on 17.12.2018; in any event, as predicted earlier by the Opinion delivered by the AG Tanchev in Case C-619/18, the ECJ epilogue released on 24.6.2019, dissimilar to the one reached in the Hungarian case, was the heaviest 'contrariness to EU law'.

Keywords: Poland, Judicial Independence, European standards, Law and Justice, European Court of Human Rights, Commission v Poland

1. Introduction

The independence of the judicial branch is a foundational value for the proper functioning of a society founded upon the rule of law¹ and, at the same time, of a society shaped by a constitutional liberal democratic order. Judicial independence, strictly speaking, refers in its core meaning to the notion of conflict resolution by a 'neutral third', which means that the judicial branch should be entitled to settle controversies after

¹ See, e.g., International Association of Judges, The Universal Charter of the Judge, Taiwan, 17.11.1999, Introduction, p. 1.

considering only the facts and their relation to the relevant applicable law,² and even though it is undisputedly a complex and contested concept, at its core, it involves the ability and willingness of courts to decide cases in light of the law without undue regard to the views of other government actors,³ or more broadly, free from political pressure outside of the judiciary itself.⁴

The intimate relationship that occur amongst democracy, judicial independence and separation of powers is both structural and value-laden, where all the three components interact constantly. A society that inspires to reach a democratic *pedigree*, following the French tradition of Montesquieu,⁵ should be based on the core principle of ‘separation of powers’, which in an effort to prevent a latent monopoly of power or the emergence of authoritarian forms, requires the establishment of a distinction and, therefore, independence of the three traditional State actors, being the legislative, executive and judiciary branch in particular.

The essential role that separation of powers should play within a liberal democratic order is expressed by the incorporation of the principle itself in many national legal systems at a constitutional level, and amongst the many European constitutional legal orders, Article 173 of the Polish Constitution states as follows: ‘The courts and tribunals shall constitute a separate power and shall be independent of other branches of power’⁶

Furthermore, it is worth noting that all the main components of the rule of law, namely legality, legal certainty, prohibition of arbitrariness and respect for human rights,⁷ are mainly influenced for their proper functioning by the further and additional requirement of access to justice

² M. Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, 1981, Chicago, pp. 1-8.

³ J. Melton, T. Ginsburg, *Does De Jure Judicial Independence Really Matter?: A Re-evaluation of Explanations for Judicial Independence*, ‘Journal of Law and Courts’ 2014, vol. 2, no. 2, p. 190.

⁴ See T.S. Clark, *The Limits of Judicial Independence*, Cambridge University Press, Cambridge 2012, p. 5.

⁵ Which, as clearly noted by S. Shetreet in *Judicial Independence, Liberty, Democracy and International Economy*, [in:] S. Shetreet, C. Forsyth, *The Culture of Judicial Independence*, p. 18 ‘traced back its origin in the English tradition of the Act of Settlement of 1701 which served as a primary theoretical model’.

⁶ Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland], Polish OJ 1997, no. 78, item 483, Article 173.

⁷ See European Commission, Communication from the Commission to the European Parliament and the Council. *A new EU Framework to strengthen the Rule of Law*, /COM/2014/0158 final/, p. 2.

mechanisms, with regard to which the concept of judiciary independence entails a constitutive requirement that could be read as ‘a pre-requisite of the rule of law system’.⁸

At the international level, the Special Rapporteur of the Commission on Human Rights took a further step when it clarified that judicial independence is ‘part of the general principles of law recognised by civilised nations’,⁹ and for that reason, ‘the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the Country. It is the duty of all governments or other institutions to respect and observe the independence of the judiciary’.¹⁰

However, and as pointed out brilliantly by Storme, independence does not mean that the judicial power should be not accountable, because if this is the case, the independence would degenerate into a form of irresponsibility,¹¹ which is in sharp contrast with the crucial role of the judges as ‘guardians of the rights and freedoms of the people’;¹² as a consequence, the notion of independence should be interpreted not as a value or an end in itself, but as an ‘instrumental value’,¹³ a necessary tool for the appropriate safeguard of other fundamental principles and, above and beyond, the binary pillars of rule of law and sustainable liberal democratic order.

In any event, an impressive number of quasi insolvable scenarios remains on the surface, today as they were yesterday, and to this end, it is sufficient to mention all the challenges that struck the Venice Commission in 2007, prior to the enlargement of two CEE countries (namely, the accession

⁸ Judicial Integrity Group, *The Bangalore Principles of Judicial Conduct*, Value 1, Independence, p. 3.

⁹ Report of the Special Rapporteur, Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, UN Doc. E/CN 4/1995/39, para. 34.

¹⁰ UN, Basic Principles of the United Nations on Judicial Independence, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26.8. to 6.9.1985 and endorsed by General Assembly resolutions 40/32 of 29.11.1985 and 40/146 of 13.12.1985, Principle 1, p. 1.

¹¹ See, *inter alia*, M. Storme, *Independence of the Judiciary: The European Perspective*, [in:] S. Shetreet, C. Forsyth, ‘The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges’, p. 85.

¹² Venice Commission, *Report on the Independence of the Judicial System, Part I: The independence of judges*, CDL-AD (2010)004, Strasbourg 16.3.2010, para. 6.

¹³ See M. Cappelletti, *Who watches the watchmen? A Comparative Study on Judicial Responsibility*, ‘American Journal of Comparative Law’ 1983, vol. 31, p. 16.

of Bulgaria and Romania as newly established democracies), in which serious concerns on the independence and political impartiality of the judiciary were still considered persistent. In particular, scepticisms were raised about political involvement in the appointment procedures which could have jeopardised the neutrality of the judiciary.

Concurrently, and most notably, the existence of a crucial criticism was definitely affirmed when it was admitted that ‘no single non-political ‘model’ of appointment system exists which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary’¹⁴; a stalemate that Piana, unsuccessfully, tried to overcome by referring to ideal types of constitutionalism in which judicial governance has a central place and plays a key role.¹⁵

This potentially endless list of intricacies is today made even more acute by the ever-changing European scenario, where ‘the process of European integration has brought about an expansion of legislative and executive power’ and ‘a genuine separation of powers is indispensable for the proper functioning of any State that respects the rule of law’¹⁶.

2. Present-day European regulatory framework

At the European level, several legal instruments concur to form a more complete European legal scenario, many of which are expressed in the form of soft law tools; however, one should note the primary importance of the fair trial principle enshrined in Article 6 of the European Convention on Human Rights¹⁷ and of the ‘Right to an effective remedy and to a fair trial’ as determined by Article 47 of the EU Charter on Fundamental Rights.¹⁸

¹⁴ Venice Commission, *Judicial Appointments*, CDL-AD (2007)028, Venice 22.6.2007, para. 44.

¹⁵ D. Piana, *Beyond Judicial Independence*, [in:] L. Morlino, G. Palombella, ‘Rule of Law and Democracy, inquiries into Internal and External Issues’, Brill, 2010, p. 68.

¹⁶ European Association of Judges, *Judges’ Charter in Europe*, in its introductory part, p. 1.

¹⁷ Article 6, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos. 11 and 14) 4.11.1950, ETS 5.

¹⁸ European Union, Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391, Article 47.

The other functional legal instruments comprise, *inter alia*, the Council of Europe Recommendation on Judges: Independence, efficiency and responsibilities,¹⁹ the Council of Europe Recommendation on the independence, efficiency and role of judges²⁰ and the subsequent Opinion No. 1 of the Consultative Council of European Judges,²¹ the European Charter on the statute for judges,²² the Magna Carta of Judges,²³ the Judges' Charter in Europe,²⁴ the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia,²⁵ the Venice Commission's Recommendations,²⁶ the Opinions of CCJE²⁷ and the Reports of the ENCJ.²⁸

Although the entire legal landscape could be interpreted, *prima facie*, as rather labyrinthine and somewhat twisted, nevertheless, some common principle have emerged on the ground, and consequently, all together they form a shared European perception around the core elements that judicial

¹⁹ Council of Europe, *Judges: independence, efficiency and responsibilities*, Recommendation CM/Rec (2010)12 adopted by the Committee of Ministers of the Council of Europe on 17.11.2010 and explanatory memorandum.

²⁰ Council of Europe, *Independence, Efficiency and Role of Judges*, Recommendation No. R (94) 12 adopted by the Committee of Ministers on 13.10.1994 at the 518th meeting of the Ministers' Deputies.

²¹ Council of Europe, *Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the Independence of the Judiciary and the Irremovability of judges*, CCJE (2001), Strasbourg, 23.11.2001.

²² Council of Europe, *European Charter on the statute for judges and Explanatory Memorandum*, DAJ/DOC (98) 23, Strasbourg, 8-10.7.1998.

²³ Consultative Council of European Judges (CCJE), *Magna Carta of Judges*, CCJE (2010)3, Strasbourg, 17.11.2010.

²⁴ European Association of Judges, *Judges' Charter in Europe*, 1997.

²⁵ OSCE Office for Democratic Institutions and Human Rights, Max Planck Minerva Research Group on Judicial Independence, *Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus and Central Asia*, Kyiv, 23-25.6.2010.

²⁶ Venice Commission, *Report on the Independence of the Judicial System, Part I: The independence of judges*, CDL-AD (2010)004, Strasbourg, 16.3.2010; Venice Commission, *European Standards on the Independence of the Judiciary, A Systematic Overview*, CDL-JD (2008)002, Study No. 494/2008, Strasbourg, 3.10.2008; Venice Commission, *Judicial Appointments*, op. cit., *supra* note 14.

²⁷ Consultative Council of European Judges (CCJE), Opinion No. 1, op. cit., *supra* note 21, Opinion No. 5 (2003), Opinion No. 7 (2005), Opinion No. 10 (2007), Opinion No. 17 (2014), Opinion No. 18 (2015).

²⁸ European Network of Councils for the Judiciary (ENCJ), *Council for the Judiciary Report 2010-2011 and Development of Minimum Judicial Standards Report 2010-2011*.

independence should incorporate and that could be labelled as a rising framework for 'European standards'. In this meaning, and even though we are certainly dealing with, in principle, non-binding instruments, this new corpus of tools seems to have the consensual strength to trace, guide and lead the 'escape route', particularly meaningful for fragile [in]transition democracies.

2.1. Judicial independence, rule of law component or pre-requisite?

One of the prior conceptual impasses to overcome is the proper interpretation of the bond that should tie judicial independence with the rule of law²⁹ as a legally binding constitutional principle common to all the constitutional systems of the European Member States. The superb complexity of the matter derives from the opacity in the definition of both concepts, and the very relationship between independence and rule of law seems more complex than might be expected.³⁰ Indeed, a great majority of the definition provided by the European standards seems to include the independence of the judiciary within the rule of law framework, where 'the independence of the judiciary is one of the foundations of the rule of law'.³¹

The Venice Commission, for instance, in defining the four elements of the rule of law checklist, legality, legal certainty, prevention of abuse (misuse) of powers and access to justice, placed the independence

²⁹ The crucial importance of the concept of rule of law is confessed within the framework of Article 2 TEU, which reads as follows: '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'; however, the precise definition of rule of law is highly critical, as noted by J. Møller, Svend E. Skaaning, *The Rule of Law*, Palgrave Macmillan, 2014, p. 13, 'we also made it clear that the universal recognition of the merits of the rule of law has in no way been accompanied by a universally accepted definition of it. On the contrary, different people mean very different things when employing the term'; see, *inter alia*, for a comprehensive historical and theoretical perspective, Brian Z. Tamanaha, *On the rule of law, history, politics, theory*, Cambridge University Press, 2004, pp. 1-141.

³⁰ D. Piana, *Beyond Judicial Independence*, [in:] L. Morlino, G. Palombella (eds.), 'Rule of Law and Democracy, inquiries into Internal and External Issues', Brill, 2010, p. 68.

³¹ European Association of Judges, *Judges' Charter in Europe*, op. cit., *supra* note 17, introduction, p. 1.

of the judiciary within the fourth element,³² and as a result, independence and impartiality of the judiciary can be regarded as a necessary part of the rule of law.³³

Similarly, the Magna Carta, adopted in 2010 by the Consultative Council of European Judges,³⁴ in its introductory part, affirmed that independence is intended as a fundamental aspect, which clearly alludes to an inside element aspect, of the general principle known as the rule of law, and rule of law and independence are intimately connected to each other; therefore, 'the judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the rule of law'.³⁵

However, and at an earlier date, the same Consultative Council of European Judges in 2001, when it adopted Opinion No. 1,³⁶ clarified that judicial independence was a prior notion to rule of law, being a mere 'pre-requisite'³⁷ of it. Last but not least, the notion became even more blurred when, later on, the Opinion threw light on independence as a non-privilege of the judge alone, but as an interest of the rule of law and of those seeking and expecting justice.³⁸ Independence, therefore, in this latter case, appears as a precondition of a further part, namely the rule of law, which possess a clear element of autonomy from the pre-requisite that ended up being merely reduced to serving the interest of the succeeding part.

2.2. Independence as a dual feature principle

The aforementioned notion of judicial independence mainly refers to its external breadth, which is only one of its features. In fact, external

³² Venice Commission, *Rule of Law Checklist*, CDL-AD (2016)007, Strasbourg, 18.3.2016, p. 33.

³³ Venice Commission, *The Rule of Law: Concept, Guiding Principle and Framework*, CDL-UDT (2010)011, Strasbourg, 10.5.2010, p. 8.

³⁴ Consultative Council of European Judges (CCJE), *Magna Carta of Judges*, op. cit., *supra* note 23.

³⁵ *Ibid.*, para. 1, p. 2.

³⁶ CCJE, Opinion No. 1, op. cit., *supra* note 21.

³⁷ At the international level, the same definition is adopted by the Bangalore Principles of Judicial Conduct, Value 1, op. cit., p. 3, where it is stressed that 'Judicial independence is a pre-requisite to the rule of law'.

³⁸ CCJE, Opinion No. 1, op. cit., *supra* note 21, para. 10; see also CCJE, Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, 16.10.2015.

independence shields the judge from the influence of other State powers and is an essential element of the rule of law.³⁹ On the other hand, judicial independence could be tackled from a different perspective: an internal feature, which ensures that a judge makes decisions only on the basis of the Constitution and laws and not on the basis of instructions given by higher ranking judges.⁴⁰

While great attention has been devoted to the standards of the external independence of the judiciary, internal independence has received less attention, at least from a quantitative point of view.⁴¹ The latter, moreover, relies, *inter alia*, on the respect of the principle of the natural or lawful judge and can be jeopardised by a hierarchical organisation of the judiciary.⁴² In any case, it is the external dimension that brings into the spotlight all the intricacies arising from a potential clash of rule of law, separation of power and judicial independence; hence, this explains the greater attention that scholars reserved for the external character over the internal one.

Furthermore, it is worth noting that in 2010, the Council of Europe stepped into the core of the matter. Preliminary, it was emphasize the existence of a dual nature pertaining judicial independence, namely, objective and subjective components; at the same time and most interestingly, it was affirmed that the external character, a more sensitive feature than the internal one, has to be placed at the heart of the concept of judicial independence, due to its broader scope of application.⁴³

In any circumstances, external and internal aspects must be considered as two sides of the same coin – two interacting and interlinking pieces – and not separate or distinct identities. Less obviously, the internal organisation of a judiciary can also have a profound effect on its susceptibility to external influence,⁴⁴ and conversely, external pressure, in most cases, aims to shape the internal structure of the judiciary.

³⁹ Venice Commission, *Report on the Independence of the Judicial System*, op. cit., *supra* note 12, para. 56.

⁴⁰ Ibidem.

⁴¹ Venice Commission, *The various aspects of external and internal independence of the judiciary*, CDL (2012)035, Strasbourg, 27.4.2012, p. 4.

⁴² Ibidem, pp. 5-6.

⁴³ Council of Europe, op. cit., *supra* note 19, para. 18, p. 20.

⁴⁴ David S. Law, *Judicial Independence*, 'Revista Forumul Judecatorilor' 2011, no. 4, p. 42.

2.3. A prior standard of formality, constitutionality or quasi

One of the primary worries of the European actors has been the precise indication of a technical requirement. Indeed, efforts were shifted to the source of law argument and, more precisely, which hierarchical ranking should have been the more appropriate for the right placement of the judicial independence tool.

In fact, the Council of Europe, one of the most authoritative and reputable institutions in the whole European panorama, stepped in several times on the argument, and when it was called into action, prescribed a very precise legal allocation of the judicial independence principle within the national legal frameworks, and as a result: the principle itself should be enshrined in the ‘constitution or at the highest legal level in Member States’⁴⁵ or ‘set out in internal norms at the highest level’⁴⁶ or ‘by inserting specific provisions in the constitution or other legislation’.⁴⁷

Similarly, the Venice Commission, after having recalled the standards previously stated by the Committee of Ministers, according to which ‘independence should be guaranteed pursuant to the provisions of the Convention and constitutional principles by inserting specific provisions in the Constitutions or other legislation’,⁴⁸ and Opinion No. 1 of the Consultative Council of European Judges, which clarified that ‘the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level’⁴⁹ and, therefore, that the principle should be guaranteed at the highest level and, preferably, at the constitutional level or among the fundamental principles by those countries with no written text,⁵⁰ drew its final conclusion following the same line of interpretative reasoning when it affirmed solemnly that: ‘The basic principles ensuring independence should be set out in the Constitution or equivalent text.’⁵¹

⁴⁵ Council of Europe, *op. cit.*, *supra* note 19, para. 7, p. 7.

⁴⁶ Council of Europe, European Charter on the statute for judges and Explanatory Memorandum, *op. cit.*, *supra* note 22, principle 1.2, p. 3.

⁴⁷ Council of Europe, *op. cit.*, *supra* note 20, principle I.2.a., p. 2.

⁴⁸ *Ibid.*, Principle I.2.a., p. 1.

⁴⁹ Consultative Council of European Judges (CCJE), Opinion No. 1, *op. cit.*, *supra* note 21, para. 16.

⁵⁰ *Ibid.*, para. 14.

⁵¹ Venice Commission, *Report on the Independence of the Judicial System*, *op. cit.*, *supra* note 12, para. 22.

Once again, in 2008, the Venice Commission further clarified its standards in the Recommendation on the European Standards on the Independence of the Judiciary, Systematic Overview,⁵² by endorsing its previous standard, whereby the principle of judicial independence should be enclosed in Constitutional provisions.⁵³

2.4. Manifold aspects of substantiality

European standards can be further traceable in an abundant list of substantive guidelines, sub-issues, intimate aspects involving, amongst other things, the proper rules to follow in order to appoint a singular judge (i.e. criteria of appointment), rules on the allocation of judicial cases and, last but not least, the guarantees to be recognised in the judicial mandate (i.e. irremovability from office).

Regarding the first, aforementioned, substantial element, we should acknowledge the presence of an uniform view. In fact, the Council of Europe affirmed that the appointment should be 'based on objective criteria, and selection based on merit, regard to qualifications, integrity, ability and efficiency'.⁵⁴ Equally, the Venice Commission, first in 2008 and then in 2010, followed the same path, declaring that the decisions concerning judicial careers should be based on objective criteria⁵⁵ and that 'all decisions on appointment and professional career based on merit, applying objective criteria within the framework of the law, are indisputable'.⁵⁶

The Venice Commission then went further when in its 2007 report, it tried to trace the way forward for the approaching Member States when disclosing that:

New democracies, however, have not yet had a chance to develop these traditions which can prevent abuse. Therefore, at least in

⁵² Venice Commission, *European Standards on the Independence of the Judiciary, A Systematic Overview*, op. cit., *supra* note 26.

⁵³ *Ibid.*, p. 2, cfr. Recommendation No. R (94) 12, op. cit., *supra* note 20, Principle I.2.a., p. 2 and CCJE, Opinion No. 1, op. cit., *supra* note 21, p. 16.

⁵⁴ See, *supra* note 13, Principle I.1.c., and *supra* note 39, para. 45.

⁵⁵ Venice Commission, *European Standards on the Independence of the Judiciary, A Systematic Overview*, op. cit., *supra* note 26, p. 3, cfr. Recommendation (92) 12 and CCJE, Opinion No. 1, op. cit., *supra* note 21, p. 25.

⁵⁶ Venice Commission, *Report on the Independence of the Judicial System*, op. cit., *supra* note 12, para. 27.

new democracies, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other State powers in the appointment of judges.⁵⁷

On the same token, the Consultative Council of European Judges corroborates the standard, declaring that all the decisions about the judges' career should be based on objective criteria, with the aim of ensuring that the selection and career are based on merit with regard to qualifications, integrity, ability and efficiency.⁵⁸ In addition, it was also stressed that these objective standards are required not merely to exclude political influence, but for other reasons, such as the risk of favouritism, conservatism and cronyism (or 'cloning'), which exist if appointments are made in an unstructured way or on the basis of personal recommendations.⁵⁹

In any event, a critical assessment involves the proper interpretation to be given to the requirement of objective criteria. No international instrument clarifies what a criteria of objective nature should be, on the other hand, the merit-based approach, including qualifications, integrity, ability and efficiency, should be read as only an aim to which an undefined criteria must be oriented for.

With reference to the appropriate allocation of judicial cases to follow, the Venice Commission first highlighted the presence of a strong criticism: 'In many countries, court presidents exercise a strong influence by allocating cases to individual judges',⁶⁰ and later suggested a practical method to pursue: 'Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetic order of some similar system'⁶¹ or, more broadly, 'should follow objective criteria'.⁶² As a result, within an open perspective, the allocation should be 'based to the maximum extent on objective and transparent criteria established in advance by law or special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated'.⁶³

⁵⁷ Venice Commission, *Judicial Appointments*, op. cit., *supra* note 14, para. 6.

⁵⁸ CCJE, Opinion No. 1, op. cit., *supra* note 21, para. 25.

⁵⁹ *Ibid.*, para. 24.

⁶⁰ Venice Commission, *Report on the Independence of the Judicial System*, op. cit., *supra* note 12, para. 74.

⁶¹ See *supra* note 20, Principles I.2.e and I.2.f., p. 1.

⁶² Venice Commission, *Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia*, CDL-AD (2002)026-e, para. 70.7.

⁶³ Venice Commission, *Report on the Independence of the Judicial System*, op. cit., *supra* note 12, para. 81.

Lastly, and more importantly, standards were verged to the delicate issue of judicial irremovability, wherein the principle of judicial irremovability is a cornerstone in order to prevent democratic backlashes that could erode the overall asset of judicial independence.⁶⁴

The Council of Europe, in its 1994 Recommendation, showed from the very beginning its fear of undue pressure by other State powers, stating that: 'The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.'⁶⁵ As a result, the judicial body should be vested with the full guarantee of the principle of irremovability, especially 'judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office'.⁶⁶

The Venice Commission, in the same manner, after having called attention to CCJE Opinion No. 1, according to which 'European practice to make full-time appointments until the legal retirement age, this is the approach least problematic from the viewpoint of independence',⁶⁷ affirmed that it 'strongly recommends that ordinary judges be appointed permanently till retirement age...the principle of irremovability should have a Constitutional basis, transfers against the will of the judge may be permissible only in exceptional cases'.⁶⁸ A similar conclusion was reached by the Consultative Council of European Judges, according to which the judges' mandate should be guaranteed until a mandatory retirement age or the expiry of a fixed term of office, and the irremovability of judges should be enshrined at the highest internal level.⁶⁹

2.5. Final step, the urge of an independent authority

A crucial substantive standard, in which the efforts were primarily focused, was the establishment of a separate, distinct and fully independent body

⁶⁴ Venice Commission, *European Standards on the Independence of the Judiciary, A Systematic Overview*, op. cit., *supra* note 26, para. 48.

⁶⁵ *Ibid.*, Principle I.2.b., p. 2.

⁶⁶ *Ibid.*, Principle I.3., p. 2.

⁶⁷ Venice Commission, *Report on the Independence of the Judicial System*, op.cit., *supra* note 12, para. 60.

⁶⁸ *Ibid.*, para. 43.

⁶⁹ CCJE, Opinion No. 1, op.cit., *supra* note 21, paras. 57 and 60; CCJE, Opinion No. 5 (2003), 27.11.2003.

within the judiciary branch in order to ‘ensure independence of judges’⁷⁰ and to supervise the entire process of judicial appointments. As a matter of fact, the European Charter of the statute of judges,⁷¹ *inter alia*, envisaged the establishment of an independent authority equipped with supervisory and authoritative functions (‘the statute envisages the intervention of an authority independent of the executive and legislative powers’⁷²) in dealing with cases involving all the issue concerning the judges’ careers and ‘of every decision affecting the selection, recruitment, appointment, career progress or termination of office’.

Similarly, the Magna Carta of Judges⁷³ declared that ‘each State shall create a Council for the judiciary or another specific body, itself independent from legislative and executive powers, endowed with broad competences for all questions concerning their status, as well as the organisation, the functioning and the image of judicial institutions’.⁷⁴ Venice Commission, in the same vein, foresaw an appropriate method where the independent judicial council has ‘decisive influence on decisions on appointment and career’,⁷⁵ while, at the same time, emphasising a strong criticism focused on the absence of a uniform European scheme on the matter of judicial appointment. In fact, it was reported that ‘there is no single model which applies to all countries. While respecting this variety of legal systems, States should consider the establishment of an independent body’.⁷⁶

In the meantime, a potential distortion has been carefully examined, this time against an excessive concentration of power held by the judiciary, when in 2010, the Kyiv Recommendation,⁷⁷ contrary to other European standards, suggested the creation of several independent bodies, not just one:

⁷⁰ Consultative Council of European Judges (CCJE), Magna Carta of Judges, *op.cit.*, *supra* note 23, para. 13, p. 3.

⁷¹ See, *supra* note 22.

⁷² *Ibid.*, Principle 1.3., p. 2.

⁷³ Consultative Council of European Judges (CCJE), Magna Carta of Judges, *op.cit.*, *supra* note 23.

⁷⁴ *Ibid.*, para. 13, p. 3.

⁷⁵ Venice Commission, *Report on the Independence of the Judicial System*, *op.cit.*, *supra* note 12, para. 32; see, likewise, Venice Commission, *European Standards on the Independence of the Judiciary, A Systematic Overview*, *op.cit.*, *supra* note 26, p. 4.

⁷⁶ *Ibidem.*

⁷⁷ OSCE, Office for Democratic Institutions and Human Rights and Max Planck Minerva Research Group on Judicial Independence, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Judicial Administration, Selection and Accountability*, *op. cit.*, *supra* note 25.

‘A good opinion is to establish different independent bodies competent for specific aspects of judicial administration’ for the reason of avoiding ‘excessive concentration of power in one judicial body and perceptions of corporatism’.⁷⁸

But, and even more crucially, the establishment of the independent body was deemed particularly purposeful in the former communist countries (giving a clear reference to the CEE countries), where the need was seen as very urgent and, above all, for those countries which did not have other long-entrenched and democratically proven systems.⁷⁹

Given all the circumstances mentioned above, one of the prior themes, a real mantra for all European actors, involved the question of the desirable composition before the independent organism and the method of appointment of its members, starting from the assumption that even though ‘the mere existence of a high judicial council can not automatically exclude political considerations in the appointment process’,⁸⁰ the Judicial Council, amongst other things, ‘should have a decisive influence on the appointment and promotion of judges’.⁸¹

To this end, by way of example, it was considered as a satisfactory approach to utilise a general method of appointing judicial members within the independent authority and its judicial composition wherein ‘at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary’.⁸² In any case, the ever-emerging trend, which at the moment seems to be rather consolidated, is the standard, according to which the percentage of sitting members must respect a substantial majoritarian component appointed by the judiciary itself.

In practical terms, ‘the Council shall be composed either of judges exclusively or of a substantial majority of judges elected by their peers’⁸³ or ‘a substantial element or a majority of the members of the Judicial Council should be elected by the judiciary itself’,⁸⁴ or ‘judge members shall be

⁷⁸ Ibid., Principle 2, p. 2.

⁷⁹ CCJE, Opinion No. 1, op. cit., *supra* note 21, para. 45, see also CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, 23.11.2007.

⁸⁰ Venice Commission, *Judicial Appointments*, op. cit., *supra* note 14, para. 23.

⁸¹ Ibid., para. 25.

⁸² See note 71, European Charter Statute Judges.

⁸³ Consultative Council of European Judges (CCJE), *Magna Carta of Judges*, op. cit., *supra* note 23, para. 13, p. 3.

⁸⁴ Venice Commission, *Judicial Appointments*, op. cit., *supra* note 14, para. 23.

elected by their peers and represent the judiciary at large',⁸⁵ or, once again, 'and in all cases should have a pluralistic composition with a substantial part, if not the majority, of members being judges'.⁸⁶

However, there are at least two relevant exceptions to reveal. The first is addressed to the appellate court judges where the 'Judicial Councils shall not be dominated by appellate court judges. Where the chairperson of a court is appointed to the Council, he or she must resign from his or her position as court chairperson'.⁸⁷ The second, most interestingly, called attention to the necessity to provide within the Council a so-called '*democratic legitimacy*' component, and as a result, it was emphatically affirmed that 'in a system guided by democratic principles, it seems reasonable that the Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament'.⁸⁸

This last stance is particularly crucial in many respects. First and foremost, it is not entirely clear whether the democratic component of the Judicial Council should play a minority role, whereas the judicial appointment should, in any case, play a major role (as it would seem). Indeed, if this were the case, the Council could underscore serious issues in the eyes of public opinion and, as a result, be criticised in terms of 'appearance of independence', which, as we shall see later, is a fundamental parameter applied by the European Court of Human Rights when it deals with judicial independence claims.

Furthermore, the democratic legitimacy component seems to emerge as a necessary counterpart of a very sensitive issue, too often (deliberately) undervalued by scholarly works, which is the interaction between judicial corporatism and the judicialization of politics. This was an argument that was legitimately advanced by the Polish authorities in the White Paper on the Reform of the Polish Judiciary in order to justify the ongoing reform plan

⁸⁵ OSCE, Office for Democratic Institutions and Human Rights and Max Planck Minerva Research Group on Judicial Independence, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Judicial Administration, Selection and Accountability, *op. cit.*, *supra* note 25, Principle 7, p. 3.

⁸⁶ Venice Commission, *Report on the Independence of the Judicial System*, *op. cit.*, *supra* note 12, para. 32.

⁸⁷ OSCE, Office for Democratic Institutions and Human Rights and Max Planck Minerva Research Group on Judicial Independence, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Judicial Administration, Selection and Accountability, *op. cit.*, *supra* note 25, Principle 7, p. 3.

⁸⁸ Venice Commission, *Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania*, CDL-INF (1998)009, para. 9.

as an imperative step forward to prevent a risk of cronyism, self-interest, illegitimate self-protection and the public perception of judicial corporatism.⁸⁹

Lastly, instances of popular representation within the National Councils are particularly appealing in those countries where there exists an objective gap between judges and citizens, whereas the latter are substantially deprived of the right to elect judicial representatives, and as a result, there could be growing sceptical trends towards the legitimacy of the judiciary office. This popular sentiment was evidently abused by populist parties for electoral gains and pure people⁹⁰ opposed to the corrupted judiciary as an ideological tool for strengthen the legitimacy of political leadership.

3. Criteria of the European Court of Human Rights

Interestingly, Venice Commission expressed a very critical voice on the importance, on a more general ground, of the jurisprudence of the European Court of Human Rights. Indeed, it was argued that ‘the case-law of the Court sheds light on a number of important aspects of judicial independence but, by its very nature, does not approach the issue in a systematic way’;⁹¹ however, from where I stand, the importance of the role and the judgments of the Strasbourg Court should not be underrated since they offered a crucial legal precedent for all the matters pertaining ‘fair trial’ and judicial independence.

Furthermore, and despite the fact that neither Article 6 nor any other provision of the European Convention on Human Rights requires that States must comply with a particular theoretical constitutional scheme, previously fixed or suggested, regarding the permissible limits of the powers’ interaction and the respect of the separation of power, the question is always whether, in a given case, the requirements of the Convention are met or not.⁹²

⁸⁹ Poland, the Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, Warsaw, 7.3.2018, pp. 48, 54, 58-61.

⁹⁰ The reference to ‘pure people’ as a populist target is brilliantly highlighted by C. Mudde, *Are Populists Friends or Foes of Constitutionalism*, ‘The Social and Political Foundations of Constitutions, The Foundation for Law, Justice and Society’ 2013, p. 3.

⁹¹ Venice Commission, *Report on the Independence of the Judicial System*, op. cit., *supra* note 12, para. 13.

⁹² Henryk Urban and Ryszard Urban v. Poland, Application 23614/08, Judgment of 30.11.2010, para. 46

The European Court of Human Rights' case law,⁹³ when it is called to assess whether a judicial body can be labelled as an 'independent' body, referred mainly to four distinct criteria: manner of appointment of the judicial members; duration of the term of the judicial office; existence of certain guarantees against outside pressures; whether the body presents an appearance of independence.

In any case, it is worth noting that the Court's reasoning, when it deals with all of the four parameters, necessarily involved a simultaneous assessment of the 'impartiality' as a concrete and subsequent outcome. In fact, the following assessment by the Court involved a double approach: *subjective* – meaning to ascertain the personal conviction or concrete interest of the judge in a given case; and *objective* – consisting in determining potential doubts, fears or suspicions of the judges' behaviours and whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.⁹⁴

As clarified by the Court, in the vast majority of cases, the focus was on the fulfilment of the objective test; however, there is no watertight division between the two approaches, since the judges' conduct may not only prompt objectively held misgivings from the point of view of the external observer (objective test), but may also involve the issue of his or her personal conviction (subjective test).⁹⁵

3.1. Manner of Appointment

The first criteria involved the method followed in order to appoint the specific members of the judicial bodies and, in particular, the legal institution which should be in charge of making the appointment or,

⁹³ *Findlay v. the United Kingdom*, Application no. 22107/93, Judgment of 25.2.1997 Reports of Judgments and Decisions 1997-I, para. 73; *Campbell and Fell v. United Kingdom*, Application no. 7819/77; 7878/77, Judgment of 28.6.1984, Series A no. 80, para. 78; *Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], Applications nos. 2312/08 and 34179/08, Judgment of 18.7.2013, ECHR 2013, para. 49; *Brudnicka and Others v. Poland*, Application no. 54723/00, Judgment of 3.5.2005, ECHR 2005-II, para. 38.

⁹⁴ *De Cubber v. Belgium*, Application no. 9186/80, Judgment of 26.10.1984, Series A no. 86, para. 24.

⁹⁵ *Micallef v. Malta* [GC], Application no. 17056/06, Judgment of 5.09.2006, ECHR 2009, para. 95; *Kyprianou v. Cyprus* [GC], Application no. 73797/01, Judgment of 27.1.2004, ECHR 2005-XIII, para. 119.

in other words, whether and to what extent the legislative, executive or the judicial power itself should be competent.

Article 6(1) of the European Convention requires independence not only from the executive and the parties, but also from the legislator, namely the national Parliaments;⁹⁶ however, the mere appointment of judges by Parliament cannot be seen as casting doubt on their independence;⁹⁷ similarly, judicial appointments made by the executive is permissible, as long as the judges are free from pressure or influence when carrying out their adjudicatory role.⁹⁸

For instance, in the case *Ninn-Hansen v. Denmark*, the applicant complained about the manner of appointment of the lay judges, elected by the Parliament; however, the Court declared that there were no reasonable doubts about their fairness of the adjudicatory role. Indeed, ‘although political sympathies may play part in the process of appointment of lay judges...the Court does not consider that this alone gives legitimate doubts as to their independence and impartiality (...) Nor has it been established that there existed other links between Parliament and the lay judges which could give rise to misgivings as to the lay judges’ independence and impartiality’.⁹⁹ Similarly, the Court declared in the case of *Filippini v. Saint Marin* that the mere appointment by the legislator is not enough to declare the lack of independence of the judges, which requires a further step forward.

To establish a lack of independence in the way of appointment, it is either necessary to show that the practice of appointment as a whole was unsatisfactory or, alternatively, that the establishment of the particular court or the appointment of the particular adjudicator gave rise to a risk of undue influence over the outcome of the case;¹⁰⁰ therefore, even though the independence of the judges is at stake, it will be necessary in the course

⁹⁶ *Crociani et al v. Italy*, Applications 8603/79, 8722/79, 8723/79, 8729/79, Judgment of 18.12.1980, paras. 194, 195 and 196.

⁹⁷ *Filippini v Saint-Marin*, Application no. 10526/02, Judgment of 26.8.2003, ECHR 2003, para. 13; *Ninn-Hansen v. Denmark*, Application no. 28972/95, Judgment of 18.5.1999, ECHR 1999, p. 19.

⁹⁸ See, *Henryk Urban and Ryszard Urban v. Poland*, *supra* note 92, para. 49; *Campbell and Fell v. United Kingdom*, *supra* note 93, para. 79; *Maktouf and Damjanovic v. Bosnia and Herzegovina* [GC], *supra* note 93, para. 49; *Flux v. Moldova* (no. 2), Application No. 31001/03, Judgment of 3.7.2007, para. 27.

⁹⁹ *Ninn-Hansen v. Denmark*, *supra* note 97, para. 20.

¹⁰⁰ *Zand v. Austria*, Application no. 7360/76, Judgment of 16.5.1977, para. 78.

of the overall legal reasoning to further assess the matter of impartiality in its outward form as the result of a lack of independence.

To sum up, although the assignment of a case to a particular judge or court and, therefore, the manner of their appointments falls within the margin of appreciation enjoyed by the domestic authorities in such matters, the Court must be satisfied that this was compatible with Article 6(1) and, in particular, with its requirements of independence and impartiality.¹⁰¹

3.2. Term of office

The second requirement is the duration of the appointment; no particular term of office has been specified as necessary minimum. It is true that irremovability of judges by the executive during their term of office must, in general, be considered a corollary of their independence and thus included in the guarantees of Article 6(1); however, the absence of any formal recognition of this irremovability in the law does not in itself imply lack of independence, provided that it is recognised in fact and that the other necessary guarantees are present.¹⁰²

For instance, a relatively short term of office (3 years) has been held acceptable by the Court, in the case *Campbell and Fell v. the United Kingdom*, for unpaid appointees to administrative or disciplinary tribunals.¹⁰³ On the other hand, a renewable four year appointment for a judge who was a member of a national security court was considered ‘questionable’ by the Court in the case *Incal v. Turkey*: ‘On the other hand, other aspects of these judges’ status make it questionable (...) Lastly, their term of office as National Security Court is only four years and can be renewed.’¹⁰⁴

From another perspective, the Court, in the case *Maktouf and Damjanovic v. Bosnia and Herzegovina*, considered the judicial mandate in line with the Article 6(1), in a case questioning the presence of international

¹⁰¹ *Moiseyev v. Russia*, Application no. 62936/00, Judgment of 9.10.2008, para. 176.

¹⁰² See *Campbell and Fell v. the United Kingdom*, *supra* note 93, para. 80, *Engel and others v. The Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8.6.1976, Series A no. 22, para. 68, *Henryk Urban and Ryszard Urban v. Poland*, para. 45, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, *supra* note 93, para. 49.

¹⁰³ *Campbell and Fell v. the United Kingdom*, *supra* note 93, para. 80.

¹⁰⁴ *Incal v. Turkey*, Application No. 41/1997/825/103, Judgment of 9.6.1998, 29 EHRR 449, para. 68.

judges appointed for a renewable two year term on the bench of a court ruling on war crimes, taking into account, on the whole, external and outward factors, and as a result, it concluded that: 'Admittedly, their term of office was relatively short, but this is understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments.'¹⁰⁵

Interestingly, the Court in the case *Gurov v. Moldova*, where the applicant alleged a breach of Article 6, as the term of the office of a judge hearing a case was expired, provided an innovative interpretation of the term 'established by law', the object of which is to ensure 'that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament'. Moreover, and most importantly, the term covers not only the legal basis for the very existence of a 'tribunal', but also the composition of the bench in each case.¹⁰⁶

Therefore, the Court concluded that there were no legal grounds for the involvement of the judge, and therefore, the case had not been heard by a tribunal established by law. Moreover, tacitly prolonging the term was in contradiction with the principle that the judicial organisation in a democratic society should not depend on the discretion of the executive.¹⁰⁷

3.3. Guarantees against outside pressures

The third condition invokes the guarantee against any outside pressure performed by other State powers. The Court, in *Campbell and Fell v. the United Kingdom*, prescribed that the judicial members of a tribunal must, at a very minimum, be protected against a removal act passed by the legislative branch during their terms of office, stating that: "The irrevocability of judges by the executive during their term of office must, in general, be considered as a corollary of their independence and thus included in the guarantees of Article 6(1). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence,

¹⁰⁵ *Maktouf and Damjanovic v. Bosnia and Herzegovina*, *supra* note 93, para. 51.

¹⁰⁶ *Gurov v. Moldova*, Application no. 36455/02, Judgment of 11.7.2006, para. 34 and 35; *Posokhov v. Russia*, Application no. 63486/00 Judgment of 9.7.2002, ECHR 2003-IV, para. 39.

¹⁰⁷ *Gurov v. Moldova*, *ibid.*, para. 37.

provided that it is recognised in fact and that the other necessary guarantees are present.’

Furthermore, the European Court, in the case *Sovtransavto Holding v. Ukraine*, where the applicant lodged a complaint due to political pressure, found a violation of Article 6(1) of the Convention, having regard to the interventions by the executive branch of the State in the judicial proceedings, as it declared that ‘ (...) in view of their content and the manner in which they were made, they were *ipso facto* incompatible with the notion of an ‘independent and impartial tribunal’ within the meaning of Article 6(1) of the Convention.’¹⁰⁸

In a similar manner, and most interestingly, in *Kinsky v. the Czech Republic*¹⁰⁹ the Court, while declaring in its conclusion of a violation of Article 6(1) of the Convention, affirmed that ‘the activities of certain politicians referred to by the applicant, be they verbal expressions to the media or other, aimed at creating a negative atmosphere around the legal actions of the applicant or constituting direct attempts to interfere in these proceedings, were unacceptable in a system based on the rule of law’; therefore, it seems that even any indirect pressure performed by other State actors could amount to an illegitimate intervention sufficient to disturb, influence or shift the parameter of judicial independence.

On a final note, it is not surprising that the Court, when it is called to cope with the criteria of the guarantees against outside pressure, acts in a very cautious and wary manner, as this involves a very problematic argument, being the separation of powers, where no fixed models can be applied to national States and where the national sovereignty, expressed by parliamentary will, still plays a role as primary leading actor in establishing national constitutional orders.

3.4. Appearance of Independence

The fourth requirement is the one concerning appearance, which recalled the standpoint of an objective observer and, furthermore, the recognition of the judicial body by the people in terms of impartiality. The Court

¹⁰⁸ *Sovtransavto Holding v. Ukraine*, Application no. 48553/99, Judgment of 25.7.2002 ECHR 2002-VII, para. 40.

¹⁰⁹ *Kinsky v. the Czech Republic*, Application no. 42856/06, Judgment of 9.2.2012, para. 23.

reiterated that impartiality denotes the absence of prejudice or bias, and its existence can be tested in various ways. The existence of impartiality for the purpose of Article 6(1) must be determined according, first, to a 'subjective test', where regard must be had to the personal behaviour of a particular judge, i.e. whether the judge held any personal prejudice or bias in a given case, and also according to an 'objective test', i.e. by ascertaining whether the tribunal itself and, among other aspects, its composition offered sufficient guarantees to exclude any legitimate doubt in respect to its impartiality.¹¹⁰

As stated by the Court in *Morice v. France*¹¹¹ as to the objective test, it must be determined whether there are ascertainable facts which may raise doubts of impartiality, and the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified.¹¹²

An appearance of independence is crucial, because, as the Court clarified, 'what is at stake is the confidence which the courts in a democratic society must inspire in the public',¹¹³ and the appearance itself may be of certain importance – 'justice must not only be done, it must also be seen to be done'.¹¹⁴ As factual examples, whether the public is reasonably entitled to entertain doubts as to the independence or impartiality of the tribunal,¹¹⁵ whether there are legitimate grounds for fearing,¹¹⁶ whether there are ascertainable facts that may raise doubts or whether such doubts can be objectively justified,¹¹⁷ the objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings.¹¹⁸

¹¹⁰ *Morice v. France* [GC], Application no. 29369/10, Judgment of 23.4.2015, ECHR 2015, para. 73; *Kyprianou v. Cyprus* [GC], Application no. 73797/01, Judgment of 21.1.2004, ECHR 2005-XIII, para. 118; *Micallef v. Malta* [GC], *supra* note 95, para. 93.

¹¹¹ *Morice v. France* [GC], *supra* note 110.

¹¹² *Morice v. France*, *supra* note 110, para. 76, *Micallef v. Malta* [GC], *supra* note 95, para. 96.

¹¹³ *Incal v. Turkey*, *supra* note 104, para. 48; *Morice v. France* [GC], *supra* note 110, para. 78.

¹¹⁴ *Denisov v. Ukraine* [GC], Application no. 76639/11, Judgment of 25.9.2018, ECHR 2018, para. 63.

¹¹⁵ *Campbell and Fell v. the United Kingdom*, *supra* note 93, para. 20.

¹¹⁶ *Langborger v. Sweden*, Application no. 11179/84, Judgment of 22.6.1989, Series A no. 155, para. 34; *Procola v. Luxembourg*, Application no. 14570/89, Judgment of 28.9.1995, Series A no. 326, para. 42; *McGonnell v. the United Kingdom*, Application no. 28488/95, Judgment of 8.2.2000, ECHR 2000-II, para. 63.

¹¹⁷ *Castillo Algar v. Spain*, Judgment of 28.10.1998, Reports 1998-VIII, para. 45.

¹¹⁸ *Micallef v. Malta* [GC], *supra* note 95, para. 97.

In *De Cubber v. Belgium*, the Court, focusing more on the objective test, confirmed that ‘however, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach),’¹¹⁹ referring to the Belgian Court of Cassation, according to which any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw, because what is at risk is ‘the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused.’¹²⁰

4. The Polish Constitutional Tribunal

The first judicial body exposed to the judicial reform plan initiated by the Polish ruling party, Law and Justice, was the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*). As a preliminary note, it is worth mentioning that Article 194 of the Polish Constitution explicitly states that: ‘The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office’.

The procedural changes that have occurred within the CT have been numerous. Among the many are: a new quorum of eleven out of fifteen judges for certain decisions, the possibility for four judges to postpone any decision if they are not satisfied after an initial internal vote, the necessary presence of the prosecutor general for certain sets of decisions, further disciplinary proceedings against the elected constitutional judges and a more wary publication of the CT judgments which currently relies on the formal approval of the Prime Minister and a broad and extensive list of hypothesis in which the publication of the judgements could be legitimately delayed.¹²¹

However, the most notable step taken by the Polish ruling party was a test of strength, a real showdown, consisting in the replacement

¹¹⁹ *De Cubber v. Belgium*, *supra* note 94, para. 26.

¹²⁰ *Ibid.*

¹²¹ See A. Sanders, L. Von Danwitz, *Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy*, ‘German Law Journal’ 2018, vol. 19, p. 769.

of five judges already sitting in the Constitutional Tribunal, appointed after an endless legal diatribe based on several twisted pre-facts.¹²²

A few days before the 2015 parliamentary elections, on 8.10.2015 (by the end of the 7th Term of the Sejm), the lower Chamber of the Parliament, the old Sejm, elected five new judges, based on the amendment of the CT of 25.6.2015, instead of the appointment of just three judges, which was, as stated by both scholars and the Constitutional Court the election of those two extra judges, clearly¹²³ improper and patently unconstitutional.¹²⁴

On the matter, the Constitutional Tribunal, in its notable ruling K 34/15, declared that the election of the two extra judges was improper and, therefore, unconstitutional, because it was done by the VII Sejm, whose term ended on 12.11, while the tenure of the elected judges was to commence on 2.12 and 8.12, respectively, the same day the nine-year tenure of the two former judges ended. Conversely, the appointment of the other three judges, whose tenure ended on 6.11., were proper and according to the Constitution, as the tenure of the Sejm overlapped with the date of the ending of their mandate¹²⁵; in other words, only the Sejm in office during which the mandate of the CT judges will expire is authorised to make the judicial appointment.

Afterwards, the Parliament, guided by the ruling party majority, adopted in the late 2015 a resolution on 25.11,¹²⁶ according to which all five judges had to be considered as irregular members and their election as null and void. Consequently, on that ground, on 2.12.2015, the new Sejm elected five new judges, reshaping the composition of the Constitutional

¹²² For a comprehensive analysis of the constitutional crisis, see, *inter alia*, W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, 'Revista Forumul Judecatorilor' 2018, vol. 104.

¹²³ *Ibid.*, p. 21.

¹²⁴ See Judgment of the Constitutional Tribunal of 9.12.2015, ref. no. K 35/15, OTK ZU no. 11/A/2015, item 186, part III, paras. 1.1., 3, 3.3. and 6.3.1.; Judgment of the Constitutional Tribunal of 9.3.2016, ref. no. K 47/15, OTK ZU no. A/2016, part III, paras. 1.3., 2.3., 4.6.8. and 5.2.3.

¹²⁵ See. S. Jankovic, *Polish Democracy Under Threat? An Issue of Mere Politics or A Real Danger?*, 'Baltic Journal of Law & Politics' 2016, vol. 9, p. 54.

¹²⁶ Resolution of the Sejm of the Republic of Poland of 2.12.2015 regarding the election of a judge of the Constitutional Tribunal (Polish Law Monitor, no 1, item 1182-1186, 2015); see W. Sadurski, *supra* note 110, 'The Constitution does not recognise the possibility of such a resolution annulling an earlier election of judges, a resolution which effectively adds a new, extra-constitutional, method of extinguishing the judicial term of office', p. 21.

Tribunal, which was stated by the Constitutional Tribunal in the K 34/15 judgment. Although the former appointment of the two judges was, in fact, unconstitutional, the remaining mandate of the three other members was made according to constitutional standards; therefore, the new government would have been allowed to appoint only two judges, rather than five of them, in December 2015.

Furthermore, the other crucial legal argument for declaring the legitimacy of the newly appointed judges was one concerning the precise moment when they should assume their judicial office and, especially, the formality of the oath before the President of the Republic.

In short, the process of becoming a judge, in theory, ends with the election in the Sejm, but in practice, it ends only after being sworn in by the President.¹²⁷ On that basis, the President, after the election of the five judges by the old Sejm, refused to receive the oath from them; however, on 2.12, the President received the oath by the five new judges immediately after their appointment.

The ruling of the K 34/15 judgment declared that the President has to receive the oath from elected judges immediately, but the exclusive right to appoint judges rests within the power of the Sejm. As a result, the appointment ends with the election of the Sejm and not with the oath. Similarly, the K 35/15 judgment, declaring unconstitutional the amendment to the CT the Act of 19.11.2015, which introduced a 30-day period during which the President should receive the oath from elected judges, would contradict the former judgment, K 34/15, as the President is obliged to receive the oath immediately and introduced a role of co-participation, not prescribed by the constitutional scheme, in the election of the members of the Constitutional Tribunal.

Nonetheless and, quite predictably, the reshaped Constitutional Tribunal on 24.10.2017 handed down a judgment (K 1/17¹²⁸) which, contrary to the previous statement of the K 34/15 and in contradiction to Article 194 of the Constitution and its well-established interpretation, declared that the most important and constitutive element in order to hold

¹²⁷ Act of 22.7.2016 on the Constitutional Tribunal, Polish OJ 2016, no. 1, item 1157, see, *inter alia*, Articles 5(5) and 5(6).

¹²⁸ Judgment of the Constitutional Tribunal of 24.10.2017, ref. no. K 1/17, OTK ZU no. A/2017.

the office of judge, a member of the Constitutional Tribunal, is the requisite of the oath before the President.¹²⁹

5. The National Council of Judiciary

A second tier was the rethinking of the Polish National Council of Judiciary (*Krajowa Rada Sądownictwa* or *KRS*), which performs a crucial role within the Polish Constitutional boundaries, as it was created in 1989 in the wake of the democratic transition as an authority to safeguard the independence of courts and judges.¹³⁰ The very first act was adopted on 20.12.1989 pursuant to the amended Constitution of 1952; however, it failed to avoid the challenge of exclusively serving the interest of the judiciary rather than the interest of justice. For that reason, the first Council had rather limited powers.¹³¹

In any event, according to Article 186 of the Polish Constitution, the supreme judicial body acts as a guardian of the whole judicial system, and in this meaning, it 'shall safeguard the independence of courts and judges'. Its main task is to make judicial appointments by a motion which should be approved by the President of the Republic, who formalises the proposed appointments.¹³² Additional powers include submitting issues of constitutionality for review to the Constitutional Tribunal, adopting a judicial code of ethics and expressing an opinion on draft legal reform.

Concerning KRS members, the composition is mixed, which include all of the three powers of the State. Article 187 established the number of its members as 25: 15 members from the judiciary branch, 4 members chosen by the Sejm among its deputies, 2 members chosen by the Senate among its members, the First President of the Supreme Court, the Minister

¹²⁹ W. Sadurski, *op.cit.*, p. 22.

¹³⁰ P. Mikuli, *An Explicit Constitutional Change by Means of an Ordinary Statute? On a Bill Concerning the Reform of the National Council of the Judiciary in Poland*, 'International Journal of Constitutional Law Blog' 2017, p. 1, on the issue of Judicial Councils and Judicial Self-Governance, see D. Kosař, *Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe*, 'German Law Journal' 2018, vol. 19, pp. 1567-1612.

¹³¹ In this way, A. Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, 'German Law Journal' 2018, vol. 19, p. 1847.

¹³² Article 179 of the Polish Constitution, chapter VIII.

of Justice, the President of the Supreme Administrative Court and 1 member appointed by the President of the Republic.

In particular, the Constitutional text stated that ‘15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts’ and some scholars affirmed that the selection is mostly conferred to the judiciary itself.¹³³ Meanwhile, other commentators raised doubts about the legal text, which it seems to not provide, explicitly, that judge members should be elected by the judiciary itself, even though it has always been understood that they are elected by the judiciary itself.¹³⁴

Having clarified the constitutional relevance of the judicial body, the reforming process went through a two-step phase: an original draft proposal, then rejected by the President of the Republic, which, later on, became, with some adjustments, a definitive legal reform.

According to the first draft proposal, adopted by the Parliament on 12.7.2017 (Act of 23.1.2017), the National Council of Judiciary would have been divided into two different chambers: one of judicial composition and the other composed of political members. On the flip side, a decision in order to be of a binding effect should have obtained the consent of both chambers.

However, the President of the Republic expressed concerns about the amendment, referring to the immediate termination of the judicial mandate, especially in relation to Article 187(3) of the Constitution, which established that: ‘The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.’ He therefore vetoed the initial proposal.

The definitive version on the new Council of Judiciary voted by Sejm on 8.12.2017 and Senate on 15.12.2017, signed by the President on 20.12.2017, came into force on the date of 15.1.2018, which confirms the election of the whole judicial body (15 judicial members) by the Sejm, performed through a quite complex procedure.

First of all, the candidates may be proposed by groups of citizens (2000) or 25 judges; then on that basis, each of the parliamentary caucuses could nominate up to 9 candidates, and later on, the parliamentary

¹³³ A. Sanders, L. Von Danwitz, *op.cit.*, p. 776.

¹³⁴ W. Sadurski, *op.cit.*, p. 143; see similarly, A. Śledzińska-Simon, *op.cit.*, p. 1850, ‘The Constitution is silent on this matter and does not stipulate that all judges shall have equal voting rights in the election of the judicial members of the Council’.

committee will select 15 candidates to be presented to the Sejm. The lower chamber, in the first round, will elect the appropriate candidates by a 3/5 majority, and if a quorum is not achieved, the Sejm seems to be able to elect the candidates by a simple majority procedure.

More precisely, in the second round, the candidates are elected 'by a roll call'. Each Parliamentary member has one vote and may vote for only one candidate. Candidates who have received the highest number of votes shall be deemed to have been elected, and each Parliamentary member may vote for or against, or abstain. Afterwards, in case of tie, a candidate who received fewer votes against them will be elected.¹³⁵

However, Parliament is not obliged to select candidates with sufficient support in the judiciary and may choose candidates who have only minimal support amongst their colleagues, and for this reason, the Venice Commission emphasised the procedure as 'regrettable', because the judicial community has insufficient weight in the NCJ election.¹³⁶

Furthermore, it was introduced a pre-term removal of the sitting judges, despite the 4 year term guaranteed by the Constitution. In doing so, Article 6 of the Reforming Act provides for an early termination of the term of office of all sitting judges relying on the judgment of the Constitutional Tribunal of 20.6.2017,¹³⁷ where the Court declared that the term of the office of the members should be seen as a collective term and not as an individual one.

In this regard, the Venice Commission, after presenting all of its scepticisms about the notion of 'joint term of office', stated that even assuming the latter as politically legitimate, the Polish aim could have been achieved differently: 'The currently serving judicial members may remain in their position until the original term of their mandate expires, while new members could be elected for a shorter period, ensuring that at some point in future the whole composition of the NCJ will be renewed simultaneously. This solution will not only respect the security of tenure but also better ensure the institutional continuity of the body.'¹³⁸

¹³⁵ Venice Commission, Opinion No. 904/2017, para. 21, p. 6.

¹³⁶ Ibid., para. 26.

¹³⁷ Judgment of the Constitutional Tribunal of 20.6.2017, K 5/17, OTK ZU A/2017, item 48.

¹³⁸ Venice Commission, Opinion No. 904/2017, para. 30, p. 8, which recalls the Venice Commission *Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania*, CDL-INF(1998)009, paras. 20 and 21.

All things considered, it certainly appears that the reform plan affecting the National Council of Judiciary, in the end, moves the authority to select judicial members away from the bodies representing the judiciary and places it into the hands of a more powerful Parliament.¹³⁹

6. The Law on the Supreme Court

Lastly, the judicial reform affected the judges sitting in the Supreme Court, as the new Polish Law on the Supreme Court ('the Law on the Supreme Court'), entered into force on 3.4.2018,¹⁴⁰ prescribed a sundry list of legal innovations: a new retirement age for all the sitting judges, a new method for appointing the Chief Justice of the Supreme Court, an increase in the total number of the sitting judges, the creation of two new chambers (one for hearing disciplinary cases and another for extraordinary appeals) and, lastly, a new judicial review procedure called the 'extraordinary complaint'.¹⁴¹

Evidently, the new age limit drawn up by the reform is the main target of severe criticism displayed by scholars¹⁴² and institutional European actors. The Law on the Supreme Court, prescribed in section 37 and concerning a lowering of the current retirement age, applies to all judges, including those appointed before the entry into force of the law. Following the passage of this law, all sitting judges were forced to retire early (at 60, rather than 70) and with immediate effect. Thus, as it patently appears, the most concerning argument of the new reform is the prevision of the so-called 'early retirement age'.

Nonetheless, the judges affected by the retirement age requisite could continue to hold their judicial office under three certain specific conditions: a submission of a statement indicating the desire to continue to perform his duties, a certificate stating good health condition and, lastly, a formal approval by the President of the Republic, which seems to be the most debatable and controversial prerequisite, for the reason that the President

¹³⁹ See A. Śledzińska-Simon, *op. cit.*, p. 1851.

¹⁴⁰ Law of 8.12.2017 on the Supreme Court, Polish OJ 2018, item 5, 650, 771, 847, 848, 1045, 1443, 2507, Polish OJ 2019, item 125.

¹⁴¹ W. Sadurski, *op.cit.*, p. 146.

¹⁴² W. Sadurski, *op.cit.*, p. 145; A. Sanders, L. Von Danwitz, *op.cit.*, p. 35.

himself does not seem bound by any legal criteria, and furthermore, his final decision is not subject to further judicial review.

On the international level, the most striking criticism came from the Venice Commission when it expressed its concerns, declaring that: ‘In the first place, there is no apparent rationale determining the office of which judges might be extended; it appears to be at the discretion of the President of Poland. This will give the President excessive influence over those judges who are approaching the retirement age.’¹⁴³ The Commission, concerning the substantial absence of judicial remedies, also stated: ‘Under the Draft Act, Polish judges exposed to early retirement would not have any judicial remedy at their disposal. Given the recent developments in the case-law of the ECtHR, absence of judicial remedies in this situation appears problematic.’¹⁴⁴

In particular, the Venice Commission expressed its concerns taking into account the meaning conveyed in the pivotal case of *Baka v. Hungary*,¹⁴⁵ concerning the right of access to further judicial remedies for civil servants in case of premature dismissal from the judicial office, where the European Court of Human Rights declared the existence of a violation of the right of fair trial as enshrined in Article 6(1) of the Convention.¹⁴⁶

However, and as a predictable further development after the definitive establishment of an expedited procedure before the Court of Justice of the European Union,¹⁴⁷ the Polish government retraced its steps when, on 17.12.2018, the President of the Republic signed a new law amending the former one, which entered into force on 1.1.2019.¹⁴⁸ According to the new law, the judges of the Supreme Court, including the First President of the Supreme Court, who were retired pursuant to the earlier law are now reinstated in their position and the performance of their duties is deemed to have continued without interruption.¹⁴⁹ It was then a logical and predictable consequence that Poland requested a procedural

¹⁴³ Venice Commission, Opinion No. 904/2017, para. 51.

¹⁴⁴ *Ibid.*, para. 50.

¹⁴⁵ *Baka v. Hungary* [GC], Application no. 20261/12, Judgment of 27.5.2014, ECHR 2016.

¹⁴⁶ *Ibid.*, para. 196.

¹⁴⁷ *Commission v. Poland*, Case C-619/18, ECLI:EU:C:2018:910.

¹⁴⁸ Law of 21.11.2018 amending the Law on the Supreme Court, Polish OJ 2018, heading 2507.

¹⁴⁹ See *Commission v. Poland*, Case C-619/18, Opinion of Advocate General Tanchev delivered on 11.4.2019, ECLI:EU:C:2019:325, para. 9.

withdraw based on a concrete lack of purpose in keeping the infringement procedure in place since the law contested have been repealed and the effects eliminated by the Law of 21.11.2018.¹⁵⁰

AG Tanchev, by contrast, favoured the argument of the purpose persistence since the new Law of 21.11, which entered into force after the period established in the reasoned opinion, could not be taken into consideration and, consequently, it was not able in rendering the action devoid of purpose.¹⁵¹ In other words, in order to declare the purpose no longer valid, the legal framework to consider is limited to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion¹⁵² and any legal innovation occurred after that period could not be taken into account. Furthermore, the interests of those who have acquired certain rights as result of a State default should be seen as a further reason in order to successfully establish a basis of State liability.¹⁵³

Last but not least, on 24.6.2019, the Grand Chamber of the European Court of Justice delivered its final judgment¹⁵⁴ on the matter, agreeing *in toto* with the arguments previously advanced by the AG Opinion. Preliminary, it was affirmed that exist a mutual trust between Member States in upholding the common values enshrined in Article 2 TEU,¹⁵⁵ rule of law on top of everything. Secondly, the Court recalled its settled

¹⁵⁰ Ibid., para. 33; M. Mastracci, *The Rule of Law and the Judicial Retirement Age in Poland: Is the ECJ Judgment the End of the Story?*, <http://www.iconnectblog.com/2019/07/the-rule-of-law-and-the-judicial-retirement-age-in-poland-is-the-ecj-judgment-the-end-of-the-story/> (accessed: 21.3.2020).

¹⁵¹ *Commission v. Poland*, Case C-619/18, Opinion of Advocate General Tanchev, para. 46.

¹⁵² Ibid., para. 44.

¹⁵³ Ibid., para. 45.

¹⁵⁴ *Commission v. Poland*, Case C-619/18, Judgment of 26.06.2019, ECLI:EU:C:2019:531; even more recently, the Grand Chamber delivered a judgment in *Commission v. Poland*, Case C-192/18, Judgment of 5.11.2019, ECLI:EU:C:2019:924, in relation to the former Law amending the Law on the system of ordinary courts and certain other laws of 12.7.2017 (Polish OJ 2017, item 1452; ‘the Amending Law of 12.7.2017’), where the Court concluded for a violation of Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5.7.2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and for a violation of Article 19(1) TEU concerning the right of the Minister of Justice to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age.

¹⁵⁵ Ibid., para. 43.

case-law¹⁵⁶ on the matter concerning the relevant period of time in order to assess the infringement procedure clarifying that reference must be made to the position held by the Member State at the end of the period laid down in the reasoned opinion and, as a corollary, the Court cannot take into account any subsequent changes.¹⁵⁷ Then, and quite unexpectedly, no reference was made to the interests of those persons who acquired rights as a result of the State default.

In addition, the Strasbourg Court replied to the Polish claim concerning the exclusive competence of a Member States and the linkage with EU law. In this regard, the Polish government argued that the organisation of the national justice system falls within the exclusive competence of Member States¹⁵⁸ and that no link with EU law is to be found in the present case because the contested rules are under the sole domain of national legislation.¹⁵⁹ The Court, instead, noted that the principle of effective judicial protection of individuals is a common heritage of EU law¹⁶⁰ and the 'fields covered by Union law' finds application irrespective of whether Member States are implementing EU law.¹⁶¹

For that reasons, and as a predictable outcome, the Grand Chamber concluded that the application undermines the principle of the irremovability of judges, which is essential to their independence.¹⁶² More crucially, and before claiming a rule of law victory, it remains to be seen whether and how the enforcement process will work, as well as, at later date, the cooperation of the Polish government with the ECJ ruling, including the further developments of the joined cases C-585/18, C-624/18 and C-625/18.¹⁶³

¹⁵⁶ See *Commission v. Greece*, Case C-200/88, Judgment of the Court of 27.11.1990, para. 11.

¹⁵⁷ *Commission v. Poland*, Case C-619/18, Judgment of 26.06.2019, ECLI:EU:C:2019:531, para. 30.

¹⁵⁸ *Ibid.*, para. 38.

¹⁵⁹ *Ibid.*, para. 40.

¹⁶⁰ *Ibid.*, para. 49.

¹⁶¹ *Ibid.*, para. 50.

¹⁶² *Commission v. Poland*, Case C-619/18, *op. cit.*, para. 96.

¹⁶³ See Opinion of Advocate General Tanchev delivered on 27.6.2019 in *A.K. (C-585/18) v Krajowa Rada Sądownictwa and CP (C-624/18) DO (C-625/18) v Sąd Najwyższy (C-624/18 and C-625/18) joined party: Prokurator Generalny zastępowany przez Prokuraturę Krajową*, ECLI:EU:C:2019:551.

In this labyrinthine scenario, it seems quite rushed to speak of any key lesson learnt on the substantial ineffectiveness of informal attempts (dialogues) if not followed by an *iron hand* (infringement procedures) that should persuade EU institutions to carry on ‘as many infringement actions as possible and as soon as possible’.¹⁶⁴ More precisely, a potentially unsolvable matter could emerge in applying Article 260 TFEU in relation to a prolonged non-compliance strategy with the Court judgment.¹⁶⁵

Indeed, even assuming persistent non-compliance, which would result in a procedure under Article 260 TFEU, the adherence of a Member State to the ECJ ruling may not be achieved. Article 260 TFEU, similarly to Article 258 TFEU, requires the opportunity for the Member State concerned to submit an observation within a certain period of time laid down by the Commission and, only after that, if the non-compliance still persists, a recurring penalty or lump sum can be imposed. Ironically, in the very first application of Article 258 TFEU, the Advocate General Ruiz-Jarabo Colomer came to the conclusion that ‘It is unlikely, however, that delivery of the judgment will put an end to the uncertainty’¹⁶⁶ and, therefore, guarantee 100 percent compliance. Consider then the following hypothetical scenario: since Article 260 TFEU allows the Member State to disclose an observation, which is nothing more than a new fact or a subsequent change able to satisfy the purpose of the proceeding, Poland could submit and therefore rely, once again, this time arguably with a higher degree of success, the repealing law entered into force last January. This could persuade the Polish players to run the risk of non-compliance with the ECJ judgment. Moreover, if the matter concerns an important political interest, which is clearly the case of judicial reforms, a non-compliance

¹⁶⁴ See L. Pech, S. Platon, *The beginning of the end for Poland’s so-called ‘judicial reforms’? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case)*, <https://reconnect-europe.eu/blog/pech-platon-poland-ecj-rule-of-law-reform/>, (accessed: 21.3.2020).

¹⁶⁵ On this matter, an interesting study on States non-compliance strategies was conducted in T. Borzel, T. Hofmann, and Diana Panke, *Who’s Afraid of the ECJ? Member States, Court Referrals, and (Non) Compliance*, ECPR Joint Sessions, Granada, 14.4.2005, p. 12.

¹⁶⁶ *Commission v. Hellenic Republic*, Case C-387/97, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 28.9.1999, para. 1.

strategy may well continue¹⁶⁷ and the Member State may not be put off by the threat of a mere financial sanction.¹⁶⁸

6.1. The Hungarian precedent

In 2011, Hungary adopted a similar legislation of the one propelled by the new Polish government that invested in the attempt to shorten the mandatory retirement age for judges from 70 to 62 years within a short transitional period. Afterwards, the European Commission, in January 2012, launched infringement proceedings and referred the case to the Court of Justice of the EU.¹⁶⁹

However, in that occurrence, the Court of Justice of the EU was not alone in its adjudicatory task, and other higher Courts were called to pronounce upon the contentious matter.

Reducing the age of retirement, as a general concept, and effectively shortening the term of office during the term may be considered unconstitutional, as was found by both the Hungarian Constitutional Court¹⁷⁰ and the Court of Justice of the EU.¹⁷¹ Moreover, the Venice Commission, relying upon the judgment of the Hungarian Constitutional Court, declared that: 'It trusts that the Hungarian authorities will respect this judgment and ensure its implementation, i.e. re-instate the former judges to their previous position.'¹⁷²

The Hungarian Constitutional Court also declared unconstitutional the retirement age provisions for violation of judicial independence on

¹⁶⁷ B. Jack, *Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?*, 'European Law Journal' 2013, vol. 19, no. 3, p. 19.

¹⁶⁸ T.C. Hartley, *Constitutional Problems of the European Union*, Hart Publishing 1999, pp. 109-110.

¹⁶⁹ *Commission v. Hungary*, Case C-286/12, op. cit.; however, and quite surprisingly, on 20.11.2013, the Commission closed the infringement procedure because 'the new law adopted by the Hungarian Parliament on 11 March 2013 lowers the retirement age for judges, prosecutors and notaries to 65 over a period of 10 years, rather than lowering it to 62 over one year, as before...The new law also provides for the right for all judges and prosecutors who had been forced to retire before to be reinstated in their posts, with no need to bring a case to court. Moreover, they will be compensated for remuneration lost during the period they were not working'.

¹⁷⁰ Judgment no. 33/2012 (VII. 17) of 16.7.2012.

¹⁷¹ *Commission v. Hungary*, Case C-286/12, paras. 79, 80 and 81.

¹⁷² Venice Commission, Opinion No. 683/2012, para. 75.

formal and substantive grounds. From the formal requirement, the reform should have determined the length of judicial service and the precise retirement age, the reference to the general retirement age being not clear enough. Meanwhile, from the substantive ground, the new law resulting in the removal of judges within a short period of three months has to be seen as a clear risk to the judicial safeguards and, therefore, contrary to constitutional provisions.¹⁷³

Likewise, in Case C-286/12, the Court of Justice of the EU based its decision on the grounds of a diverse legal basis, namely the proper application of the antidiscrimination directive,¹⁷⁴ stating that even if the 'standardisation of retirement age' or a 'balanced age structure' could amount to a legitimate employment policy objective, the measures put forward by the Hungarian government were not necessary nor proportionate to achieve this aim.¹⁷⁵

After one year of contentious, the European Commission put an end to the infringement procedure before the European Court of Justice, declaring its satisfaction following a new law adopted by the Hungarian Parliament on 11.3.2013 that, among other things, provided for the right for all judges and prosecutors who had been forced to retire to be reinstated in their posts, and on these grounds, it was declared that 'the Commission is now satisfied that Hungary has brought its legislation in line with EU law'.¹⁷⁶

Finally, the Hungarian reform was contested on the international level before the European Court of Human Rights in the well-known case of *Baka v. Hungary*, already cited, lodged by the former President of the Supreme Court against the premature termination of his mandate, which should constitute a violation of Article 6(1) of the European Convention, namely the right to a fair trial, for the reason that no judicial remedy was technically possible in order to react to the alleged violation. The Strasbourg Court also confirmed that the reform enacted at a constitutional level was not subject to any form of judicial review, even by the Hungarian Constitutional Court

¹⁷³ *Baka v. Hungary* [GC], *supra* note 145, para. 45.

¹⁷⁴ Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

¹⁷⁵ See A. Vincze, *Judicial Independence and its guarantees beyond the Nation State – Some recent Hungarian experience*, 'Journal of the Indian Law Institute' 2014, vol. 56, p. 207.

¹⁷⁶ European Commission, Press Release, *European Commission closes infringement procedure on forced retirement of Hungarian judges*, Brussels, 20.11.2013, p. 1.

and, as a result, found a breach of the right of access to a court for a judicial remedy and, therefore, a jeopardy of the right to a fair trial.

However, and quite surprisingly, as already pointed out from several scholarly works, the international institutions dealing with the pith of the Hungarian case, the Court of Justice of the EU¹⁷⁷ and European Court of Human Rights limited themselves to rather technical questions, and they evaded more precise and detailed remarks on the authentic background of the case, namely judicial independence.¹⁷⁸

7. Concluding Remarks

The judicial reform plan carried out right after the parliamentary election of 2015 by the new Polish parliament with a strong majoritarian component guided by the Law and Justice party raises several problematic and intricate assessments at the European level, taking into account the consolidated European standards on the matter.

The political and legal diatribe which involved the composition of the Polish Constitutional Tribunal appears to be particularly sensitive with regard to the proper interpretation of the crucial principle of separation of power, where the legislative and executive branches must abstain from any overdue influence upon the judiciary, especially when it comes to deal with the selection process. The warning enclosed in the introductory remarks by the Judges' Charter about the European integration process, the increasing role of the legislative and executive powers and the future risks of the erosion of checks and balances is now greater than ever, particularly within the group of fragile democracies.

Furthermore, the new composition of the Supreme Tribunal and its proactive role in enforcing the political and legal legitimacy of parliamentarian stances, e.g. the U-turn on the K 34/15 ruling, brings into the spotlight several suspicions from the perspective of the European

¹⁷⁷ See T. von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 'Fordham International Law Journal' 2014, vol. 37, no. 5, p. 1315, where the author critically acknowledges 'the evolution of the Court's jurisprudence in this field is characterized by a cautious step-by-step approach and a particular self-restraint'.

¹⁷⁸ A. Sanders, L. Von Danwitz, op.cit., p. 785, A. Vincze, op.cit., p. 212, where the author critically underlined that 'the judgment of the ECJ did not even mention the world judicial independence'.

Court of Human Rights and the criteria developed by its well-established jurisprudence, particularly on the manner of appointment, the guarantees against any outside pressure and the appearance of independence of the judicial body.

Next in order, the new legal reform that reshaped the Polish National Council of Judiciary, a judicial body in charge of the protection of the independence of courts and judges, which establishes a pre-term removal for all sitting judges, along with the increased power of the Parliament in the appointment process, seems to clash with all existing European standards on the matter.

First of all, as previously clarified by the 1994 Council of Europe Recommendation, the principle of irremovability must assume a decisive weight, according to which the judges' mandate should be guaranteed until the expiry of the term of the office. In addition, concerning the appointment procedure of the judicial members of the National Council of Judiciary, the election of a majoritarian component performed by the judicial branch it is an established and unanimous European standard that should be pursued; even though, a certain role of the Parliament in the appointment procedure it cannot be disregarded as it could enhance the 'democratic component' of citizen participation.

Lastly, the new law on the Supreme Courts which prescribed, similarly to the former Hungarian reform, an early retirement age for all the sitting Supreme Court judges, could pose a serious risk to the principle of judicial irremovability. Threat that becomes higher in the exceptional cases of a judge who wishes to continue to hold office upon the requisite of formal approval by the President of the Republic.

The President's decision, then, seems not bound by any fixed legal criteria and, additionally, there is no chance of a judicial review remedy for the judges after their forced retirement. Furthermore, in the latter case, the dismissed judges may lodge an application before the European Court of Human Rights, as judge Baka did, on the basis of the lack of any available judicial remedy against the premature termination of the judicial mandate with the expectation of a favourable judgment declaring the breach of Article 6(1) of the Convention.

In any event, the most worrying development may involve a risk of a future non-compliance strategy that the Polish actors might pursue in the aftermath of the ECJ judgments. Indeed, the weaknesses of the current wording of Article 260 TFEU, triggered in the event of persistent non-compliance with a Court judgment, could lead Poland to run the risk of a systemic failure to comply.

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