Palacky University Olomouc
Faculty of Law

On Poland and Beyond

The Role of Judges in the Future of Judicial Independence in the Backsliding EU Member States

Doctoral Dissertation

by

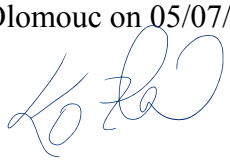
Mgr. Alena Kozlová, LL.M. BA

Olomouc 2024

Declaration of Authenticity

I hereby declare that this Doctoral Dissertation on the topic of “On Poland and Beyond: The Role of Judges in the Future of Judicial Independence in the Backsliding EU Member States” is my original work and I have acknowledged all sources used.

In Olomouc on 05/07/2024



Disclaimer

This thesis was submitted in partial fulfilment of the requirements for the Degree of Doctor of Philosophy in the study programme International and European Law at Palacky University Olomouc. The views and opinions expressed in this work are those of the author and do not necessarily reflect the official policy or position of the university. The research and conclusions presented herein are the result of the author's independent scholarly work and cannot in any circumstances be regarded as stating an official position of the European Commission.

Acknowledgements

To the many judges resisting attacks on judicial independence and rule of law

~

As someone once aptly put it, and colleagues from academia will pardon my lack of referencing, "finishing a PhD is like a roller coaster that only goes up and occasionally loops-de-loops in sheer madness" – while most of it is very much self-induced. In the course of the last years, I have learned first-hand that embarking on a path to write a PhD thesis offers more than a few dark and puzzling corners. That is why I would like to take this opportunity to acknowledge that I could not have undertaken this journey without the collective contributions from numerous individuals whose constructive comments, guidance, but also support throughout my studies have been instrumental for me to complete this incredibly challenging work.

This research was conducted at the Department of International and European Law, Faculty of Law, Palacky University Olomouc. In the first place, I extend my heartfelt gratitude to my PhD supervisor, our dean doc. JUDr. Václav Stehlík, LL.M. Ph.D., for his unassuming mentorship, expertise on EU law and kind support throughout the entire writing process during the last four years. At the same place, I am deeply indebted to the academic staff and colleagues from the Department of International and European Law, namely JUDr. Ondrej Hamuľák, Ph.D.; JUDr. Zuzana Vikarská, Ph.D.; doc. JUDr. Michal Petr, Ph.D.; Mgr. Eva Zorková, Ph.D.; JUDr. Martin Faix, Ph.D., MJI; Dr. Marko Svicevic LL. Dip.; JUDr. Pavel Bureš, Ph.D.; doc. JUDr. Ondřej Svaček, LL.M. Ph.D.; Prof. JUDr. Dalibor Jílek, CSc., for a rich intellectual environment that encouraged growth and exploration, and for their enlightening views on a number of legal discussions throughout my six years at the Law Faculty of Palacky University in Olomouc. That life was also made much easier by excellent colleagues at the International Office, Mgr. Radana Kuncová and Mgr. Lucie Kovaříková, Ph.D., who were ready to step in on any kind of practical study hurdles come rain or shine.

Similarly, I appreciate the insights of my professional network and other colleagues from academia whom I encountered on various occasions, be it through international conferences or research trips, from whose wisdom I have benefited. Thank you for making me ask myself those difficult questions and dig just a little deeper into the subject matter, even though it was a little bit painful to do so. Above all, to my former supervisor and the director of the Advanced LL.M. Programme in European and International Human Rights Law at Leiden Law School, Dr. Rick Lawson, for his expert advice, case-law memory and shared

passion for the rule of law. To Dr. Martha Bradley, Dr. Jennie Edlund, Dr. Jan-Peter Loof, Dr. Helen Duffy and Dr. Carsten Stahn for their knowledge and professional advice.

I would be remiss in not properly thanking all my colleagues at the Rule of Law Unit (C1), and at the Sector for External aspects of rule of law and judicial cooperation at the International affairs and data flows Unit (01.002), at the Directorate-General for Justice and Consumers at the European Commission. Thank you for your practical insights, thought-provoking questions and the real-world spin you brought to my research. Your country-specific expertise not only enriched my understanding of the various layers of judicial independence and added depth to this work, but your support and friendship became a much-needed source of fuel and motivation. Those thanks go to Florian Geyer, Nicolaas Bel, Vukasin Adams-Loncarevic, Annegret Kempf, Georgi Ganchev, Clara Ohayon, Christina Karakosta, Gabor Magyar, Bartosz Marciniak, Joze Strus, Kateřina Svíčková, Sara Vassalo Amorim, Sara Mirabell Hátlová and Wouter Van-Ballegooij. They go also to my excellent colleagues and team members Maia Ignatenko, Angela Rupp, Jan Petry and Marie Delplace, from whom I learn a lot every day. In particular, though, they go to my first EU Commission mentor and friend, Pablo Olivares Martinez for his expertise, support and the many free coffees.

I would also like to mention my fellow MA and PhD classmates and friends, Dr. Hazhar Jamali and Mgr. Pablo Martinez Ramil. We drew from each other's experiences, finding a shared passion for human rights and a mutual drive to question the *status quo*. We inspired one another, occasionally traumatised each other, but most importantly, we kept each other going. Pablo, without being on the same boat with you – without sails, on fire – I would probably jump off, so many thanks for keeping me afloat. I am also grateful to Diane, Paula, Camilla and Jakub for being there in the middle of the night when I needed them to.

Special thanks should go to my loved ones. It is my mum, my dad, my sister, my grandparents and the rest of the family, whom I should be thanking, for so much. For being there, for inspiring me to make a little difference in the world, for putting up with my love for all things international. I owe a heartfelt thanks to min älskling, Daniel, who had to cope with my outbursts of frustration and bad writing days, and who has yet continued to love me unconditionally. Jag älskar dig så in i helvete. I could never go this far without the support, encouragement and love of my family to begin with. And, perhaps, this is also the appropriate time to thank *myself* for pushing through and not getting stuck along the way – I wanted to give up so many times. *Thank you to each and every one of you.*

Table of Contents

List of Abbreviations and Acronyms

AG	Advocate General of the European Court of Justice
CBA	Central Anti-Corruption Bureau
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPPO	European Public Prosecutor's Office
EU	European Union
GC	Grand Chamber
HCP	High Contracting Parties
MoA	Margin of appreciation
MoJ	Minister of Justice
MP	Member of Parliament
NCJ	National Council of Judiciary
PACE	Parliamentary Assembly of the Council of Europe
PG	Prosecutor General
PiS	*Prawo i Sprawiedliwość*, Law and Justice party in Poland
PM	Prime Minister
RRF	Recovery and Resilience Facility
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VC	Venice Commission (European Commission for Democracy through Law)
VP	Vice-president

Abstract (EN)

As the European Union grapples with the challenges of upholding the rule of law, judges find themselves at the forefront of the fight for, but also *against*, judicial independence. As proactive actors resisting the attacks on judicial independence, but also potential facilitators of the entrenchment of autocratic governmental blueprints, they become increasingly influential in shifting the *status quo* of judicial independence in Europe. In its initial segment, this thesis explores the role played by judges in resisting attacks on judicial independence, namely how their undertakings can feed into the development of judicial independence standards related to intra- and inter-court transfers, judicial nomination procedures, premature termination of office, and the link to the right to freedom of expression. This analysis is primarily grounded upon a detailed case study of two judgments before the European Court of Justice and the European Court of Human Rights putting Judge Żurek at the forefront. Then, the thesis delves into the less explored, yet crucial, role of judges as potential facilitators of rule of law backsliding. Building upon the jurisprudence of the two Courts, it analyses how judges can strategically exploit the existing legal framework or make use of its limits to undermine judicial independence standards, particularly in relation to tactical use of the preliminary ruling procedure, instrumentalising the normative scope of the principle of mutual trust and nullifying the purpose of judicial review. In examining the juxtaposition of these conflicting roles, this thesis not only highlights how the mutual interplay of both courts can respond to real-time rule of law developments and reveal the limitations and challenges inherent in this interplay, but it paints a comprehensive picture of where the EU law framework can be exploited. It underscores the imperative for a consistent judicial practice in the context of the European Court of Justice and continued evolution of legal standards to strengthen the rule of law.

Keywords: rule of law backsliding, judicial independence standards, tribunal established by law, irregular appointment, judicial activism, fake judges, ECtHR, CJEU.

Abstract (CZ)

Zatímco se Evropská unie potýká s výzvami udržování právního státu, soudci se ocitají v přední linii boje *za*, ale také *proti*, nezávislosti soudnictví. Jako proaktivní subjekty odolávající útokům na nezávislost soudů, ale také jako potenciální podporovatelé autokratických vládních plánů, se stávají stále významnějšími aktéry při budování *status quo* nezávislosti soudů v Evropě. V úvodním segmentu se tato disertační práce zabývá rolí, kterou hrají soudci při odolávání útokům na nezávislost soudnictví, a to zejména tím, jak jejich úsilí může přispívat k rozvoji standardů nezávislosti soudů v souvislosti s intra a inter-soudními přesuny, postupy nominace soudců, předčasné ukončení funkce a vazbu na právo na svobodu projevu. Toto část staví zejména na studii dvou rozsudků před Evropským soudním dvorem a Evropským soudem pro lidská práva, které staví do popředí úsilí soudce Żurka. Následně práce hlouběji zkoumá méně prozkoumanou, avšak stejně důležitou, roli soudců jako potenciálních podporovatelů tzv. „rule of law backsliding“. Navazuje přitom na judikaturu obou soudů a analyzuje, jak mohou soudci strategicky využívat existující právní rámec nebo využívat jeho limity ke snížení standardů nezávislosti soudů, zejména v souvislosti s taktickým využitím postupu předběžného rozhodnutí, instrumentalizováním principu vzájemné důvěry a zneplatňováním cíle soudního přezkumu. Při zkoumání protichůdných rolí soudců tato disertační práce nejenom zdůrazňuje, jak vzájemné působení obou soudů může reagovat na skutečný vývoj v oblasti právního státu a odhalovat omezení a výzvy spojené s tímto působením, ale také poskytuje komplexní obraz toho, kde může být právní rámec EU zneužit, a zdůrazňuje naléhavou potřebu konzistentní soudní praxe v kontextu Evropského soudního dvora a trvalého vývoje právních standardů pro posílení právního státu.

Klíčová slova: právní stát, standardy nezávislosti soudů, soud zřízený zákonem, jmenování soudců, soudní aktivismus, falešní soudci, ESLP, SDEU.

1. Introduction

1.1 Introduction to the Topic and the Research Area

"The rule of law never dies by itself. This death always requires the assistance of lawyers. Every populist and authoritarian regime leans on them, depends on them. Someone must masquerade as judges and professors, someone must draft regulations for the authorities, and someone must relay the authorities' decrees to the common folk. These are the silent lawyers – driven by resentment, fear, greed, lethargy, naivety, and at times, ignorance. The rule of law dies only with their help."[1]

Włodzimierz Wròbel, Polish Supreme Court judge, in 2020

~

As the European Union (EU) grapples with the challenges of upholding the rule of law and preserving the integrity of its legal system, judges find themselves at the forefront of the fight for, but also *against*, judicial independence.[2] The current landscape is marked by significant developments on the ground, including Poland's post-2015 so-called judicial reforms, Hungary's restructuring efforts post-2010, and further instances of rule of law backsliding which signal a more extensive trend of judicial independence backlash across Europe.[3] This backlash has manifested *inter alia* via turning strategic legislative amendments into leverage used to influence and instruct the judiciary,[4] creative reading of national

---

[1] A translation from the Polish original "Państwo prawa nie umiera nigdy samo z siebie. Akuszerami tej śmierci są zawsze prawnicy. Potrzebował ich i potrzebuje każdy populistyczny i autorytarny reżim. Ktoś musi udawać sędziów i profesorów, ktoś musi władzy pisać przepisy i ktoś musi Kowalskiemu oznajmiać decyzje władz. Milczący prawnicy. Z resentymentu, ze strachu, z chęci zysku, z lenistwa, z naiwności a czasem ignorancji. Państwo prawa umiera tylko z ich pomocą."

[2] Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law Is Under Attack* (Springer Berlin Heidelberg 2015) <https://link.springer.com/10.1007/978-3-662-44293-7> accessed 12 July 2023; Petra Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2021) 27 European Law Journal 185; Marcin Matczak, '10 Facts on Poland for the Consideration of the European Court of Justice' (*Verfassungsblog on Matters Constitutional*, 2018) <https://verfassungsblog.de/10-facts-on-poland-for-the-consideration-of-the-european-court-of-justice/> accessed 19 June 2022.

[3] Fachhochschule für Verwaltung und Dienstleistung and others, '"The Rule of Law Mechanism" and the Hungarian and Polish Resistance: European Law Against National Identity?' (2021) 14 Journal of the University of Latvia. Law 49; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

[4] PACE, 'Resolution 2188 (2017) - New Threats to the Rule of Law in Council of Europe Member States: Selected Examples' (2017) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en> accessed 29 March 2022.

Constitutions of (not only) EU Member States,[5] or outright controversies when it comes to filling up the judicial bench.[6] While it would be overly ambitious to try to quantify where rule of law backsliding starts, unlawful and irregular appointments of judges,[7] lack of guarantees against external pressure,[8] loss of access to justice,[9] non-existence of judicial review,[10] and loss of appearance of independence and impartiality, would be likely candidates. The failure of political measures and the very little impact of infringement proceedings in redressing this situation[11] have exposed pre-existing limits in the rule of law framework and the inadequacies in its enforcement within the EU's constitutional framework.[12] These conditions create a difficult playing field for judges to navigate in the face of authoritarian measures introduced by the executive and legislative branches designed to limit judicial independence. At times, however, those measures have been introduced *with the help* of judges themselves.

This study departs from the assumption that judges do not only enter the scene as actors capable of actively contributing to upholding judicial independence, or perhaps even as protagonists in what one might term 'judicial resistance',[13] strategically employing available

---

[5] Venice Commission, 'Opinion No. 833/2015. Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e>; Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law 116; Uladzislau Belavusau, 'Mnemonic Constitutionalism and Rule of Law in Hungary and Russia' (2020) 1 Interdisciplinary Journal of Populism 16; Venice Commission, 'Opinion No. 832/2015. Russian Federation Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e>; Adam Ploszka, 'It Never Rains but It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' (2023) 15 Hague Journal on the Rule of Law 51.

[6] Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 Hague Journal on the Rule of Law 353.

[7] Venice Commission, 'Opinion No. 833/2015. Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' (n 5).

[8] Beken Saatçioğlu, 'De-Europeanisation in Turkey: The Case of the Rule of Law' (2016) 21 South European Society and Politics 133.

[9] Jan Winczorek and Karol Muszyński, 'The Access to Justice Gap and the Rule of Law Crisis in Poland' (2022) 42 Zeitschrift für Rechtssoziologie 5.

[10] *Grzęda v Poland* [2022] ECtHR [GC] No. 43572/18.

[11] Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) <http://ebooks.cambridge.org/ref/id/CBO9781316258774> accessed 14 July 2021.

[12] Tomasz Tadeusz Koncewicz, 'The Democratic Backsliding in the European Union and the Challenge of Constitutional Design' in Xenophōn I Kontiadēs and Alkmēnē Phōtiadou (eds), *Routledge handbook of comparative constitutional change* (Routledge, Taylor & Francis Group 2021); Ondrej Hamuľák and Andrea Circolo, 'Challenges and Possibilities of Enforcing the Rule of Law within the EU Constitutional Edifice—The Need for Increased Role of Court of Justice, EU Charter and Diagonality in Perception' in David Ramiro Troitiño and others (eds), *The EU in the 21st Century* (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-030-38399-2_10> accessed 31 March 2022.

[13] Claudia-Y Matthes, 'Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law' (2022) 38 East European Politics 468.

tools to shape the interpretation of standards by judicial bodies like the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). In other, less explored yet equally significant cases, judges emerge also as potential facilitators of rule of law backsliding — as 'fake judges',[14] who achieve this title through irregular procedures and who leverage the same rules to enable rule of law backsliding. [15]

The juxtaposition of these conflicting roles underscores their significant impact on the development of the rule of law in Europe. This impact is crucial to understand as a Polish or German or Swedish judge is, *by default*, a European judge.[16] Contrary to common misconceptions, EU law is not a shapeless construct confined to the corridors of European institutions in Brussels; rather, it takes tangible shape through the judicial decisions and interpretation of EU legislation by national judges. In essence, EU law owes its existence, and to some extent also substance, to these national judges.[17] Without their contributions, EU law would lack the necessary foundation to *manifest* itself. Therefore, the actions of each national judge carry weight, potentially impacting the integrity of the entire EU legal system as a whole.

While the rule of law stands as a fundamental value of the EU, shaping its 'common EU legal order' and carrying constitutional significance,[18] its vast implications across various aspects of the EU *acquis* often go unnoticed. It is easy to lose sight of its tangible impacts on everyday life, affecting crucial areas such as the handling of cross-border cases, judicial cooperation in criminal matters, e.g. the functionality of the European Arrest Warrant (EAW) or the stability of the internal market.[19] Good governance and respect for the rule of law,

---

[14] See in more detail in the 1.5 Methodology and 1.6 Delimitations sections how this concept is used throughout the thesis as a conceptual lens, following a set of objective criteria (e.g. irregular appointment or irregular promotion, in a procedure which is more broadly encompassing a judicial body 'manifestly lacking basic independence' and/or which was also 'set up in violation of the national Constitution', as is the case of appointments by the new National Council of Judiciary in the Polish context), and without prejudice to passing moral judgments, implicating judges personally or asserting a simplified binary classification.

[15] It would be oversimplifying to claim that judges either act in a way that defends rule of law or contributes to its further backsliding. The present approach does not seek to paint a black-and-white picture but rather aims to underscore the duality in their impact as a focus point of this study, which seeks to investigate the positive and negative influence they can wield in shaping the future of the rule of law in Europe. More detailed methodological considerations regarding this 'juxtaposed' approach can be found in Delimitations (Section 1.6).

[16] European Commission, 'Commission Decides to Refer Poland' (*European Commission Press Release*, 15 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842> accessed 2 April 2024.

[17] Urszula Jaremba, 'At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-Level Legal Order' (2013) 6 Erasmus Law Review 191.

[18] *C-156/21 Hungary v Parliament and Council* (European Court of Justice).

[19] European Commission. Directorate General for Justice and Consumers., *The 2023 EU Justice Scoreboard :Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions.* (Publications Office 2023) <https://data.europa.eu/doi/10.2838/619558> accessed 2 April 2024.

particularly independent, quality, and efficient justice systems, are vital determinants of an economy that serves its citizens, and is also precondition for sound financial management and effective EU funding.[20] Efficient judiciaries play a crucial role in fostering a favourable business environment, ensuring fair and effective dispute resolution and contract enforcement, functioning and effective tax systems and robust anti-corruption and anti-fraud frameworks. All these factors contribute to setting up a level playing field and promoting trust in the business environment.[21] An illustrative example of the latter's impact on the ground is evident in the effect on businesses, as demonstrated by German companies who have taken a step back on their operations in Hungary due to uncertainty caused by the volatile judicial framework.[22] This type of challenge to the common market vividly highlights the crucial role of a robust rule of law framework and its direct impact on the daily lives and economic prosperity of EU citizens.

Much has been said about the ongoing rule of law crisis in Hungary and Poland, two EU Member States whose interpretation of the rights and obligations bestowed upon them through the EU membership has sent the EU policy-makers into a tailspin.[23] No other Member State has gone as far in subjecting the judiciary to the will of the political authorities, in initiating disciplinary proceedings against judges who challenge the *status quo,* or in challenging the judgments of European courts. If nothing else, these developments paint a vivid picture of a continent grappling with systemic challenges to judicial independence verging on what some have dubbed a 'constitutional cancel culture'.[24] This erosion of judicial independence not only compromises the integrity of the justice system as such, but also lays the groundwork for further exploitation.[25] The recent backlash against both the CJEU and the ECtHR, both of which are

[20] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget 2020 (OJ L).
[21] European Commission, 'Annual Sustainable Growth Survey 2023' (2022) COM(2022) 780.
[22] European Commission. Directorate General for Justice and Consumers. (n 19).
[23] Alena Kozlová, 'Beyond Confirming Validity: Implications of the CJEU Rule of Law Conditionality Cases on the Scope of EU Values', *Post-Pandemic Challenges and Opportunities of the Czech and European Policy* (PRIGO University 2022).
[24] Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond' (n 5); Rick Lawson, '"Non-Existent": The Polish Constitutional Tribunal in a State of Denial of the ECtHR Xero Flor Judgment' (*Verfassungsblog on Matters Constitutional*, 2021) <https://staging.verfassungsblog.de/non-existent/> accessed 13 March 2022.
[25] Wojciech Sadurski, *Poland's Constitutional Breakdown* (1st edn, Oxford University Press 2019) <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198840503.001.0001/oso-9780198840503> accessed 17 June 2022.

authoritative bodies in shaping the interpretation of judicial independence standards in Europe, serves as a stark reminder of the challenges faced by judicial office holders.[26]

It is understandable that, amid the recent regulatory responses, namely the introduction of a new EU Rule of law Conditionality Regulation[27] inspired by violation of the rule of law principles by Hungary and Poland, one may assume that these countries are the primary culprits of the rule of law backsliding. However, the pattern of politicization of judicial institutions and the executive power shrugging off democratic oversight goes beyond. In fact, attempts by the executive and legislative branches to undermine judicial independence in other European countries such as Turkey, Romania, Malta,[28] and most recently Slovakia,[29] have put the human rights of millions of individuals at risk and put into question the very systems of checks and balances that underpin the principle of the separation of powers.[30] So while a very limited sneak peek at the complex reality that is the state of rule of law in Europe, these well-documented and widely debated challenges to it amplify the importance of safeguarding judicial independence in a perhaps increasingly legally creative and sometimes hostile judicial environment.[31]

Academic research has yet to uncover a case other than Poland, that would on one hand put forward evidence of judicial resistance that is "so large in scale, so prolonged, largely the result of a consciously constructed strategy, and so rich in a variety of methods"[32], while at the same time countered with evidence of the very same actors being responsible for watering down judicial independence standards.[33] The simultaneous presence of judges responsible for both resisting and undermining judicial independence is precisely what makes Poland a well-

---

[26] Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 International Studies Quarterly 770; Bárd (n 2).
[27] Regulation 2020/2092.
[28] PACE (n 4).
[29] Parliament, 'Parliament Concerned about the Rule of Law in Slovakia' (*European Parliament Press Release*, 17 January 2024) <https://www.europarl.europa.eu/news/en/press-room/20240112IPR16770/parliament-concerned-about-the-rule-of-law-in-slovakia> accessed 2 April 2024.
[30] Dunja Mijatović, 'The Independence of Judges and the Judiciary under Threat' (*The Council of Europe Commissioner for Human Rights*, 2019) <https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/the-independence-of-judges-and-the-judiciary-under-threat> accessed 6 June 2022.
[31] Biljana Braithwaite, Catharina Harby and Goran Miletić (eds), 'Independence and Impartiality of the Judiciary: An Overview of Relevant Jurisprudence of the European Court of Human Rights' <https://www.rolplatform.org/wp-content/uploads/2021/09/independence-and-impartiality-of-judiciary-eng.pdf>.
[32] Łukasz Bojarski, 'Judicial Resistance against the Rule of Law Backsliding —Judges and Citizens—the Case of Poland' (PhD Thesis, University of Oslo 2023).
[33] Laurent Pech, 'Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG' (2020) <https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf>.

positioned case study, offering a rich ground for analysis. Drawing on the evidence from recent litigation before the ECtHR and the CJEU, a growing divide has emerged among States when it comes to the question of regulating the balance of powers and its allocation between the executive, legislative and the judiciary.[34] This has, in turn, sparked discussions on the ECtHR's and CJEU's understanding and shaping of judicial independence standards, or their ability to curb some of the instances of rule of law backsliding.[35] Despite the increasingly significant role of judges in this process, however, most existing research either analyses the factors and context behind judicial resistance,[36] or examines specific instances where judicial actions have compromised the rule of law.[37] What is lacking is a comprehensive study that would place judges as key players in shaping judicial independence standards, for better or worse, within the framework of European law.

To conclude, the challenges of judicial independence in the EU are vast and multifaceted, and judges are at the forefront of this battle.[38] These systemic deficiencies not only undermine the integrity of the justice system but also pose significant threats to democratic governance and the rule of law. It is imperative for the EU, policymakers and civil society alike to recognise the power wielded by judges in shaping standards, both in terms of advancing them strategically and exploiting existing gaps to undermine them. Understanding this dual role is essential for devising effective strategies to safeguard judicial independence and uphold the principles of democracy and the rule of law within the EU.

1.2 Aims and Significance of the Study

In recent years, the foundational principles of judicial independence and the rule of law have faced unprecedented challenges both within national jurisdictions and before European

---

[34] Braithwaite, Harby and Miletić (n 31).
[35] Paz Andrés Sáenz de Santa María, 'Rule of Law and Judicial Independence in the Light of CJEU and ECtHR Case Law' in Cristina Izquierdo-Sans, Carmen Martínez-Capdevila and Magdalena Nogueira-Guastavino (eds), *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer International Publishing 2021) <https://doi.org/10.1007/978-3-030-72798-7_9> accessed 28 March 2022.
[36] Bojarski (n 32); Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 European Constitutional Law Review 391.
[37] Mathieu Leloup, 'Who Safeguards the Guardians? A Subjective Right of Judges to Their Independence under Article 6(1) ECHR' (2021) 17 European Constitutional Law Review 394; Graver (n 2).
[38] Alena Kozlová, 'Poland's Rule of Law Breakdown Continued: Judge Żurek's Battle for Judicial Independence Within the European Human Rights Framework' (2023) 48 Review of Central and East European Law 63.

courts.[39] These challenges have not only necessitated a re-evaluation of the traditional understanding of judicial independence but have also given rise to the emergence of novel legal standards and the identification of previously unexplored grey areas that warrant scrutiny.[40] Across Europe, judiciaries are grappling not only with systemic generalised deficiencies when it comes to rule of law,[41] but also with alarming instances of backlash of national courts and democratic backsliding at large that seems to be spreading beyond Europe.[42] This reality starkly contrasts with the ideals forged in the halls of Luxembourg, Strasbourg and Brussels.

While a number of academics have touched upon various facets of this issue, existing literature often focuses narrowly either on instances of judicial resistance[43] or cases where judicial actions have resulted in undermining the rule of law.[44] What remains absent is a comprehensive examination centred around judges as key actors in both dimensions, acknowledging their potential to shape standards by leveraging the mechanisms provided by European law. This study aims to bridge this gap by exploring how judges navigate European legal mechanisms to redefine judicial independence standards, thereby influencing the trajectory of democratic governance within the EU. By assessing their role within real-time contexts, this study contributes to our understanding of judicial independence as interpreted by the CJEU and the ECtHR, while also exploring avenues for its strengthening. It outlines the complexities involved in addressing challenges judicial independence standards that exploit system blind spots, with a focus on current legal developments relating to judicial appointments and thee meaning of 'tribunal established by law'. Despite the focus on Poland, and the EU

---

[39] Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer 2019); Stiansen and Voeten (n 26); Michael Blauberger and Dorte Sindbjerg Martinsen, 'The Court of Justice in Times of Politicisation: "Law as a Mask and Shield" Revisited' (2020) 27 Journal of European Public Policy 382.

[40] Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) 39 Yearbook of European Law 3; Hamuľák and Circolo (n 12); Kozlová, 'Beyond Confirming Validity' (n 23).

[41] A 'generalised deficiency as regards the rule of law' was defined in the initial EU proposal for Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, Article 2 (b), as "widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law".

[42] Martin Faix and Ayyoub Jamali, 'Is the African Court on Human and Peoples' Rights in an Existential Crisis?' (2022) 40 Netherlands Quarterly of Human Rights 56; Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 International Journal of Law in Context 237; Ayyoub Jamali, 'Human Rights Courts Under Attack: Analysis of Resistance Against Regional Human Rights Courts in Europe, the Americas, and Africa' (PhD Thesis, Palacky University Olomouc 2023).

[43] Matthes (n 13).

[44] Laurent Pech and Sébastien Platon, 'How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling' [2021] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00011004> accessed 29 June 2024.

framework, it will provide a comparative overlap to the regional human rights framework, the ECtHR. Through an in-depth case study of the multifaceted role of judges, this research offers insights for policymakers, legal practitioners, and civil society actors. Understanding the dual role of judges is crucial for developing effective strategies to protect judicial independence, uphold democratic principles, and maintain the rule of law across EU Member States. By contextualising judicial agency within the broader landscape of EU governance, the thesis aims to provide actionable insights that empower stakeholders to uphold fundamental democratic values and preserve the rule of law within the EU and beyond.

1.3 Research questions

The thesis seeks to explore the role of judges in shaping the future of judicial independence in EU Member States experiencing rule of law backsliding. Specifically, it examines how judges influence the development of judicial independence standards amidst the EU's rule of law crisis, and how their actions can be interpreted both as resistance to and facilitation of rule of law backsliding.

A number of additional, guiding questions have emerged in the course of the research process as a result of brainstorming. These questions serve as a lens to better understand and address the main research question – rather than being answered directly one by one, they provide a useful framework for the analysis:

i) What measures can judges take within the domestic legal framework to safeguard judicial independence, and how effective are these measures in the face of systemic reforms aimed at undermining this independence? How do preliminary references to the CJEU by domestic courts impact the preservation of judicial independence within Member States? What are the limitations and potential outcomes of these references in relation to the judges setting them forth? In what ways does the European Human Rights framework provide legal recourse for judges who face persecution for defending judicial independence? What are the practical challenges in translating these legal principles into effective protections on the ground?

ii) How can judges leverage the existing legal framework, particularly through the tactical use of the preliminary ruling procedure, to undermine judicial independence standards within the EU? In what ways can judges exploit the

limits of the principle of mutual trust to justify decisions which undermine judicial independence, and how does this affect intra-EU legal cooperation? What are the potential consequences of judges exploiting legal loopholes and procedural intricacies within the European legal framework to weaken judicial independence standards? When does an irregular appointment of a judge constitute a violation of the right to a 'tribunal established by court'? What are the appropriate legal ramifications if a tribunal is found not to be 'established by law'? Where to strike the balance between legal certainty, public interest and deliberately irregular appointments aimed to weaken the judiciary from within?

iii) What is the interplay between the ECtHR and the CJEU in upholding judicial independence, and how do their judgments complement or conflict with each other in this context? Does the collaborative synergy between these judicial bodies strengthen and harmonise judicial independence standards in Europe, or does it lead to a proliferation of disparate standards that hinder applicants and citizens? Are the standards established by the CJEU and the ECtHR robust enough to counteract assaults on judicial independence within the EU? What avenues for recourse and standard-setting are available to individual judges seeking to safeguard their independence or that of their judiciary?

1.4 Previous Research and Relevance of the Topic

Evidence from recent litigation before the ECtHR and the CJEU reveals an increasing divide among states regarding the regulation and distribution of powers between the executive, legislative, and judiciary branches.[45] This divide is particularly pronounced in the context of judicial independence standards and the interaction between these branches.[46] While both Courts share the fundamental premise of an independent and impartial tribunal established by law, their reading of executive involvement in judicial appointments, what constitutes external pressure or what should be left to national courts to decide, differ.[47] Foor instance, the ECtHR

[45] Braithwaite, Harby and Miletić (n 31).
[46] Edit Zgut, 'Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland' [2022] Hague Journal on the Rule of Law <https://doi.org/10.1007/s40803-022-00170-0> accessed 31 March 2022.
[47] Haukur Logi Karlsson, 'The Emergence of the Established "By Law" Criterion for Reviewing European Judicial Appointments' (2022) 23 German Law Journal 1051; Andrés Sáenz de Santa María (n 35).

increasingly emphasises the need for a tribunal to be 'established by law' as a standalone requirement.[48] Scholarly discussions have increasingly focused on the differing interpretations and applications of judicial independence by the ECtHR and the CJEU, highlighting their respective roles in shaping new legal standards and their capacity to address instances of rule of law backsliding at the face of authoritarian rulers using the law as a tool for oppression.[49]

Scholars have explored the wider implications of this divide. They puzzled over the implications of bottom-up pressure against the CJEU and the ECtHR,[50] particularly how it translates into political backlash which goes hand in hand with judicial restraint.[51] They noted that these situations create a vicious cycle where the delivery of justice is compromised, with core values being sacrificed to maintain an appearance of power vis-à-vis State parties.[52] The resulting proliferation of standards fragments judicial dialogue and undermines the values at stake.[53] In this context, it is crucial to note the growing trend of judicial 'resistance' against regional human rights courts and their rulings evident in recent developments across the Americas[54] or Africa[55]. This shift underscores the need to critically evaluate and strengthen the mechanisms that ensure compliance with international human rights standards, enhance the independence and authority of national and European courts, and address the underlying political and institutional factors contributing to democratic backsliding.

Some scholars have specifically examined the role of judges in the delivery of justice, whether advancing or undermining it. For instance, Matthes analyses how Polish judges have strategically focused on legal avenues to uphold the rule of law, rather than relying on the Art. 7 TEU procedure, emphasising their engagement with the EU institutions. She puts forward that judicial associations have forged alliances with lawyers, NGOs, and European judicial bodies to strategically amplify their impact. This collaborative approach enabled simultaneous actions such as organising public demonstrations, lobbying the European Commission for

---

[48] *Guðmundur Andri Ástráðsson v Iceland* [2020] ECtHR [GC] No. 26374/18.
[49] Matteo Mastracci, 'Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland' (2019) 5 Athens Journal of Law 323; Andrés Sáenz de Santa María (n 35).
[50] Blauberger and Martinsen (n 39).
[51] Stiansen and Voeten (n 26).
[52] Bárd (n 2).
[53] Dimitry V Kochenov and Petra Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' [2022] JCMS: Journal of Common Market Studies jcms.13418.
[54] Soley and Steininger (n 42).
[55] IJRC, 'Benin and Côte d'Ivoire to Withdraw Individual Access to African Court' (*International Justice Resource Center*, 6 May 2020) <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/> accessed 21 December 2022.

interim measures, and leveraging public attention. Despite facing disciplinary measures and social media harassment, judges remained motivated by their commitment to constitutional guardianship and democratic values. This internal activism, while resisting political actors, has positioned them as significant legal activists within Poland and abroad, contributing to broader discussions on democratic resilience and the rule of law in Europe amidst ongoing challenges from the Polish government and judicial rulings by the CJEU.[56] Similarly, Bojarski underlines in his research on judicial resistance that where judicial independence is compromised and courts face pressure from authoritarian-leaning political leaders, the risk of fundamental rights violations becomes ever-pronounced. For courts to effectively uphold the rights of citizens and serve as checks on governmental power, they must remain immune to political influence and executive subordination. By means of historical examples, he illustrates the critical role of judicial independence in defending democratic principles. In his view, current developments at the European level, particularly in countries experiencing democratic backsliding, highlight the evolution from soft to hard law standards, which are better equipped to empower judges to resist attacks on judicial independence.[57]

In contrast to this, Graver's book 'Judges against Justice' offers a comprehensive picture of how judges in various countries during the 20th century participated in legal oppression. It explores the roles and responsibilities of judges under authoritarian regimes, highlighting their complicity through ignoring abuses, refusing to challenge the regime, or reinterpreting laws to support oppressive policies.[58] He investigates the drivers behind authoritarian rulers' reliance on judicial support and the methods they employ to secure this compliance, which often extends beyond direct repression. Graver further opens the question of criminal liability for judges in these contexts, highlighting that historically, holding judges accountable has proved difficult, with notable exceptions such as the post-World War II Nazi trials. He advocates for equal accountability of judges under international law, underscoring the significance of the Rome Statute of the International Criminal Court in advancing this cause. Moreover, his assessment scrutinises the reasons behind judicial support for oppressive systems, examining social, economic, and moral influences. It engages in a critical debate on the role of legal positivism and other legal methodologies in judicial complicity. It concludes with practical advice for judges on making ethical decisions and resisting participation in oppressive regimes, drawing

[56] Matthes (n 13).
[57] Bojarski (n 32).
[58] Graver (n 2).

on interdisciplinary insights from psychology and political science.[59] Zoll and Wortham examine how political leaders may cloak attempts to control the judiciary under the guise of accountability measures, ultimately wielding them as tools for political influence. They argue that the mere existence of governmental structures, like a National Judiciary Council, does not inherently ensure judicial independence. Instead, the effective operation of such structures hinges on a country's cultural norms and the extent to which officials respect the informal boundaries that traditionally separate governmental branches.[60]

Despite the increasingly relevant role of judges in judicial backsliding, which has inspired numerous papers and discussions, the existing literature tends to focus either on analysing drivers for and contextualising judicial resistance, or isolated cases where the actions of judges have undermined the rule of law in specific delimited areas. What is missing is a comprehensive study that revolves around judges as primary agents in both dimensions, emphasising the extent of their potential to shape judicial independence standards, for better or for worse, by leveraging available EU law mechanisms. This gap underscores the need for a thorough examination of judicial behaviour in the context of rule of law challenges, a gap that this thesis aims to fill by providing an in-depth contextual analysis of the dual roles of judges and their impact on the evolution of rule of law principles within the EU.

The significance of the present study, however, stretches beyond the constitutional, legal, and political dimensions into the broader societal and international arenas. When courts fail to maintain their independence, fundamental rights guarantees are at risk of compromise, potentially diluting internationally recognised standards.[61] Upholding the rule of law also impacts the EU's stability and credibility, introducing foreign policy and security considerations, too.[62] Over the past decade, Hungary and Poland have demonstrated significant backsliding, not only putting the democracy within their borders at risk, but also negatively impacting the EU's decision-making and legitimacy.

---

[59] ibid.
[60] Fryderyk Zoll and Leah Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland' (2019) 42 Fordham International Law Journal 875.
[61] Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20' (2021) 17 European Constitutional Law Review 130.
[62] Cristina Saenz Perez, 'What about Fundamental Rights? Security and Fundamental Rights in the Midst of a Rule of Law Breakdown' (2022) 13 New Journal of European Criminal Law 526.

The actions of Hungary and Poland in response to Russia's aggression against Ukraine have weakened the EU rule of law framework,[63] exposing pre-existing structural flaws in the EU's approach to managing backsliding governments which continue to benefit from EU funding, wield veto power in the decision-making and rely on EU's silence during election periods.[64] The lenient stance towards Hungary's *Fidesz*-led government and Poland's *Prawo i Sprawiedliwość (PiS)* has prompted the EU to compromise on its standards, providing political rationales for its lack of action and triggering the deepening of double standards in several fields, including migration.[65] Hungary's regression has allowed external influences to weaken the EU Council's actions, leading the Commission to freeze funds as a last resort. Meanwhile, Poland leveraged its strong stance against Russia to evade scrutiny, including continuing its legal decline until the 2023 parliamentary elections, where it lost its majority after holding office since 2015.[66] These recent examples illustrate the pitfalls of a *laissez-faire* approach,[67] where the lack of decisiveness risks further institutional weakening of the EU, and highlights the divide between the EU values 'on paper' and their actual enforcement in real-life context.[68]

Judicial independence is not a political trade-off, and it is too important to fall victim of the same lack of action, especially when considering the broader implications of EU actions.[69] While many argue that sacrificing certain values to maintain operational capacity, such as deciding on sanctions against Russia, is justified within the EU's operational context, such short-term reasoning neglects the long-term consequences of these compromises and effectively places fundamental EU principles, which all member states should uphold without exception, on the negotiation table within the Council.[70] The belief that the EU lacks the power to counteract pressures from backsliding Member States overlooks its inherent power. In

---

[63] Mitchell A Orenstein and R Daniel Kelemen, 'Trojan Horses in EU Foreign Policy' (2017) 55 JCMS: Journal of Common Market Studies 87.
[64] Benedetta Lobina, 'Between a Rock and a Hard Place: The Impact of Rule of Law Backsliding on the EU's Response to the Russo-Ukrainian War' (2023) 8 European Papers 1143.
[65] Petra Bard and Dimitry V Kochenov, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for An EU Constitutional Awakening' (24 May 2022) <https://papers.ssrn.com/abstract=4169856> accessed 23 September 2022.
[66] Lobina (n 64).
[67] Bárd (n 2).
[68] András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (First edition, Oxford University Press 2017); Venetia Argyropoulou, 'Enforcing the Rule of Law in the European Union, Quo Vadis EU?' (2019) 11 Harvard Human Rights Journal <https://harvardhrj.com/2019/11/enforcing-the-rule-of-law-in-the-european-union-quo-vadis-eu/> accessed 21 December 2022.
[69] Sophie Pornschlegel and Clara Sophie Cramer, 'No Power without Values: Why the EU Needs to Embrace Political Leadership If It Wants to Safeguard Democracy' (European Policy Centre 2022).
[70] Bard and Kochenov (n 65).

reality, the EU holds substantial leverage, making it imperative to uphold principles like judicial independence consistently, without yielding to political pressures or short-term expediency.[71]

1.5 Methodological Framework and Considerations

This PhD thesis employs a methodological approach to investigate how judges navigate their role in upholding or potentially undermining the rule of law in Europe. It consists of two phases, the research phase and the writing phase. The research phase, spanning over 3 years, provided a comprehensive review of case law, literature, and data collection, which laid a solid foundation for further analysis. Additional assumptions and delimitations specific to this study, considered at different stages, are detailed in a dedicated section below.

The thesis builds on a blend of empirical, analytical, and descriptive methods, complemented by a comparative approach to delineate nuances in judicial independence standards as interpreted by the CJEU and the ECtHR. Structured into two key segments, the first part provides a substantive analysis of Judge Żurek's legal proceedings through a doctrinal review of the judgments in *Żurek v. Poland* and *WŻ*. This allows for a comprehensive case study of a Polish judge, whose challenges mirror those of other judges, before both the CJEU and the ECtHR. This approach, although revolving around one judge, offers insights into broader patterns affecting judges across the EU. By scrutinising irregular judicial appointments, non-consensual inter- and intra-court transfers, and other measures employed by illiberal governments, this approach illuminates how courts interpret and respond to threats to judicial autonomy. Despite its focus on a single judge, this analysis serves as a lens through which to understand systemic challenges encountered by judges across Europe. The findings from this chapter therefore offer valuable insights into identifying potential legal pitfalls and illustrate how judges, exemplified by Judge Żurek, can defend the rule of law. They underscore the importance of strategic use of legal mechanisms in safeguarding judicial independence, both at the national level and within the broader European context.

The complexity of the developments in Poland since 2015 makes it overly ambitious to cover them in a comprehensive manner, which is why an in-depth examination of a single case is more meaningful. By following the fate of one judge from Luxembourg to Strasbourg, this

---

[71] Pornschlegel and Cramer (n 69).

thesis offers a practical perspective on how avenues of redress available through European courts can unfold in real-life scenarios. The reasoning of both the CJEU and the ECtHR in these cases not only sets precedents for future cases but also illuminates the evolving standards of judicial independence in their interpretations. When placed in the context of broader developments and jurisprudence, this case study yields practical insights that enhance judicial consistency in ECtHR rulings. Moreover, it provides authoritative interpretations of EU law through the CJEU, thereby fortifying the framework for judicial independence across Europe.

The second part of the thesis provides a substantive, contextual assessment of the 'tribunal (previously) established by law' standard, as interpreted in the jurisprudence of the CJEU and the ECtHR in the recent years in response to rule of law backsliding. It reflects on the evolution of standards applied in preliminary ruling procedures, examining cases such as *Banco de Santander SA*, *Getin Noble Bank*, *Minister for Justice and Equality v. LM*, *AB and Others*, *Simpson and HG*, and *Sharpston*. This part of the thesis examines the reasoning of both the CJEU and the ECtHR, shedding light on the evolving standards of judicial independence and how recent developments in Polish legislation impact these interpretations. This section aims to reveal how judges can, at times, undermine the rule of law by strategically exploiting legal frameworks or contributing to the dilution of judicial independence standards.

In both parts, the selection of cases and methodological approaches was driven by the need to provide a balanced perspective on the challenges facing judicial independence within the EU. The decision to focus on Judge Żurek as a case study was guided by two primary considerations. Firstly, his case exemplifies the systemic challenges faced by judges in Poland, offering a microcosm that effectively captures the issues adjudicated by both the CJEU and the ECtHR. Through his case, broader trends in judicial independence across the EU can be discerned and analysed in depth. Secondly, while the study revolves around a single judge, the findings are situated within the broader context of European jurisprudence and ongoing developments, ensuring their relevance and applicability across diverse EU contexts.

As regards the second part, the selection of *Banco de Santander SA*, *Getin Noble Bank*, *Minister for Justice and Equality v. LM*, *AB and Others*, *Simpson and HG*, and *Sharpston* was informed by significant case law developments concerning judicial independence standards at the European level. These cases were selected through rigorous research, drawing on insights provided by scholars and legal experts. They represent key decisions that highlight various dimensions of the 'tribunal established by law' standard in the EU context, thereby enriching the comparative analysis and contributing to a nuanced understanding of the evolving legal

landscape. By integrating these cases into the thesis, the aim is to provide a robust framework for examining the multifaceted challenges to judicial independence across different EU Member States. This approach not only enhances the scholarly depth of the study but also facilitates a critical assessment of the role of judges in shaping relevant legal standards.

Overall, the research findings were discussed on various occasions with scholars, legal professionals and judges from different EU Member States, which have informed the development of key arguments and analysis. Reflections and interim findings were also partly disseminated through three academic papers,[72] two of which were presented and discussed at conferences, offering valuable opportunities for peer-review. To illustrate, some of the early stages of the research process saw a stronger focus on the normative scope and enforcement of EU values in the context of challenges posed by non-compliant Member States, including the use and limitations of mechanisms such as Article 7 TEU. Gradually, the focus shifted to judges, first as active figures of 'judicial activism', and then much later to judges as someone who can work *against* the rule of law. This is when I first had the idea of connecting these two dimensions and write a comprehensive piece that would highlight the role of judges in shaping judicial independence standards, and by extension, the rule of law developments in Europe.

Additionally, a one-year research stay at Leiden Law School, conducted essentially as part of this PhD research project, resulted in an LLM thesis which initially shaped the outlook of the second chapter of this study. While the LLM thesis laid the groundwork with its structure and insights, the current thesis chapter significantly builds upon this foundation by expanding the substantive content, updating case-law developments, providing additional contextualisation, and employing a different conceptual framework for the analysis. The chapter is as such integrated into the thesis. As a whole, the research activities and collaborative exchanges with colleagues in the field facilitated feedback and helped refine the research focus, contributing to the overall rigour and depth of the study. The comprehensive methodology behind the thesis ensures a thorough and nuanced understanding of the issues at hand, allowing for a detailed exploration of the role of judges in both resisting and facilitating rule of law backsliding in Europe.

---

[72] Kozlová, 'Poland's Rule of Law Breakdown Continued' (n 38); Kozlová, 'Beyond Confirming Validity' (n 23); Alena Kozlová, 'Losing Through Winning: The European Court of Justice Vis-À-Vis the Rule of Law Backsliding In Hungary' (PRIGO University 2021) <https://www.researchgate.net/publication/357930320_Losing_Through_Winning_The_European_Court_of_Justice_Vis-A-Vis_the_Rule_of_Law_Backsliding_In_Hungary>.

For a detailed overview of the different stages of the research process and timeline, refer to the figure below, which outlines the sequential phases from 2020 to 2024, including the research phase for literature review, data collection, and analysis, followed by the writing phase itself, which broadly covers doctrinal analysis, interim research outputs, and the final consolidation of the text of the thesis.

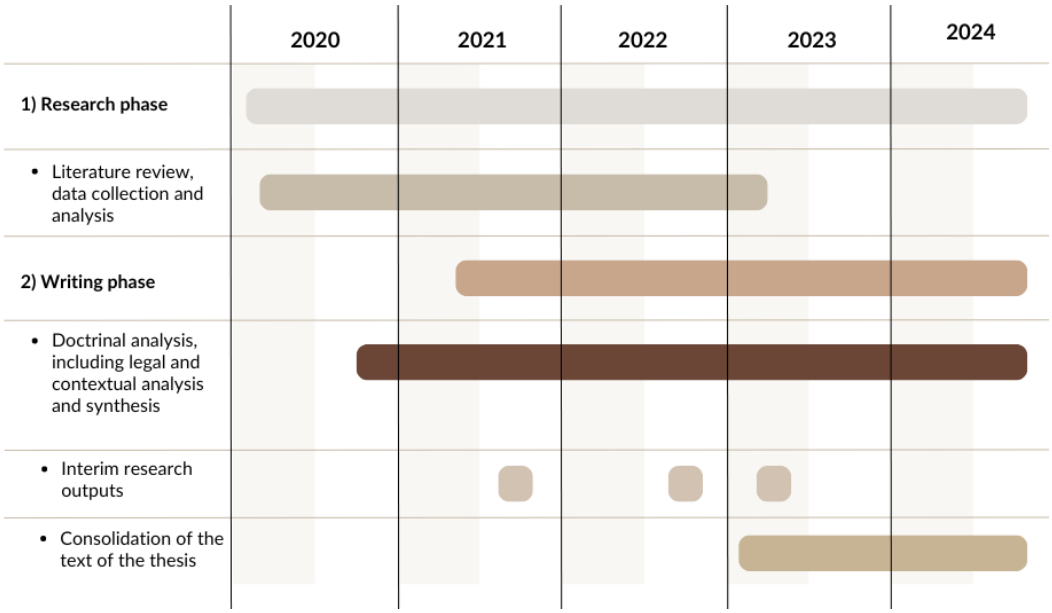


Figure 1: Overview of research phases

1.6 Delimitations and Assumptions

It would be oversimplifying the reality to claim that judges either act in a way that defends rule of law or contributes to its further backsliding. This approach does not seek to paint a black-and-white picture but rather aims to underscore the duality in their impact – the positive and negative influence they can wield in shaping the future of the rule of law in Europe. In particular, it is important to emphasise that the use of the term ‘fake judges’ as employed in this study, is a construct established by scholars to encapsulate an emerging multifaceted phenomenon. This designation is not presented with the intention of delineating an exhaustive list of variables that categorise judges as either ‘authentic’ or ‘fake’. Instead, it serves as a conceptual framework grounded in objective criteria relating namely to irregular appointment or irregular promotion, in a procedure which is more broadly encompassing a judicial body ‘manifestly lacking basic independence’ and/or which was also ‘set up in violation of the national Constitution’, as is the case of appointments made by the new NCJ in Poland, that have emerged through scholarly discourse and analysis. The use of this term is aimed at providing a

nuanced lens through which to examine and understand the complex challenges surrounding judicial legitimacy within the context of rule of law backsliding. It is not an assertion of a binary classification, but rather a tool for scholarly exploration, allowing for a comprehensive analysis of the dynamics inherent in their interplay.

At the same time, this approach leaves aside instances where judges irregularly appointed or promoted deliver judgments that might raise doubts regarding their status as de facto judges — where the rulings themselves appear valid but are undermined by the judges' *de facto* status. Instead, the focus is directed towards cases where their official title grants them the authority to act, serving as a pretext for their actions. It also refrains from implicating judges personally in their intentions or pass judgments about their moral obligations towards justice, as has been studied by other authors.[73] This thesis looks into how their agency translates into tangible action that can be used to strengthen or undermine rule of law.

In analysing how judges emerge as defenders of rule of law, this thesis largely delimits its focus to the case of Judge Żurek within the context of judicial independence challenges in Poland. This methodological choice does not diminish the significance of similar challenges faced by other judges who have encountered repressive actions, including harassment, smear campaigns, disciplinary proceedings, non-consensual transfers or dismissals due to their activities or rulings.[74] Rather, it is chosen for its suitability in providing a detailed examination of one judge's legal journey before both the CJEU and the ECtHR. By analysing Judge Żurek's case comprehensively, this thesis aims to illuminate broader patterns and implications for judicial independence that can be applied within wider framework. At the same time, it does not diminish the significance of other cases where judges may have undermined rule of law.

This thesis does not delve deeply into the various motivations that might drive the decisions of judges in the context of rule of law backsliding. While recognising that their actions can be influenced by an array of factors such as a commitment to upholding the law, fear of reprisal, or a desire to maintain stability, this study focuses primarily on the outcomes and implications of their decisions rather than the personal or psychological motivations behind

---

[73] Graver (n 2).

[74] Michał Bober and others, *Justice Under Pressure - Repressions as of Means of Attempting to Take Control over the Judiciary and the Prosecution in Poland Years 2015-2019* (Jakub Koscierzynski ed, Association of Polish Judges 'Iustitia' 2019); Wolne Sądy, '2000 Days of Lawlessness' (2021) <https://wolnesady.org/files/2000_days_of_Lawlessness_FreeCourts_Report.pdf>.

them. While understanding these motivations could provide a richer context to the findings, such considerations fall outside the scope of this research.

This thesis does not purport to provide an exhaustive examination of all rule of law issues within the broader context of Poland or across the EU. Instead, its focus is strategically narrowed to delve into the intricate dynamics surrounding judges and their role in either bolstering or undermining the rule of law. The research scrutinises how judges contribute to the development of judicial independence standards, acknowledging the dynamic nature of this field, which constantly evolves, generating novel standards and responses to developments. By concentrating on this specific aspect, the thesis aims to offer a nuanced understanding of the complex interplay between judges and the rule of law, avoiding an overly broad scope to maintain analytical precision and depth in addressing the core issues under investigation.

The thesis also does not put emphasis on the roles of other significant actors, such as the executive branch, the legislature, and civil society, in the context of rule of law backsliding. While these actors undoubtedly play crucial roles in shaping the judicial landscape and influencing judicial independence, the focus of this study is on the judiciary itself. By narrowing the scope in this manner, the research aims to provide a detailed analysis of judicial behaviour and its impact on the rule of law. This delimitation allows for a more focused examination but acknowledges that a comprehensive understanding of rule of law backsliding requires considering the interplay of all relevant actors.

This thesis does not intend to engage in an evaluation of political parties nor seeks to denominate them as inherently 'good' or 'bad'. It builds upon the scholarly work of others, acknowledging certain parties, such as *PiS* in Poland and *Fidesz* in Hungary, as subjects of scrutiny due to their characterisation as illiberal and autocratic. The emphasis lies on objectively assessing their legislative initiatives, particularly those that contravene constitutional principles or target specific groups' rights within a populist framework. Importantly, the thesis maintains a steadfast focus on the technical and legal dimensions of these developments, [75] steering clear of overtly political considerations. By adopting this approach, it aims to provide a rigorous analysis of the legal aspects surrounding the rule of law challenges posed by specific legislative actions without venturing into broader political evaluations.

---

[75] von Bogdandy and Spieker (n 36); Kolja Raube and Francisca Costa Reis, 'The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis' in Marianne Riddervold, Jarle Trondal and Akasemi Newsome (eds), *The Palgrave Handbook of EU Crises* (Springer International Publishing 2021) <https://link.springer.com/10.1007/978-3-030-51791-5_37> accessed 31 March 2024.

This study delimits its temporal focus to events from 2015 to 2024. This period was chosen to capture the significant developments in Poland under the *PiS* government, which notably impacted judicial independence. Although the *PiS* government lost power in 2023, signalling potential positive changes, it is put forward that the findings remain ever-relevant as they illustrate the extent to which a judiciary can backslide within less than ten years, stating important takeaways. The thesis does not, however, attempt to provide an exhaustive overview of case law of the CJEU or the ECtHR relating to judicial independence covering the entire period mentioned above. Instead, it highlights key cases that illustrate the main trends and issues pertinent to judicial independence during this time. Future research could extend the analysis to include more recent developments and a broader range of cases.

An underlying assumption in this study is the effectiveness of international pressure in influencing judicial practices and safeguarding judicial independence. While the research acknowledges the role of international bodies and mechanisms in exerting pressure on national governments and judiciaries, it does not empirically test the extent of this influence. The assumption is that international pressure can contribute positively to upholding the rule of law, but this thesis primarily focuses on the judicial responses and interpretations within the given legal frameworks. Further empirical studies could investigate the direct impacts of international pressure to validate or challenge this assumption.

1.7 Structure and Chapter Outline

The thesis is structured into four chapters, which are further divided into sections, subsections and subdivisions.

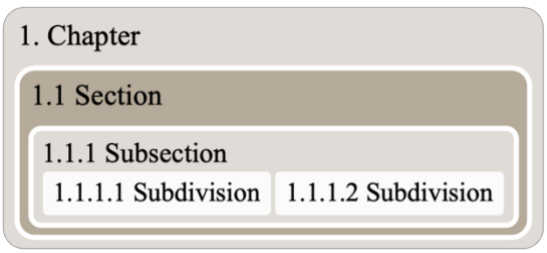


Figure 2 Structure of headings

The first chapter sets the stage by examining the challenges the EU's challenges in maintaining the rule of law. It accentuates the critical role judges play, not only as defenders of judicial independence but also as potential facilitators of its undermining. It also outlines the scope and objectives of the thesis, framing the subsequent analysis within the broader context

of EU legal framework. **The second chapter** explores how judges proactively defend judicial independence against various threats. It scrutinises their efforts in shaping standards related to intra- and inter-court transfers, judicial nomination processes, premature office terminations, and the protection of freedom of expression. In contrast, **the third chapter** explores the less discussed but equally crucial role of judges as potential facilitators of rule of law backsliding. Building on the jurisprudence of the CJEU and ECtHR, it analyses how judges can strategically exploit the existing legal framework or its limitations to undermine judicial independence. This includes the tactical use of the preliminary ruling procedure, instrumentalising the normative scope of the principle of mutual trust, and nullifying the purpose of judicial review. **The fourth chapter** concludes by juxtaposing the roles of judges discussed in the preceding chapters, offering insights into how the EU legal framework may be manipulated. It underscores the importance of maintaining consistent judicial practices and examines how the CJEU's interaction with the ECtHR responds to contemporary rule of law challenges. The chapter also reveals inherent limitations and complexities in this relationship. Finally, it emphasises the ongoing necessity to evolve legal standards to bolster the rule of law throughout Europe.

2. Judges as Defenders of Rule of Law: Judge Żurek's Fight for Judicial Independence Before the European Court of Justice and the European Court of Human Rights

2.1 Introduction[76]

This chapter delves into the role of judges as actors capable of actively contributing to upholding judicial independence, or perhaps even as protagonists in what one might term 'judicial resistance'[77] against rule of law backsliding. It looks at how they strategically employ available tools to shape the interpretation of standards by judicial bodies like the CJEU and the ECtHR. This analysis is particularly relevant in the context of the "concerted political assault"[78] on the judiciary in Poland and other instances of rule of law backsliding across Europe, often justified under the guise of 'judicial reforms'.

The chapter focuses on two in-depth case studies before the CJEU and the ECtHR, centred on Judge Żurek, a prominent figure in the Polish judiciary who has faced prosecution for his criticism of legislative changes affecting the judiciary. Through these case studies, the chapter assesses the positive impact that judges can have on shaping judicial independence standards. It contextualises these findings with relevant case law and reflects on their broader implications. This inquiry addresses key issues such as intra- and inter-court transfers of judges, judicial nomination procedures, premature termination of office, and the complex link between judicial independence and the right to freedom of expression. In this context, breaches of the rule of law are evaluated against objective criteria derived from international standards, highlighting the illegitimacy of such actions.[79]

---

[76] *This chapter partly draws on previous research, including the author's article 'Poland's Rule of Law Breakdown Continued: Judge Żurek's Battle for Judicial Independence Within the European Human Rights Framework' published in March 2023 in the *Review of Central and East European Law*, vol 48, issue 1, pp. 63-88. It also builds upon the 2022 thesis entitled 'From Poland with Love: Judge Żurek's Fight for Judicial Independence Within the European Human Rights Framework,' submitted in partial fulfilment of the requirements of the LL.M. Advanced Studies in European and International Human Rights Law at Leiden University Law School, The Netherlands. However, the chapter significantly expands the analysis, updates the case law, provides additional context and employs a different analytical framework. Therefore, while it follows the structure and some of the insights from the LL.M. thesis, it offers new interpretations and a more in-depth examination of the issues surrounding judicial independence within the European human rights framework.

[77] Łukasz Bojarski, 'Judicial Resistance – Missing Part of Judicial Independence? The Case of Poland and Beyond' <https://www.researchgate.net/publication/375838108_Judicial_Resistance_-_missing_part_of_Judicial_independence_The_case_of_Poland_and_beyond>.

[78] ibid.

[79] ibid.

The first section of the chapter situates the circumstances of Judge Żurek's prosecution within the broader context of the judicial reality in Poland, focusing on the measures prompting his disciplinary proceedings. Within the domestic context, it illustrates the actions a judge may take to safeguard judicial independence when the system of justice no longer operates under the premise of separation of powers and the rule of law.

Following Judge Żurek to Luxembourg, the second section of this chapter illustrates how a judge can be given a cause, shedding light on how a domestic court can shape the development of discussion on rule of law standards by strategically devising a request for a preliminary reference to the CJEU. It examines how the Court provided a binding interpretation of the legality of non-consensual intra- and inter-court transfers, as well as the judicial nomination procedure by irregularly composed bodies such as the National Council of Judiciary (NCJ) in Poland. In particular, it underscores that forced transfers of judges can undermine the principles of judicial independence and the security of judicial tenure, setting out specific conditions under which national courts may determine that the inclusion of a particular judge on the bench no longer ensures the court's status as 'an independent and impartial tribunal previously established by law'. Consequently, courts may declare an order issued by such a judge 'null and void', despite its purported finality. It also outlines how the CJEU can interplay with the ECtHR while pursuing a common cause, illustrating the added value of a united front. However, it also notes the Polish Constitutional Court's alarming tendency to disregard the CJEU judgments, as illustrated through the mean of the *K 3/21* ruling, and the broader implications of such national "resistance".

The third section of this chapter focuses on Judge Żurek's application lodged in Strasbourg, situating it within what is now a growing body of case law 'on Poland'. Noting how the Court affirms its reasoning regarding the applicability of Article 6 § 1 to the premature termination of office in the NCJ, namely its civil head, while Judge Żurek had still remained a serving judge, it explains how the Court finds a violation. It also shows how the Court establishes that the impugned measures constitute an interference with Judge Żurek's exercise of his right to freedom of expression, particularly because of the causal link between the timeline of his public statements and the successive measures instigated by the Government as a response to them. It notes the importance the Court attaches to a judge's freedom of expression as contrasted to measures taken by bodies under the Government's control, stating that a high level of scrutiny should be applied.

Similarly to the Constitutional Tribunal's ruling in *K 3/21*, however, it indicates the very same Tribunal's backlash against the ECtHR, as evidenced through its response to *Xero Flor v. Poland*. This obviously raises doubts as regards Poland's willingness – or rather the lack of it – to execute the judgments of the European courts.

2.2 Targeting the Bench: A New Judicial Independence Paradigm

2.2.1 The Backdrop of the Post-2015 Judicial Reforms in Poland and Judges as Targets of Repressive Measures

~

This is a story of an ordinary man who has sought to challenge the ruling party's attempts to overhaul judicial institutions and who has, at great personal cost, carried on in his fight to preserve the rule of law – or what has remained of it – in Poland.

This is the story of Judge Waldemar Żurek.

However, this could have been the story of Judges Igor Tuleya, Beata Morawiec, Paweł Juszczyszyn, Krystian Markiewicz, Monika Zielinska, Bartłomiej Starosta, Justyna Koska-Janusz, Monika Frąckowiak, Dariusz Mazur, Piotr Gąciarek, Maciej Czajka, Paweł Juszczyszyn, Olimpia Barańska-Małuszek, Adam Synakiewicz, Alina Czubieniak or Maciej Ferek.

This could have been the story of the many judges resisting attacks on judicial independence and rule of law in Hungary, Turkey, Romania or Malta.

This could be your story.

~

This subsection will situate the circumstances of Judge Żurek's prosecution within the wider background of the post-2015 so-called judicial reforms in Poland. After introducing Judge Żurek and his struggle at the Polish courts, it will explain how the ruling party managed to 'capture' the Constitutional Tribunal. This example serves as an illustrative case, shedding light on potential strategies employed by governments to assume control of judiciaries, and how judges become important figures in rule of law-related considerations. It will proceed by pointing out how that created a momentum for further restructuring of the court system and its subordination to political actors. Then it will zoom in on the repressive measures used against Judge Żurek under the relevant reforms. Namely, it will illustrate how judicial discipline has been used in Poland to silence the most vocal Government critics. The analysis will not only provide insights into the specifics of this case but will also serve as a lens into broader patterns of potential governmental influence on judiciaries. Lastly, it will summarise the key points and patterns in the ruling party's toolkit before reflecting on possible avenues of redress.

The ongoing prosecution of Judge Żurek has reverberated through Poland.[80] A man who was once considered a rising star of the Krakow District Court, applauded for his diligent work as a judge and rumoured to make it to the Supreme Court, has fallen from grace.[81] Before long, he has become the man who has 'made it his mission' to defend the independence of judicial institutions in the face of an unconstitutional takeover by the Government.[82] On a number of occasions, though, somewhat fittingly as he was leaving the courtroom to respond to charges brought against him, he said all he has ever engaged in was merely 'doing his job'.[83] Yet, it seems that his resolve to speak up against what many refer to as Rule of law backsliding,[84] has moved the populist *PiS* to places it had never gone before, making use of all kinds of repressive measures against him.[85] Essentially, apart from being stripped of his title as a judge, he has endured everything from disciplinary investigations to staff support withholding, smear

---

[80] Anna Wójcik, 'Judge Żurek: The Authorities Will Try to Bribe and Intimidate the Judges. But This Won't Work' (*Rule of Law*, 2021) <https://ruleoflaw.pl/judge-zurek-the-authorities-will-try-to-bribe-and-intimidate-the-judges-but-this-wont-work/> accessed 18 June 2022.
[81] Jaweed Kaleem, '"Poland Is the New Battleground": Judges Face Peril, Even Death Threats, for Criticizing Right-Wing Government' (*Los Angeles Times*, 27 February 2020) <https://www.latimes.com/world-nation/story/2020-02-27/poland-government-judges-nationalism> accessed 20 June 2022.
[82] Sadurski (n 25); Fryderyk Zoll and Leah Wortham, 'Weaponizing Judicial Discipline: Poland' in Richard Devlin and Sheila Wildeman (eds), *Disciplining judges : contemporary challenges and controversies* (Edward Elgar Publishing 2021) <https://www-elgaronline-com.ezproxy.leidenuniv.nl/view/edcoll/9781789902365/9781789902365.00018.xml> accessed 18 June 2022.
[83] Kaleem (n 81).
[84] *Grzęda v. Poland* (n 10).
[85] Zoll and Wortham (n 82).

campaigns, street harassment, personal information leaks, mobbing or inquiries into non-existing work accidents.[86]

It would be somewhat over-ambitious to attempt to provide a comprehensive diagnosis of the post-2015 situation in Poland. The changing political context, and the scope and nature of the judicial reforms which had allegedly been long over-due "for a system beset by corruption and communist era mentalities"[87], is rather complex. Similarly, the 'good change' reforms, as the ruling party denotes them,[88] have stirred up a lot of discussion among various stakeholders, which is difficult to convey with complete accuracy. In any case, an exhaustive account of the relevant judicial developments is not necessary for the purposes of this thesis, and an apt description thereof has been already provided by other scholars in more detail.[89] References to the relevant reforms will be nevertheless given so as to illustrate the wider background in place at the material time and thus of direct relevance for Judge Żurek's case. Rather than aiming to summarise them in their entirety, however, an attempt will be made to zoom in on those measures which either concern him directly, or are otherwise necessary to understand the position of judges in the country. Highlighting those measures applied to Judge Żurek under the new legal framework against the wider context of rule of law backsliding in Poland at the same time allows to trace potential patterns in the ruling party's 'cookbook' relevant for the follow-up discussion. That, in turn, gives a better insight into the overall state of judicial independence in the country whilst using a very narrow case study.

---

[86] ibid; Ewa Siedlecka, 'To Shoot Down a Judge: The Endless Hounding of Judge Waldemar Żurek' (*Verfassungsblog on Matters Constitutional*, 2020) <https://verfassungsblog.de/to-shoot-down-a-judge/> accessed 17 June 2022.

[87] Alistair Walsh, 'What Are Poland's Controversial Judicial Reforms?' (*DW Akademie*, 2019) <https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696> accessed 18 June 2022.

[88] Zoll and Wortham (n 82).

[89] Sadurski (n 25); Pech and Scheppele (n 3); Laurent Pech and Dimitry Kochenov, 'Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3403355 <https://papers.ssrn.com/abstract=3403355> accessed 18 July 2021; Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond' (n 5); Scheppele, Kochenov and Grabowska-Moroz (n 40).

2.2.2 The Role of 'Double' Judges in the Process of Appointment and Composition of Judicial Bodies

As outlined above, from 2015 onwards,[90] Poland has embarked on a journey to reorganise the state apparatus, which many believed was desperately in need of reform.[91] Namely, the perceived lack of 'political pluralism', 'social hierarchy' and 'legitimacy of the post-1989 institutions' has supposedly warranted a much deeper restructuring of the judiciary,[92] which essentially suffered from 'lengthy court processes', 'corruption', and the fact that some of the serving judges were 'Communists'.[93] The double victory of *PiS* – one through the means of a *PiS* candidate succeeding in the presidential elections and the other through the party's major win in the general elections and its subsequent securing of a majority in *Sejm* – in combination with the already existing majority of *PiS* in the Senate allowed just that. Despite falling short of a super-majority required to change the Constitution directly, the new Government took its first legally creative steps towards paralysing the Constitutional Tribunal.[94] Through laws and regulations designed to obstruct its functioning, including court packing, these measures were crafted to maintain an appearance of constitutional compliance while avoiding formal changes to the Constitution.[95] By 2016, the Constitutional Tribunal transformed from a paralysed institution into an active facilitator of Government policies aimed at dismantling checks and balances and restricting civil rights, with its judges acting as enthusiastic supporters of Government initiatives, conveniently laying the groundwork for removing the prospect of constitutional review from the equation.[96]

This downfall began with the appointment of double judges in the Constitutional Tribunal. The outgoing *Sejm* had elected five new judges: three to replace judges whose terms of office would expire within its mandate, and two to replace those whose terms would end

---

[90] The most recent government change in Poland occurred in December 2023. This followed parliamentary elections in October 2023, where *PiS* lost its majority after holding office since 2015. A new government led by Donald Tusk was sworn in December of last year.
[91] The Warsaw Institute Review, 'The Context and Meaning of Judicial Reforms in Poland after 2015' (*The Warsaw Institute Review*, 18 April 2021) <https://warsawinstitute.review/issues-2021/the-context-and-meaning-of-judicial-reforms-in-poland-after-2015/> accessed 18 June 2022.
[92] Stanley Bill, 'What Does Jarosław Kaczyński Want? Poland and the Rule of Law' (*Notes From Poland*, 18 June 2017) <https://notesfrompoland.com/2017/06/18/what-does-jaroslaw-kaczynski-want-poland-and-the-rule-of-law/> accessed 20 June 2022.
[93] Zoll and Wortham (n 82).
[94] Mirosław Granat and Katarzyna Granat, *The Constitution of Poland: A Contextual Analysis* (Paperback edition, Hart 2021).
[95] Pech and Scheppele (n 3); Koncewicz, 'The Democratic Backsliding in the European Union and the Challenge of Constitutional Design' (n 12).
[96] Sadurski (n 25).

during the new *Sejm*'s term.[97] However, shortly after taking office, PiS revoked all five nominations in an unprecedented move and appointed its own five candidates instead. This action clearly overstepped the outgoing *Sejm*'s mandate and effectively circumvented the Constitution. According to the Constitutional Tribunal, the new PiS-dominated *Sejm* was only entitled to elect two judges — those whose terms were ending. The appointment of three judges in violation of Poland's own laws,[98] and contrary to the principle of judicial irremovability, brought the rule of law into question for the first time.[99]

Despite the fact that the legality of these so-called 'double judges' — or 'fake judges', to borrow the methodology of this thesis — was later deemed a violation of the 'tribunal established by law'[100] benchmark under Article 6 § 1 ECHR in the ECtHR's ruling *Xero Flor v. Poland*,[101] the executive's and the *Sejm*'s open overhaul of the Constitutional Tribunal had only opened a path to further systemic changes in the judiciary. Throughout 2016, this evolved into a full-scale attack on the judicial review procedure and elimination of systems of checks and balances in the country. This resulted in what has been described by some as a constitutional *coup d'état*,[102] fundamentally altering the judiciary's independence and effectiveness. These changes, unprecedented in scope and intensity, targeted the very existence of the Constitutional Tribunal, transforming it from a robust institution into a severely weakened 'fake' body by 2017.[103] Using its judicial review powers to advance the political agenda and rubber-stamp unconstitutional measures, this period marked a transition from the Court's 'existential jurisprudence', which fought to uphold the rule of law and judicial independence, to a 'subversive jurisprudence' that facilitated the erosion of these very principles.[104]

The structural deficiencies were emphasised through unconstitutional appointments, *post facto* validation of appointments made by 'fake' judges and other statutory changes. For instance, the term of office of the Constitutional Tribunal's president and vice-presidents (VPs) has been shortened from nine to three years, a measure which had been declared

---

[97] *Grzęda v. Poland* (n 10).
[98] According to Article 7 of the Polish Constitution, "public authorities shall act *in accordance with* and *within the limits* of the law" [emphasis added].
[99] *Grzęda v. Poland* (n 10).
[100] *Ástráðsson v. Iceland* (n 48).
[101] *Xero Flor w Polsce sp z o.o v Poland* [2021] ECtHR No. 4907/18.
[102] Sadurski (n 25).
[103] Tomasz Koncewicz, 'The Court Is Dead, Long Live the Courts?: On Judicial Review in Poland in 2017 and „judicial Space" beyond' [2018] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00003254> accessed 1 July 2024.
[104] ibid.

unconstitutional by the Tribunal itself in an 'open rebellion' against the Government.[105] Many scholars have expressed their concerns that such shortening of term of office would grant too much room for the ruling party's manoeuvring should a need to appoint a more 'politically expedient' candidate arise.[106] Be that as it may, the reforms have far from stopped at the Constitutional Tribunal's doorstep. Instead, they have spread to ordinary courts, the Supreme Court or the NCJ – a constitutional organ whose main task is to safeguard the independence of the judiciary through evaluation and nomination of candidates for appointment.[107]

The measures have not only interfered with the appointment and composition of judicial bodies but also affected the substance of judicial deliberations. Judges were left questioning how to perform their duties independently, as they were forced to either align with the government or face disproportionate penalties.[108] These successive legislative amendments prompted strong reactions from key European actors, including the EU, the Council of Europe, and the Venice Commission.[109] All of these actors condemned the developments in the strongest terms, providing independent analyses of the constitutionally ambiguous situation in Poland. The Venice Commission particularly highlighted that the reforms cannot be justified by the Government's argument of needing to remedy the absence of 'pluralism in the composition of the Tribunal'. It emphasised the necessity of an independent constitutional court to ensure checks and balances in a constitutional democracy. According to the Commission, the 2015 amendments not only slowed down the administration of justice, which they purportedly aimed to expedite, but also rendered the Constitutional Tribunal ineffective in protecting the Constitution. This, in turn, jeopardised democracy, the rule of law, and human right.[110] Furthermore, although the EU Commission's early involvement was later criticised for

---

[105] Walsh (n 87).
[106] Sadurski (n 25).
[107] *See* Article 186 § 1 of the Polish Constitution.
[108] Kaleem (n 81).
[109] Venice Commission, 'Opinion No. 833/2015. Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' (n 5); Venice Commission, 'Opinion No. 892/2017. Opinion on the Act on the Pulic Prosecutor's Office As Amended' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e>; Venice Commission, 'Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and Some Other Laws [in Poland]' (2020) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e>.
[110] Venice Commission, 'Opinion No. 833/2015. Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' (n 5).

not being sufficiently robust, with some recoursing to the term "too little too late"[111], it set the tone for the ongoing rule of law discussions with Poland.

The extensive restructuring of Poland's judiciary post-2015, driven by the *PiS* Government, has led to significant undermining of the judiciary, particularly by allowing the executive to exercise control over judicial appointments and appoint 'fake judges' to the highest courts. This involvement erodes the fundamental principles of judicial independence and accountability and underscores a broader issue of executive overreach, where the judiciary is no longer an independent check on governmental power but rather a tool for its consolidation.

2.2.3 Impacts of Politically-motivated Restructuring of the Judiciary on Judicial Safeguards

Measures of particular relevance for Judge Żurek's case relate to the restructuring of the court system as a whole, and especially its *de facto* subordination to political actors related to *PiS*. In this context, the role of Minister of Justice (MoJ) Zbigniew Ziobro becomes particularly significant. The 2016 Act on the Public Prosecutor's Office joined the offices of the Prosecutor General (PG) and MoJ, a model to which Poland recoursed during the communist era, whose 'mentality' PiS claimed to eradicate in the first place.[112] As a result, the MoJ became a PG with a power to intervene in any pending case, and of course, a power to instruct other PGs. The MoJ/PG could then engage in various activities including establishing court divisions, lodging disciplinary proceedings against judges, appealing against the decisions of a disciplinary court, deciding on matters of territorial jurisdiction areas or authorising inter-court transfers.[113]

It is worth noting that one of the new powers granted to the MoJ/PG included the authority to request inquiries related to ongoing investigations, a function particularly susceptible to abuse.[114] A recent ECtHR judgment highlighted the problematic nature of this power, stating that even the mere passive presence of a government member within a body empowered to impose disciplinary sanctions on judges was highly problematic under Article 6,

---

[111] Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 Hague Journal on the Rule of Law 1.
[112] One of PiS' justifications for the introduction of the judicial reforms it has enacted since 2015 was to make amends for Poland's communist past and put an end on 'communist era mentality' by setting up a more transparent and independent court system in place. However, the joining of
[113] Sadurski (n 25).
[114] ibid.

especially regarding the requirement for the disciplinary body to be independent.[115] Ultimately, the MoJ/PG could perform multiple functions within the justice sphere while being the same individual, who would normally only have one.

While holding a political function — such as being a Member of Parliament (MP) — is incompatible with the office of PG pursuant to Article 103 of the Polish Constitution, attempts to enforce this particular provision against Mr Ziobro have come to a halt.[116] In fact, the criteria for becoming a PG have been lowered to allow MPs to become prosecutors, further blurring the lines between political and judicial roles.[117] Furthermore, the new law has reduced the retirement age for judges and prosecutors, while granting the MoJ the discretionary power to extend the active service of certain judges.[118] In a political landscape where the ruling party's firm grasp on the judiciary is evident, the power to decide which judges remain in office is a troubling development. This not only undermines the independence of the judiciary but also paves the way for increased political interference in judicial matters. Such changes draw the judiciary further away from impartiality, potentially eroding public trust in the legal system. These developments highlight a concerning trajectory where the separation of powers is increasingly compromised, posing a significant threat to the rule of law.

Allegedly, the aim of the Statute of 27 July 2017 was to enhance democratic accountability in Poland. According to the findings of the Venice Commission, however, it severely undermined judicial independence by allowing the executive and legislative powers to interfere extensively in the administration of justice.[119] Among other things, it vested the MoJ with a power to replace the presidents and VPs of all courts, without substantiating his decision, and regardless of the opinion provided by the general assembly of judges of the court in question.[120] The same amendment also removed the NCJ from the decision-making process as the previous legal regime required to obtain its approval.[121] To provide some actual numbers, the MoJ/PG used these powers to replace as many as 158 out of 730 court presidents and VPs. According to Sadurski, however, a mere statistical account of the purge is of little value. He emphasises that the depth of the changes is best reflected through their *structure.* The

---

[115] *Catană v the Republic of Moldova* [2023] ECtHR No. 43237/13.
[116] Matczak (n 2).
[117] Zoll and Wortham (n 82).
[118] *C-192/18 Commission v Poland (Independence of ordinary courts)* (European Court of Justice).
[119] Venice Commission, 'Joint Urgent Opinion of the Venice Commission on Poland' (n 109).
[120] Sadurski (n 25).
[121] Matczak (n 2).

overwhelming majority of appellate court presidents were replaced, and because of their administrative control over district courts, these courts became largely dominated by whichever judges the ruling party appointed as new appellate court presidents.[122] Moreover, the appointment of judges is particularly significant because court presidents exercise control over judges in their respective courts and can significantly influence case management. Importantly, the grounds on which the Minister of Justice could dismiss court presidents after the expiry of the transitional period included 'serious or persistent failure to comply with official duties' or 'other reasons which render remaining in office incompatible with the sound dispensation of justice'. The legal ambiguity and broad scope for interpretation of these vaguely formulated grounds make them susceptible to abuse. Despite the fact that a 2018 amendment had restricted their use to approval of the court college and the NCJ, this has not changed much in practice.[123]

The composition of the NCJ itself has gone through substantial changes, too.[124] In particular, *PiS* argued that a substantial reform of the body is required in order to increase the efficiency of the administration of justice and a more transparent and democratic election of its members.[125] The concept of self-governance, which implies that judges wield significant decision-making or veto authority over judicial matters, was seen as essential for the separation of powers and the autonomy of the judiciary, both of which were absent during the Communist era.[126] While the 15 representatives from the judiciary were previously elected *from* and *by* fellow judges, this power was now transferred to *Sejm*, and thus effectively placed under control of the majority ruling party. As a result, *PiS* was able to appoint judges in line with its preferences. Additionally, two new chambers in the Supreme Court have been introduced, Disciplinary Chamber and Extraordinary Chamber, respectively.

The Disciplinary Chamber allowed judges to be investigated and potentially sanctioned for the rulings they delivered, while the hearings and procedures would be determined by judges appointed by *Sejm*.[127] The Extraordinary Chamber, on its part, disposed of the right to submit an extraordinary appeal. This gave the MoJ not only the previously mentioned power to intervene in any pending case, but to reopen cases up to 20 years after they have become final.

---

[122] Sadurski (n 25).
[123] ibid.
[124] Bober and others (n 74).
[125] *Grzęda v. Poland* (n 10).
[126] Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19 German Law Journal 1839.
[127] Walsh (n 87).

This stands in obvious violation of the principle of *res judicata*, a doctrine of finality which does not allow for a 'matter judged' on the merits to be relitigated at a later stage. Judges for both of these Chambers were to be elected by the NCJ, and actively advertised for the position through additional remuneration, which translated into a new incentive for judges to apply and a possibility on the part of *PiS* to influence the composition of the body. At the same time, in light of the above-mentioned circumstances,[128] it does not come as a surprise that the MoJ officially declared that those judges who would 'refuse to apply the Polish laws' as a result of their 'presumed incompatibility with international law', may face disciplinary action.

By 2023, Poland has therefore been operating under aa new 'judicial independence', or rather 'non-independence', paradigm. This characterisation reflects the depth and breadth of the systemic breakdown in the rule of law, driven by a series of unconstitutional reforms and political manoeuvres that severely compromised the independence and integrity of the judicial system with unlawfully composed highest courts and compromised judicial appointment procedures, leading to systemic violations of judicial independence standards, emphasising the dire need for decisive actions to restore judicial independence and uphold the rule of law.[129]

The scale of the sustained and systemic undermining of the judiciary in Poland is illustrated in the figure below, which compiles data on the Supreme Court's ratio of regularly appointed judges versus 'fake' judges appointed by the new NCJ, based on data from the Polish initiative *Wolne Sądy*.[130] The chart indicates a shift in the composition of the judiciary over the two years, with an increasing proportion of 'fake judges'. This trend is evident across multiple chambers, highlighting significant changes within the judicial structure. The data shows an expansion in the number of irregular judicial appointments, reflecting broader systemic changes within Poland's judicial framework. While this chart underscores the evolving nature of judicial appointments in Poland, providing a quantitative insight into the ramifications of recent judicial reforms and their impact on the Supreme Court's composition, it also highlights how deeply ingrained these irregular appointments became in the last two years of *PiS* rule. This prevalence

---

[128] Please note that the previous overview of the judicial reforms may have disproportionately focused on some reforms which bear more relevance for Judge Żurek's case. They have not been presented in their complexity timeline-wise nor content-wise. For an in-depth comprehensive analysis of these reforms, *see* Sadurski (n 1).

[129] Laurent Pech, '7 Years Later: Poland as a Legal Black Hole' [2023] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00014945> accessed 1 July 2024.

[130] Wolne Sądy (n 74); Wolne Sądy, '3000 Dni Bezprawia [3000 Days of Lawlessness]' (2021) <https://wolnesady.org/files/3000-dni-bezprawia-Raport-WS-1.pdf>.

highlights the challenges in overturning such appointments and serves as a compelling lesson on the importance of upholding judicial independence safeguards.

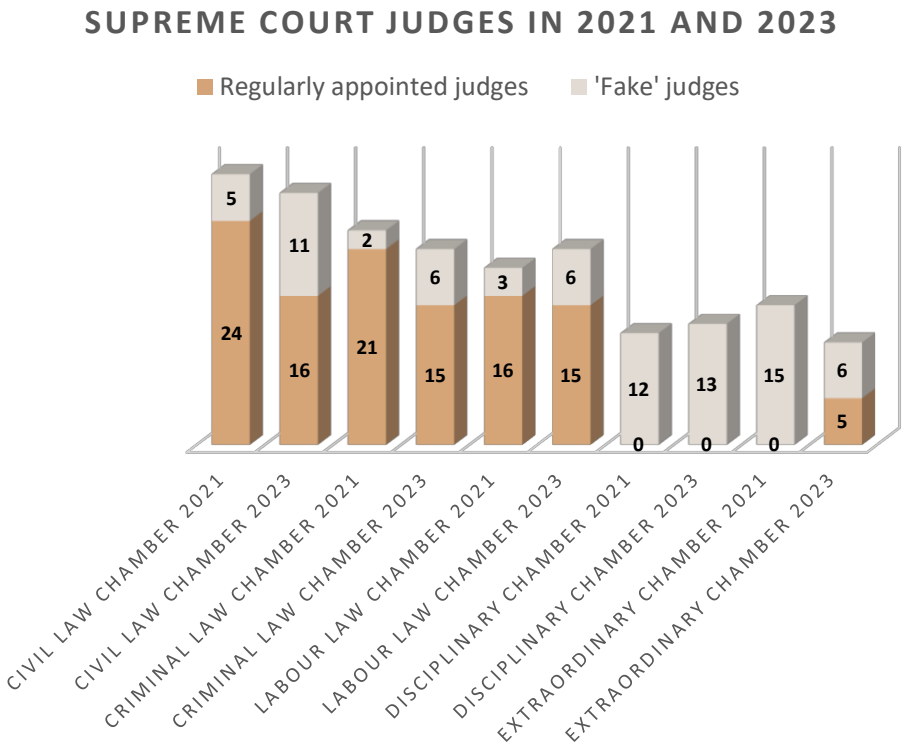


Figure 3 Ratio of Supreme Court judges in 2021 and 2023

2.2.4 Judicial Resistance Against Rule of Law Backsliding

Judge Żurek, Krakow Regional Court and the former NCJ spokesperson, has soon fell victim of the new court restructuring indicated above. After being replaced in the NCJ and stripped of his functions thereof, he was also dismissed from his function as a spokesperson for the Krakow Court by the new court president.[131] The decision was carried out without the required opinion of the court's college, and Judge Ługowska, who openly disagreed with it, was later dismissed as the president of the District Court in Wieliczka.[132] What is perhaps more striking, is the fact that the new Krakow District Court president decided to make radical changes to Judge Żurek's responsibilities. By transferring him from an appellate chamber to a first-instance chamber — a move that could be perceived as both a demotion in a judge's career and politically motivated harassment — she effectively removed him from his ongoing cases.

[131] Bober and others (n 74).
[132] Matczak (n 2).

In theory, this decision could be appealed to the new NCJ, albeit with limited chances of success due to its ruling majority-controlled composition and politicised nature.[133]

It is worth pointing out that the wider legal climate at that time was characteristic of top-down interference in adjudication. Namely, politically sensitive cases, which were not adjudicated in line with the intention of the prosecution, were likely to be quashed by the second-instance courts and the adjudicating judges subjected to disciplinary proceedings. These included a case concerning the suing of four doctors of the MoJ's deceased father Jerzy Ziobro, who were previously acquitted of charges of medical negligence,[134] or a case against an MP who later initiated disciplinary proceedings against the very judge handing down the ruling.[135] This is to emphasise that many judges have encountered both criminal and disciplinary proceedings on the basis of substance of their judgments.[136] Such actions represent an unprecedented departure from the norms expected in an independent judiciary, where judicial decisions are shielded from reprisal based on their substance. The targeting of judges through criminal and disciplinary measures not only undermines their individual judicial independence but also erodes public trust in the judiciary as a whole. It sets a concerning precedent within what is supposed to be a system safeguarding the rule of law and underscores the broader challenges facing judicial integrity and independence in contemporary legal systems.

Upon her 2019 visit to Poland, the CoE Commissioner for Human Rights accordingly warned about mass dismissals and disciplinary proceedings conducted against judges and prosecutors, reiterating that it is their right to publicly comment on matters of public interest such as reforms of the judiciary and the prosecution service without the fear of retribution through the means of disciplinary action. However, current circumstances indicate that judges who voice criticisms related to their profession face substantial career risks, and the procedural manner in subsequent proceedings suggests an intent to intimidate.[137] This has to be understood against the backdrop of the 'rule of law in flux', particularly concerning its chilling effect on judges who are actively discouraged from adopting critical stances.

---

[133] Sadurski (n 25).
[134] Martin Mycielski and others, 'Polish Public Prosecutor's Office: Selected Cases of Malicious Prosecution and Dereliction of Duties' (*Open Dialogue Foundation*, 16 February 2022) <https://en.odfoundation.eu/a/190999,polish-public-prosecutors-office-selected-cases-of-malicious-prosecution-and-dereliction-of-duties/> accessed 2 July 2022.
[135] Sadurski (n 25).
[136] ibid.
[137] *Żurek v Poland* [2022] ECtHR No. 39650/18.

To go back to Judge Żurek, he has faced a large number of artificial disciplinary charges and instances of harassment by the president of his court. To name a few, he was charged for a tweet in which he criticised the appointment of a PiS-related attorney to the Supreme Court,[138] accused of falsifying documents based on presumably 'wrong' dates on case files signed in his absence,[139] or investigated for his participation in a public debate on the justice system: "Once a popular lecturer at the National School of Judiciary and Public Prosecution in Krakow, he has now been banned by his court from teaching"[140]. The disciplinary hearings against him were conveniently 'standing only' so that his supporters, who often flooded the courtroom with banners, could not sit down.[141] Furthermore, the MoJ ordered a large-scale inspection of cases heard by him 'on the basis of anonymous reports'.[142] Judge Żurek refused to sit on the bench with judges who were either appointed or promoted with the involvement of the new NCJ, referring to the ECtHR judgments of May and July 2021,[143] and the CJEU decisions of 14 and 15 July 2021,[144] whereby both Courts challenged the legality of the disciplinary panel, the new NCJ, and the judges appointed by it.[145] These cases will be revisited in more detail later on.

2.2.5 Weaponising Disciplinary Action Against Judges

In late 2019, the Polish Supreme Court Disciplinary Chamber Law, popular rather under the term 'Muzzle law', has been enacted by the *Sejm*. The latter had empowered the Disciplinary Chamber to initiate proceedings against judges for "questioning the ruling party's platform"[146]. Fitting into a larger political process that has been spanning over years, PiS intensified its narrative of the justice system being a communist-era 'judiocracy' and hence an impediment to the democratic rule of the Polish people.[147] This allowed the ruling party to denote those judges opposing the unconstitutional changes as the 'enemies' of democracy

---

[138] Kaleem (n 81).
[139] Magdalena Gałczyńska, 'Attack of the Disciplinary Commissioners on Judge Żurek. "They Are Ridiculing Themselves"' (*Rule of Law*, 2022) <https://ruleoflaw.pl/attack-of-the-disciplinary-commissioners-on-judge-zurek-they-are-ridiculing-themselves/> accessed 18 June 2022.
[140] Kaleem (n 81).
[141] Zoll and Wortham (n 82).
[142] Matczak (n 2).
[143] *Reczkowicz v Poland* [2021] ECtHR No. 43447/19; *Żurek v. Poland* (n 137).
[144] *C-791/19* (European Court of Justice); *C-204/21 R* (European Court of Justice).
[145] Wójcik, 'Judge Żurek: The Authorities Will Try to Bribe and Intimidate the Judges. But This Won't Work' (n 80).
[146] Allyson K Duncan and John Macy, 'The Collapse of Judicial Independence in Poland: A Cautionary Tale' (2020) 104 Judicature International <https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/> accessed 18 June 2022.
[147] ibid.

standing in a way of the necessary reforms, designing the new law in such a way so that it allowed to dismiss or cut the salaries of the 'non-compliant' judges.[148] Under the auspices of the Muzzle Law, Judge Żurek's prosecution intensified substantially. At one point in time, he was charged with as many as 64 counts of disciplinary offences, and the Disciplinary Commissioner filed a request to formally inspect 122 cases from when Judge Żurek sat on the bench of the Regional Court in Krakow.[149] For example, one of the disciplinary charges against him was based on the fact that, in his former capacity as the NCJ spokesperson, he read aloud an invitation to a protest against the enacting of unconstitutional bills. He was subjected to a lengthy Central Anti-Corruption Bureau (CBA) investigation, which brought to questioning "him, his wife, elderly parents (…) [and] much of it about whether the 1977 sale of a tractor to a farmer was properly declared"[150]. Despite not being formerly opened, these investigations had been conducted for six months, and the hearings had been scattered throughout Poland to force him to travel from one place to another.[151]

Other forms of 'soft repressions' that have been put in place were swamping Judge Żurek with work while simultaneously taking away his administrative assistance. In a later interview, he declared that PiS has been engaging in strategic moves 'to set judges to fail' by on one hand introducing new obligations they would be responsible for, namely big caseloads, and on the other depriving them of clerks to manage them.[152] A 'witch hunt campaign' has been launched in the press, referring to him as 'enemy of Poland', 'traitor' and ridiculing his private affairs, the details of which were likely leaked by the PG office.[153] The MoJ himself used the power of extraordinary appeal — commonly presented as a tool to help people who could not afford a reputable lawyer — to intervene in Judge Żurek's financial settlement with his ex-wife, who also happens to be a lawyer. While challenging the final judgment, the PG office emphasised the need for "compliance with the principle of a democratic state of law implementing the principles of social justice"[154]. As a result of the campaign in the media,

---

[148] ibid.
[149] Gałczyńska (n 139).
[150] Zoll and Wortham (n 82).
[151] ibid.
[152] ibid.
[153] Mariusz Jałoszewski, 'The Prosecutor General Goes for Judge Żurek. He Is Digging into His Private Affairs – Rule of Law' (2021) <https://ruleoflaw.pl/the-prosecutor-general-goes-for-judge-zurek-he-is-digging-into-his-private-affairs/> accessed 22 June 2022.
[154] Gałczyńska (n 139).

Judge Żurek has been harassed over the phone, called out on the street, and received numerous threats.[155] Those included regular references to physical violence and death threats.[156]

A tale in itself could be the PG office investigation into the 'non-existing accident' that allegedly 'did not occur' in Judge Żurek's workplace, but for which a complex knee surgery was required. The story has it all: the mutually opposing statements of virtually all the parties to the dispute – the PG, the director of the regional court, the court president and Judge Żurek himself. Investigated for his 'failure to notify the competent authority', which he did in writing on the following day of the accident, and which is in any case striking as the provision specifically applies to employers, and thus the only person that could be legally blamed for 'non-notifying', is the director of the regional court himself.[157] Be that as it may, the persisting refusal to hand in CCTV footage, the refusal to sign a report of the accident yet requesting Judge Żurek to hand it in, is only one of the many examples of how the legislation can be used strategically in an attempt to silence *PiS* opponents.[158]

2.2.6 The Playing Field and the Way Forward

2.2.6.1 Lowering judicial independence standards and silencing judges

It appears that disposing of 'inconvenient' judges and replacing them with 'fake' judges loyal to the ruling party is not an isolated case of *PiS*' strategic use of the new legislation, rather, it is characteristic of a trend used by illiberal Governments. Be it through restructuring of the judiciary,[159] lowering the retirement age while conferring on the MoJ the power to extend the period of active service based on his own discretion,[160] waiving immunity,[161] or shortening the terms of office, these measures have created a challenging environment for judges in Poland.

In a 2020 interview in which *PiS* leader Jarosław Kaczyński officially announced a 'purge' among judges for the first time, he maintained that the party only seeks to "remove the

---

[155] Matczak (n 2).
[156] Kaleem (n 81).
[157] Siedlecka (n 86).
[158] ibid.
[159] A particularly worrying trend can be noticed in transfers from the criminal division to a civil division in the first instance after twenty years of service, which forces the judge in question to become familiar with a completely different type of cases.
[160] Note that the CJEU already ruled on the incompatibility of this particular provision in case C-192/18 Commission v Poland.
[161] Amnesty International, 'Poland: Briefing on the Rule of Law and Independence of Th Judiciary in Poland in 2020-2021' (2021) <https://www.amnesty.org/en/wp-content/uploads/2021/07/EUR3743042021ENGLISH.pdf>.

phenomenon that courts in Poland are politically dependent on the opposition (…). These courts are politicised; they are on the other side. Poland will need normal courts that stick to the law."[162] This declaration marked an escalation in the party's strategy to control the judiciary. By framing the judiciary as inherently biased and politically aligned with the "opposition", Kaczyński justified his party's aggressive tactics to reshape the judicial landscape under the guise of depoliticisation. Those judges who were subjected to severe disciplinary action due to their alleged misconduct were to no surprise largely the ones whom the new system in Poland would dispose of. The party's narrative came as a stark inversion of the reality that judges, who upheld the rule of law and EU legal standards, were often targeted. This environment in turn cultivated fear and expectation of compliance within the judiciary, as judges became wary of the repercussions of opposing governmental directives. Judges subjected to severe disciplinary actions for their so-called misconduct were often those who opposed the implementation of unconstitutional legislation.[163]

The rhetoric employed by *PiS* not only undermined the perceived impartiality and independence of the judiciary but also eroded public trust in judicial institutions. By politicising the judiciary under the pretext of depoliticisation, the *PiS* created a paradoxical situation where genuine judicial independence was sacrificed for political expediency. This approach compromised the judiciary's role as a check on executive power, a fundamental pillar of democratic governance. Moreover, this strategy extended beyond individual judges. The systemic restructuring of judicial bodies and the introduction of legislative changes that allowed for greater executive control over judicial appointments and tenure effectively dismantled safeguards that protected judicial autonomy.

The chilling effect on the judiciary was profound, with many judges opting for passivity out of fear of retribution. This self-censorship weakened the judiciary's capacity to function as an independent and impartial arbiter of the law. Freedom House reported that PiS

> "has been waging a war against the judiciary in an attempt to convert it into a pliant political tool. After devoting its initial years in office to an illegal takeover of the

---

[162] Mariusz Jałoszewski, 'Kaczyński directly announced a purge among judges for the first time' (*Stowarzyszenie Sędziów THEMIS*, 2020) <http://themis-sedziowie.eu/materials-in-english/kaczynski-directly-announced-a-purge-among-judges-for-the-first-time-mariusz-jaloszewski-oko-press-22-december-2020/> accessed 19 June 2022.

[163] Jolanta Ojczyk and Patrycja Rojek-Socha, 'Kaczyński zapowiada spłaszczenie struktury sądów' (*Prawo*, 16 October 2021) <https://www.prawo.pl/prawnicy-sady/dalsza-reforma-sadow-jaroslaw-kaczynski,511223.html> accessed 19 June 2022.

> country's constitutional court and the council responsible for judicial appointments, the PiS government started persecuting individual judges in 2019. By early 2020, judges who criticized the government's overhaul or simply applied EU law correctly were subjected to disciplinary action. Such an attack on a core tenet of democracy— that there are legal limits on a government's power, enforced by independent courts—would have been unimaginable in Europe before PiS made it a reality."[164]

The case of Judge Żurek exemplifies the struggles faced by many judges in Poland during this period. The measures taken against him inflicted personal hardship and served to deter other judges from speaking out, thereby undermining their independence from the Government. Although the *PiS* is no longer in power, the environment they created has had a lasting chilling effect on the judiciary. Many judges still choose to remain passive out of fear of retribution, highlighting the importance of continued vigilance and support for judicial independence.[165]

2.2.6.2 Judges and the role of the European Courts in addressing national rule of law backsliding

In light of the state of judicial independence in Poland, as exemplified by the Constitutional Tribunal's inability to rule out the legality of the newly enacted statutes by *PiS*, the avenues of redress for individual judges openly criticising the reforms appeared quite limited in Poland.[166] The residual impact of the *PiS* policies means that the struggle for judicial independence in Poland remains a pertinent issue. Despite the adverse judicial climate, however, this section has illustrated that there are still channels a judge may take in defence of the rule of law. For example, challenging judicial appointments made by compromised bodies, appealing unconstitutional decisions, and fighting against arbitrary disciplinary proceedings through proper legal means are crucial for the judiciary to maintain at least an appearance of independence. The situation in Poland is not unique; similar patterns can be observed in other national jurisdictions where judicial independence is under threat. In such contexts, judges face

---

[164] Zselyke Csaky, 'Nations in Transit 2020: Dropping the Democratic Facade' (*Freedom House*, 2020) <https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade> accessed 17 June 2022.
[165] Matczak (n 2).
[166] Anna Wójcik, 'Constitutional Tribunal Ruled: CJEU Interim Orders Do Not Apply in Poland – Rule of Law' (2021) <https://ruleoflaw.pl/constitutional-tribunal-ruled-cjeu-interim-orders-do-not-apply-in-poland/> accessed 22 June 2022.

limited options for redress within their own legal systems, prompting them to seek support from supranational bodies.

Given the likely limited prospects for an individual judge to seek redress within Poland, attention naturally turns to the two European Courts. Namely, the CJEU and the ECtHR may have a decisive role in containing the attacks on the judicial independence of Polish judges insofar as they deliver their binding judgments on particular repressive actions taken under the auspices of the new laws. In the following sections, we will examine the CJEU judgment in *WŻ* regarding the legality of Judge Żurek's non-consensual inter-court transfer and judicial appointments, including the NCJ. Additionally, we will explore the ECtHR case of *Żurek v. Poland*, which highlights his removal from the NCJ without review and the alleged campaign to silence him. These cases provide practical insights into how judges can seek justice and uphold judicial independence amidst politically-driven threats. The analysis will demonstrate how the strategic use of supranational legal tools can serve as judicial resistance against rule of law backsliding. Judges facing similar threats can learn valuable lessons by understanding the legal avenues available to them, such as challenging compromised judicial appointments, appealing unconstitutional decisions, and fighting arbitrary disciplinary proceedings.

By examining these two cases, we will assess the role of the CJEU and the ECtHR in protecting judges' rights and independence. This analysis will enable a reflection on whether these institutions provide sufficient support to curb attacks on judicial independence. Drawing parallels with other cases, we will highlight the importance of supranational legal frameworks in safeguarding judicial independence and the potential of European courts to uphold democratic principles across Europe. The persistent threats to judicial independence, even after *PiS* lost power, illustrate the necessity for robust supranational legal mechanisms. These frameworks offer critical support for judges facing political persecution and ensure the principles of judicial independence and the rule of law are upheld. The role of the CJEU and the ECtHR in delivering binding judgments that protect judges' rights is crucial for Poland and sets a precedent for other nations experiencing similar challenges. Judges can strategically use these supranational legal tools to resist and counteract the erosion of judicial independence, maintaining the integrity of the judiciary and upholding democratic principles across Europe

2.3 To Give a Judge a Cause: Strategic Use of Preliminary Reference at the Court of Justice of the European Union

2.3.1 Circumstances of the Referral to the Court of Justice of the European Union

In the following subsection, the context in which the request for a preliminary ruling in *WŻ* was made will be laid out, followed by a substantive analysis of the Court's judgment. Specifically, the reasoning concerning the judicial nomination procedure by the new NCJ and the legality of non-consensual intra- and inter-court transfers will be examined. Second, the ruling will be briefly contrasted with previous ECtHR jurisprudence and contextualised with the Polish Constitutional Tribunal's ruling in *K 3/21*. A summary of the relevant findings will follow, along with a reflection on the prospects of redress for an individual judge seeking to preserve his — and his country's — judicial independence, as they emerge from the CJEU ruling. This will include an inquiry into how the ruling plays out from the perspective of the European human rights framework's capacity to contain the attacks on the judicial independence of Polish judges.

As outlined in the previous section, one of the disciplinary measures taken against Judge Żurek as a part of *PiS*' repressive strategy was his forced transfer from the civil division ruling on appeal to the same division ruling at first instance at the Krakow Regional Court. Such non-consensual transfer can not only establish an unjustified demotion, but can be also used as a mean to exercise control over the scope of activities to be adjudicated by a judge, including the content of the judicial decisions.[167] Moreover, it can be used to force the judge in question into working in an area outside of his or her expertise while taking any potential error as a pretence for the initiation of disciplinary proceedings.[168] Thus, non-consensual transfers warrant special guarantees to ensure they are not arbitrary or politically motivated.

This is because arbitrary or politically motivated transfers undermine the independence of the judiciary by exerting undue pressure on judges to conform to the expectations or demands of the ruling party. When judges are subjected to such transfers, they may feel compelled to deliver judgments that favour the government to avoid further punitive actions, thereby

---

[167] *C-487/19 WŻ (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* [2021] European Court of Justice ECLI:EU:C:2021:798.
[168] Bober and others (n 74).

compromising their impartiality. Additionally, the fear of being transferred can deter judges from ruling against the interests of those in power, effectively stifling judicial dissent and critical oversight. Therefore, ensuring that non-consensual transfers are justified, transparent, and free from political influence is crucial in maintaining the integrity of the judiciary and upholding the rule of law.

To provide a more detailed account of the context, the decision to transfer Judge Żurek was made by the court president Pawełczyk-Woicka, who was appointed to the function on a discretionary basis by the MoJ.[169] Judge Żurek appealed against this decision to the NCJ in accordance with the applicable law. However, the NCJ, which had been heavily politicised due to earlier reforms, dismissed his challenge. Notably, the NCJ asserted that there was no need to adjudicate on the matter in the first place.[170] Furthermore, Pawełczyk-Woicka, the court president who issued the transfer resolution, sat on the NCJ bench, effectively reviewing her own decision.[171] To offer an additional interlude, despite Judge Żurek's lawful right to appeal the decision, one of the subsequent disciplinary charges brought against him was based on the grounds of his "alleged failure to promptly take up his duties in the new court division and instead appealing the transfer"[172], thereby violating the 'dignity of the judge's office'.[173] This captures the somewhat inconsequential nature of the legal struggle of judges in an environment where courts are prone to political interventionism.

Determined to have the resolution on his intra-court transfer properly reviewed, Judge Żurek sued Pawełczyk-Woicka for mobbing at the Katowice Regional Court, filing a motion for injunctive relief while the case was pending. To no avail, however, as the motion was swiftly rejected by the Court.[174] He proceeded to appeal to the Supreme Court, filing another motion for injunctive relief. This time around, he requested a recusal of the entire bench of the Chamber of Extraordinary Control and Public Affairs due to an alleged lack of guarantees of independence and impartiality resulting from the manner of their appointment.[175] The latter was set up as a part of a larger Supreme Court reform, and was closely linked to the NCJ, hence

---

[169] Jakub Jaraczewski, 'Op-Ed: One Man against the System – the Story of Judge Waldemar Żurek and the Court of Justice's Judgment in W.Ż.' [2021] EU Law Live <https://eulawlive-com.ezproxy.leidenuniv.nl/op-ed-one-man-against-the-system-the-story-of-judge-waldemar-zurek-and-the-court-of-justices-judgment-in-w-z-by-jakub-jaraczewski/> accessed 23 June 2022.
[170] *W.Ż.* (n 167).
[171] Siedlecka (n 86).
[172] ibid.
[173] Bober and others (n 74).
[174] Siedlecka (n 86).
[175] *W.Ż.* (n 167).

likely to dismiss his case due to its subordination to *PiS*. After protracting the takeover of the case for almost six months, a prompt dismissal of the appeal as inadmissible was handed down singlehandedly by Judge Stępkowski.[176] The latter had been appointed to the Supreme Court after Judge Żurek had challenged the entire bench, as a result of which he was not 'covered' by Judge Żurek's challenge. Despite lacking access to the case file and never having heard the applicant, the appeal was dismissed in violation of the applicable procedural provisions because the application for recusal had not been addressed at all, thereby in principle preventing the delivery of any decision.[177]

It should be reiterated that Judge Stępkowski was appointed by the Polish president on the basis of a resolution issued by the NCJ. He happens to be a PiS appointee, former Undersecretary of State in the Ministry of Foreign Affairs and also the co-founder and first president of Ordo Juris Institute of Legal Culture, which is known as "ultra-Catholic, anti-abortion and LGBT anti-rights organization"[178]. Interestingly, he was also one of three candidates nominated by the Polish government for the position of judge in the ECtHR. However, in January 2022, PACE rejected all the Polish candidates for judges due to Rule of law concerns.[179] At the material time, the procedure under which the judges in the Chamber of Extraordinary Control and Public Affairs were appointed for office had been subject to review by administrative courts.[180] Namely, those candidates that were not nominated to office by the NCJ, brought an appeal against the resolution at issue, and the Supreme Administrative Court ordered for the resolution to be suspended in the meantime. Yet, the president appointed the NCJ-proposed candidates into office regardless.[181] This gave rise to the circumstances which precipitated the Civil Chamber of the Supreme Court to refer a question to the CJEU concerning how particular provisions of EU law related to judicial appointments and independence should be interpreted in this case.[182]

The parallels drawn between the actions in Poland and similar tactics in other national jurisdictions underscore a broader issue within the EU, where political influences can

---

[176] Siedlecka (n 86).
[177] *W.Ż.* (n 167).
[178] Siedlecka (n 86).
[179] The First News, 'PACE Committee Calls for the Rejection of Polish Candidates for European Court' (2021) <https://www.thefirstnews.com/article/pace-committee-calls-for-the-rejection-of-polish-candidates-for-european-court-21239> accessed 14 February 2023.
[180] *W.Ż.* (n 167).
[181] ibid.
[182] Jaraczewski (n 169).

undermine judicial independence. Such strategic litigation is essential for bringing these issues to the fore and seeking redress through supranational judicial mechanisms like the CJEU and the ECtHR.

2.3.2 Question of Non-Consensual Transfers of Judges

2.3.2.1 Tactical framing of the preliminary question

Indeed, in response to the situation which unfolded before the Civil Chamber of the Supreme Court, it requested a preliminary reference to the CJEU pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU). The substantive issue at hand was whether intra- and inter-court transfers without the consent of the transferring judge are capable of undermining the principles of the irremovability of judges and judicial independence.[183] The question of practical relevance, however, was whether a Supreme Court judge appointed under circumstances such as those in the present case still held the status of a judge in that he constituted 'an independent and impartial tribunal (previously) established by law' within the meaning of EU law. And following that, should he not retain such status, whether the order at issue – one by which a judge had dismissed the action of another judge transferred against his will – would be in fact legally non-existent.[184]

In the CJEU's understanding, these questions related directly to the scope of Article 19 § 1 TEU.[185] It is worth taking into account that the wording of this Article does not explicitly refer to any particular institutional requirements of the judiciary such as 'independence', 'impartiality' or 'tribunal established by law'.[186] Yet, those are the attributes the Court derives its line of reasoning from, as will be illustrated below. The second subparagraph of Article 19 § 1, which is specifically invoked as encompassing these attributes, is technically concerned with the obligation of Member States to "provide *remedies sufficient* to ensure *effective legal protection* in the *fields covered by Union law* [emphasis added]."[187]

---

[183] *W.Ż.* (n 167).
[184] *Case C-487/19: Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 26 June 2019 — WŻ* (European Court of Justice).
[185] *Case C-487/19 - W.Ż.* (n 7) paras 102–104.
[186] *Cf.* The wording of the Article 6 § 1 ECHR explicitly provides for a right of everyone "(…) to a fair and public hearing within a reasonable time by an *independent* and *impartial tribunal established by law* [emphasis added]." The ECtHR refers to those attributes as 'institutional parameters', as can be seen in the *Guide on Article 6 of the Convention – Right to a fair trial (civil limb)*.
[187] European Union, 'Consolidated Version of the Treaty on European Union 2008/C 115/01' (2007) <https://www.refworld.org/docid/4b179f222.html> accessed 24 June 2022.

National courts play a strategic role in influencing legal developments through their procedural behaviour in the referral process, starting from the decision to refer.[188] They have the ability to shape outcomes by submitting pre-emptive opinions, even though procedural guidelines do not mandate, suggest, or prohibit such actions. With the goal of achieving specific policy objectives, courts strategically leverage aspects like the phrasing, scope, and timing of their submissions.[189] In a recent case, the framing of the preliminary question was strategically timed and scoped. By focusing on whether intra- and inter-court transfers without a judge's consent undermine principles of irremovability and judicial independence, the referring court directly challenged systemic changes implemented by the Polish government..[190]

This was particularly relevant as it pertained to an order of inadmissibility made by a judge of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court — appointed by the President of the Republic of Poland despite a court decision suspending the effects of the NCJ's resolution pending a CJEU ruling.[191] This approach was timely, as similar issues were affecting other judges,[192] and it highlighted the broader implications for judicial independence. The preliminary reference sought to clarify the EU standards on these issues, aiming to elicit a ruling that would not only address the specific case but also set a precedent that would make it possible to protect judges against politically motivated reassignments.[193]

Furthermore, by framing the question in this manner, the reference sought to challenge the legality of judicial appointments made by compromised bodies such as the NCJ and question the validity of their decisions. This strategic framing ensured that the CJEU would provide guidance on these fundamental principles, thereby strengthening the judicial framework within the EU and offering protection to judges facing similar challenges in other jurisdictions.[194] It underlined the importance of supranational legal tools as a form of judicial resistance against rule of law backsliding, reinforcing the safeguards necessary for maintaining judicial independence across Member States.

---

[188] Stacy A Nyikos, 'Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions' (2006) 45 European Journal of Political Research 527.
[189] ibid.
[190] *Case C-487/19* (n 184).
[191] ibid.
[192] *Tuleya v Poland* [2023] ECtHR No. 21181/19 and 51751/20; Wolne Sądy (n 74).
[193] *Case C-487/19* (n 184).
[194] PACE (n 4); Mijatović (n 30).

2.3.2.2 Role of Article 19 § 1 through a rule of law prism

There has been quite a lot of discussion on the scope of Article 19 § 1 TEU and its interaction with Article 2 TEU,[195] Articles 47[196] and 51[197] of the Charter of Fundamental Rights of the European Union (CFR).[198] And it has been largely through the Court's previous jurisprudence that the provision has been given its current shape. The principle established in the CJEU's interim order in the *Białowieża Forest*,[199] where the Court held that imposing a penalty payment for non-compliance with interim measures is essential to ensure the effective application of EU law — an integral aspect of the rule of law — introduced a new rule of law-linked sanction to address a gap in the sanctions scheme under the TFEU.[200] This approach was subsequently reinforced in the *Associação Sindical dos Juízes Portugueses* (*ASJP*) case, also known as the *Portuguese judges* case.

Namely, the Court held in *ASJP* that as long as the judicial bodies in Member States may rule as 'courts or tribunals' within the meaning of EU law, and on the application or interpretation of EU law, they must meet the criteria of 'effective judicial protection'.[201] This translates into a guarantee of independence at the level of domestic courts, particularly their wholly autonomous exercise of judicial functions without subordination to other bodies, without taking instructions from other sources or external interventions "liable to impair the independent judgment of its members and to influence their decisions"[202].

Therefore, the substantive content of Article 19 § 1 had shifted from a mere obligation to set up a system of remedies that would ensure 'effective judicial review' to a more substance-

---

[195] Article 2 TEU is the provision laying down the 'EU values' on which the organisation is founded, among which it lists 'the rule of law'. While being rather open-ended and purposefully non-exhaustive, the CJEU recently attempted to clarify its scope in the 'Conditionality Regulation cases' against Hungary and Poland. Namely, in *C-156/21 Hungary v Parliament and Council*, it referred to its "long-standing" case law on it. In § 160, it stated that Article 19 TEU gives "concrete expression to" and protects "certain aspects of" [the Rule of law], which is to be construed in the light of Article 47 CFR. It also held that "certain aspects" [of the Rule of law] are protected by Articles 47 to 50 CFR. In § 229, it stated that [rule of law] includes the principle of non-discrimination and the protection of fundamental rights, while its scope, according to §§ 230 and 233 can be further influenced by other standards, including those of the Venice Commission and the ECtHR's jurisprudence [on Article 6 ECHR].
[196] Article 47 CFR, which has the status of primary EU law by virtue of the Treaty of Lisbon, concerns the right to an effective remedy and to a fair trial. It uses the wording "(…) entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law".
[197] Without going into detail, Article 51 limits the CFR's application to when States "are implementing EU law".
[198] Andrés Sáenz de Santa María (n 22).
[199] *Case C-441/17 R Commission v Poland (Białowieża Forest)* [2018] European Court of Justice EU:C:2017:877.
[200] Pål Wennerås, 'Saving a Forest and the Rule of Law: Commission v. Poland' (2019) 56 Common Market Law Review 541.
[201] *Associação Sindical dos Juízes Portugueses* [2018] European Court of Justice C-64/16 [37–45].
[202] ibid 44.

based obligation of 'respect for judicial independence'.[203] It is crucial to emphasise that this does not imply that the CJEU overstepped its competence by inventing new obligations not already present in the Treaties. Rather, it clarified what was inherently part of the Treaties and necessary to give them meaningful effect, doing so in a strategic manner. *PiS*' has shown it is apt to play the extension of mandate argument to its benefit,[204] but the legal reasoning behind is not convincing. The Court's proactive response was essential to effectively uphold the existing Treaty obligations, thereby laying the ground for a more robust protection of judicial independence across the EU.

Analysts considered the *ASJP* judgment as strategically devised to safeguard against future rule of law cases potentially arising in Hungary and Poland.[205] In their opinion, the case contained an unnecessarily detailed interpretation — at least for the purposes of a case concerning remuneration — of what constitutes an 'independent court'. In this sense, it seemed to be laying ground for what was threatening to come next.[206] Indeed, the *ASJP* judgment crystallised in *Commission v Poland*,[207] whereby the CJEU ruled on the incompatibility of the Supreme Court reform in Poland (which led to the lowering of the retirement age of judges) with EU law, considering it to be in violation of the obligation to respect for judicial independence.[208]

2.3.2.3 Legality of non-consensual intra- and inter-court transfers

In this particular case, the Court had to make an assessment of how, in light of Article 19 § 1, one judge is to establish whether his peers remain independent. It also had to examine how one is supposed to determine the legality of judicial appointments should they be made by a body of questionable independence such as the NCJ.[209] Reiterating the role of judicial

---

[203] Aida Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence' (2020) 27 Maastricht Journal of European and Comparative Law 105.
[204] 'Statement by Prime Minister Mateusz Morawiecki in the European Parliament' (*The Chancellery of the Prime Minister of Poland*, 2021) <https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament> accessed 13 July 2023.
[205] Laurent Pech and Sébastien Platon, 'EU Law Analysis: Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical Dos Juízes Portugueses' (*EU Law Analysis*, 13 March 2018) <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html> accessed 13 June 2022; Michal Ovádek, 'Has the CJEU just Reconfigured the EU Constitutional Order?' (*Verfassungsblog on Matters Constitutional*, 2018) <https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/> accessed 25 June 2022.
[206] Michał Krajewski, 'Associação Sindical Dos Juízes Portugueses: The Court of Justice and Athena's Dilemma' (2018) 2018 3 European Papers - A Journal on Law and Integration 395.
[207] Case C-619/18 Commission v Poland (Independence of the Supreme Court) (CJEU).
[208] Torres Pérez (n 126).
[209] *Case C-487/19 - W.Ż.* (n 7) paras 120–121.

independence, which is the 'essence of effective judicial protection' and the 'fundamental right to fair trial', it held that those individuals tasked with adjudicating clearly must enjoy certain guarantees including one against removal from office.[210] An exception to this principle must be thus justified by a legitimate aim and be proportionate to it to not generate any suspicion as to other factors in play except for the interests of administration of justice. Dismissals should occur when the judge in question is unfit to remain in office either for reasons of incapacity or a serious breach of professional obligations. Either way, the rules governing removal from office must be laid down with sufficient clarity, including the right to defence and the right to challenge the decision on transfer made by the disciplinary body.[211] Indeed, the existence of reliable procedural rules and review system is key to preventing any risk of the procedure of removal "being used as a system of political control of the content of judicial decisions".[212]

Following this line of reasoning, the CJEU ruled that forced inter and intra-court transfers can undermine the principles of the irremovability of judges and judicial independence, and thus amount to a violation of Article 19 § 1. In particular, they may be used as a manner of control over the content of judicial decisions and may affect the scope of activities one judge is to adjudicate upon. Hence, they bear relevance for the allocation of cases itself, and may have an effect on life and career of the judges concerned, i.e., can be punitive in nature.[213] The Court thus explicitly recognised the danger of non-consensual transfers, asserting in which ways they can be potentially abused in a situation where the principle of separation of powers is under challenge.

2.3.2.4 Legality of judicial nomination procedure including the new National Council of Judiciary

Of even further-reaching significance, however, is the Court's deliberation on the status of the Supreme Court judge adjudicating Judge Żurek's case — Judge Stępkowski. Whilst it is ultimately within the national court's realm to assess the compatibility of the conditions of judicial appointment with EU law in particular cases falling under its jurisdiction (as it happens to be the case here), the CJEU noted that to ensure effective judicial remedy as required by Article 19 § 1, 'an independent and impartial' tribunal must be able to review the validity of

---

[210] *Case C-487/19 - W.Ż.* (n 7), paras 108–111.
[211] Ibid, paras 112–113.
[212] Ibid, paras 114.
[213] Ibid, paras 114–115.

the decision *not to adjudicate*.[214] In fact, further on in § 144, it set forth that through relying on its previous reasoning adopted in *A.B. and Others*, the referring court is bound to, where a clear breach of Article 19 § 1 had been established, 'disapply' the applicable provisions of the national law and instead apply those national provisions 'previously in force' by way of interpreting the principle of primacy of EU law.

Highlighting that the judicial appointment in question clearly occurred in breach of the Supreme Administrative Court's order, which had previously ruled on the suspension of the NCJ resolution that formed the legal basis for Judge Stępkowski's appointment, the key question here was not whether such a breach of national provisions had occurred. Essentially, the issue at hand was not even whether the legislation governing the NCJ was disregarded. Rather, the concern of the referring court was that the legislation *itself* disregarded certain provisions of both the Polish Constitution and EU law.[215] The CJEU asserted that the referring court thus may, with regard to the nature of the changes to the composition of the judicial body entrusted with nominations for appointment of judges into office, decide that there are reasonable doubts as to the appointed judges' independence.[216]

In conclusion, the Court established that if a single judge had been appointed:

(i) in breach of 'fundamental rules concerning the establishment and functioning of the judicial system';

(ii) and in such a manner which undermines the integrity of the outcome, namely in that it gives reasonable doubt as to the independence and impartiality of the judge in question, it follows that an order by which a court, ruling at last instance and comprising a single judge, had dismissed an application for recusal, must be declared null and void for it can no longer be regarded as given by a 'tribunal previously established by law'.[217]

Importantly, in § 160, the Court dismissed the principle of legal certainty and finality of a decision as grounds precluding the review of decisions made by judicial bodies that do not

---

[214] ibid 121.
[215] ibid 136.
[216] ibid 153.
[217] In § 161, the Court states that Article 19 § 1 TEU and the principle of the primacy of EU law must be interpreted as "meaning that a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply EU law challenges a decision to transfer him without his consent, must (…) declare to be null and void an order by which a court, ruling at last instance and comprising a single judge, has dismissed that action."

meet the requirements of an 'independent and impartial tribunal previously established by law'. According to the CJEU, these principles should have no bearing on a court such as the Civil Chamber of the Supreme Court declaring such order 'null and void'.[218]

2.3.3 Empowering the Bench: Wider Context of Judges Leveraging the Preliminary Ruling Procedure

The *W.Ż* judgment exemplifies a broader trend where judges assume the role of defenders by strategically employing the preliminary ruling mechanism to counteract national backsliding on the rule of law.[219] Since 2017, Polish courts of various instances have been strategically initiating requests for preliminary rulings. The Supreme Court made its first request in August 2018, followed by six more in 2018 and two in 2019. In parallel, local and regional courts also pursued similar actions, focusing on issues including forced judicial retirement, the legality of the new Disciplinary Chamber, and the independence of the NCJ.[220] These actions aimed to alert the CJEU to ongoing legal conflicts and seek its endorsement for clarifications at the national level. Polish legal scholars were hopeful that these efforts could protect the "essential and delicate enforcement of shared values"[221]. Furthermore, these initiatives also highlight the CJEU's role in safeguarding judicial independence and upholding the rule of law across the EU.

Noteworthy among these requests for preliminary rulings are the landmark cases resulting from preliminary references submitted by Polish courts regarding the clarification of scope and interaction between Article 19(1) TEU and 47 CFR.[222] These include the landmark *Joined Cases C-585/18*, *C-624/18*, and *C-625/18* (*A.K. and others*), which addressed the independence of the Disciplinary Chamber of the Supreme Court,[223] and the *Joined Cases C-558/18* and *C-563/18* (*Miasto Łowicz and Prokurator Generalny*), which sent a warning signal

---

[218] Case C-487/19 - W.Ż. (n 7) para 160.
[219] Matthes (n 13).
[220] ibid.
[221] Alicja Sikora, 'EU Law Analysis: The CJEU and the Rule of Law in Poland: Note on the Polish Supreme Court Preliminary Ruling Request of 2 August 2018' (*EU Law Analysis*, 4 August 2018) <http://eulawanalysis.blogspot.com/2018/08/the-cjeu-and-rule-of-law-in-poland-note.html> accessed 3 July 2024.
[222] Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (20 May 2021) <https://papers.ssrn.com/abstract=3850308> accessed 17 June 2024.
[223] *C-585/18 AK (Independence of the Disciplinary Chamber of the Supreme Court)* [2019] European Court of Justice ECLI:EU:C:2019:982.

that the new disciplinary regime for judges cannot be used as a means of intimidation, as further detailed below.[224]

In the reference for preliminary ruling in *A.K. and others*, judges of the referring Supreme Court raised concerns about their right to effective judicial protection under Directive 2000/78, which prohibits age discrimination and guarantees the right to an effective remedy, as well as under Article 47 CFR. The dispute centred on the new Law on the Supreme Court, which vested exclusive jurisdiction in the newly formed Disciplinary Chamber and how it related to earlier lowering of retirement age of judges.[225]

The CJEU emphasised that independence and impartiality are fundamental to effective judicial protection, stipulating that any court incapable of ensuring these safeguards must be barred from applying EU law.[226] While deferring the final assessment to the Polish Supreme Court, the CJEU highlighted potential issues regarding the Disciplinary Chamber's jurisdiction, composition, and formation, underscoring the need for independence from external influences. Namely, it held that in order to assess whether a judge constitutes an 'independent court established by law' in the meaning of EU law, relevant circumstances must be taken into account, including the context of the appointment in a procedure involving bodies independent of political influence. In §134, it emphasised that "it is still necessary [for the national court] to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges."[227]

Although the Court ultimately deemed both requests submitted by the two Polish district Courts inadmissible in *Miasto Łowicz and Prokurator Generalny,* the underlying concerns raised by the referring courts prompted an important message to the Polish authorities.[228] The referring Courts expressed concerns that disciplinary proceedings could be brought against judges if those judges were to give a ruling if their rulings did not align with the preferences of the ruling party.[229] This occurred against the backdrop of a broader context where judicial

---

[224] *C-558/18 - Miasto Łowicz (Régime disciplinaire concernant les magistrats)* [2020] European Court of Justice ECLI:EU:C:2020:234.
[225] A.K. and others, para 66.
[226] *A.K. and others*, paras 120, 166, 171.
[227] A.K. and others, para 134.
[228] Pech and Kochenov (n 222).
[229] *Miasto Łowicz*, paras 6-7.

discipline was misused, posing a threat to the objectivity and impartiality within the disciplinary framework and, consequently, affecting the independence of the referring courts. While dismissing the claim itself as not having a direct link to EU law,[230] the Court stressed that making a preliminary reference cannot expose a national judge to disciplinary actions.

In fact, the mere prospect of being the subject of disciplinary action as a result of "making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges"[231]. Any actions taken against the referring courts due to their reference *would* constitute a violation of EU law. This stance reaffirms that even in cases where the Court finds the request inadmissible, judges can strategically utilise the preliminary ruling mechanism to provoke a response and signal EU-level concerns over national judicial independence. Thus, the CJEU's cautionary message in this instance underlined CJEU's role in safeguarding the integrity of judicial processes.

These judgments not only clarify the obligation to ensure national courts provide effective judicial protection within the meaning of Article 19 (1), but also highlight a trend where Article 267 TFEU is used as a self-defence mechanism for national judges under threat.[232] This trend is particularly important in a context where European Commission's cautious and selective use of infringement actions to uphold the EU's fundamental values threatens to maintain the *status quo*.[233] It is, however, important to note that following *A.K.*, the Polish authorities not only neglected to adhere to the subsequent Interim order in *C-791/19 R* concerning the Disciplinary Chamber, but also enacted legislation to nullify the legal effect of the preliminary ruling in *A.K.* The Disciplinary Chamber itself proceeded to unlawfully invalidate the *A.K.* preliminary ruling by stripping it of any legal authority within the Polish legal system.[234] This only highlights the importance of stringent judicial safeguards, as well as the role of judges in their development.

---

[230] Miasto Łowicz, para 60.
[231] Miasto Łowicz, para 58.
[232] Pech and Kochenov (n 222).
[233] ibid.
[234] ibid.

2.4 Interplay Between the Court of Justice and the European Court of Human Rights and Its Impacts on Judicial Independence Thresholds

2.4.1 Some Reflections on Judicial Precedent in the Context of the Two Courts

The CJEU's status may be different from that of the ECtHR as the EU law makes up the European supranational legal order, but the HCP of the CoE conceded to the ECtHR's jurisdiction by virtue of acceding to the ECHR, which makes its judgments legally binding upon them. While neither the CJEU nor the ECtHR are bound by the doctrine of precedent in the same way Common law systems do, in practice, they have employed *de facto* precedent on the grounds of legal certainty, which enables them to establish a coherent line of reasoning that is subsequently refined, clarified, bolstered, or challenged in subsequent jurisprudence.[235]

At times, a case may serve to assess the political implications of a particular line of reasoning, as they are inherently intertwined with the political context in which they operate.[236] By articulating broad, open-ended principles, the Courts occasionally launch what can be likened to pilot schemes or "trial balloons"[237], gauging initial reactions and potential resistance from national jurisdictions.[238] The Courts sometimes develop principles over a longer period of time, either expanding on them or imposing limitations. While they can introduce new principles directly, they may later restrict their application to avoid open controversy, revisiting them later to reveal their full implications. This gradual approach spreads jurisprudential development strategically, often presenting significant principles initially as peripheral issues that later become pivotal legal doctrines.[239]

---

[235] Sanja Djajic, '"The Concept of Precedent at the European Court for Human Rights and Nation-al Responses to the Doctrine With Special Reference to the Constitutional Court of the Republic of Serbia"' (2018) <https://papers.ssrn.com/abstract=3503002> accessed 19 June 2024; M Payandeh, 'Precedents and Case-Based Reasoning in the European Court of Justice' (2014) 12 International Journal of Constitutional Law 832.
[236] Stiansen and Voeten (n 26); Blauberger and Martinsen (n 39).
[237] Marrie De Somer, 'Precedents and Judicial Politics – Why Studying the CJEU Requires a Long-Term Perspective' (*EU Immigration and Asylum Law and Policy*, 2018) <https://eumigrationlawblog.eu/precedents-and-judicial-politics-why-studying-the-cjeu-requires-a-long-term-perspective/> accessed 10 June 2024.
[238] Bojarski (n 77); Mikael Rask Madsen, 'Resistance to the European Court of Human Rights: The Institutional and Sociological Consequences of Principled Resistance' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?*, vol 285 (Springer Berlin Heidelberg 2019) <http://link.springer.com/10.1007/978-3-662-58986-1_2> accessed 7 January 2023.
[239] De Somer (n 237).

While the ECtHR's jurisprudence has historically been influential in shaping the CJEU's approach to fundamental rights, the introduction of the CFR has ushered in a new era marked by a certain complexity. The CJEU now references ECtHR case-law in a less structured manner, prompting questions about its role within the expanding body of CJEU fundamental rights jurisprudence.[240] Despite these shifts, the ECtHR's rulings continue to validate and inform the CJEU's legal interpretations, serving as a crucial reference point whenever the CJEU requires it. The human rights standards established by the ECHR remain foundational for the CJEU, guiding its decisions alongside other legal considerations.[241]

Answers to similar questions as those the CJEU addressed in *WŻ* were previously construed in Strasbourg. Whether the CJEU and the ECtHR could act as a joint 'European human rights tandem' has, however, been challenged in the past.[242] At times, the two courts seemed to rather be each other's rivals, and the reasoning adopted in their rulings thus often stood in stark contrast to each other.[243] In other cases, they seemed to find common ground and developed their reasoning alongside. Since the level of conformity between the two Courts in interpreting specific judicial independence thresholds may prove to have a substantial impact on their line of judicial reasoning and the very findings they come to, it is imperative to keep 'the bigger picture' in mind. None of the Courts exists in a legal vacuum – they interact, they enrich each other and they attract attention – all of which intensifies political accountability, and thus indirectly incentivises compliance.

Studying the interplay between the CJEU and the ECtHR and its impacts on judicial independence thresholds is essential for comprehending how fundamental rights and principles are interpreted and applied across Europe. This analysis helps evaluate whether their judgments align to strengthen judicial independence uniformly or create discrepancies that might complicate legal proceedings for applicants and citizens seeking justice. Examining their synergy is essential to assess whether it contributes to harmonising judicial independence

---

[240] Romain Tinière, 'The Use of ECtHR Case Law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy?' (2023) 2023 8 European Papers - A Journal on Law and Integration 323330.
[241] ibid.
[242] Kanstantsin Dzehtsiarou and others (eds), Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR (2016).
[243] To illustrate, the CJEU ruled in *Hoechst AG v Commission of the European Communities* that there is no link between the notion of private life and business premises (§ 17–18). In a response, the ECtHR found in *Niemetz v. Germany* that the concept of private life should not exclude activities of a professional or business nature, finding that a lawyer's office falls under the scope of the protection provided by the Article 8 ECHR (§ 29). Recently, the ECtHR's apprehension of bulk interception of data in *Big Brother Watch v UK* was very different from the CJEU's approach in *C-623/17 Privacy International*, *C-511/18 La Quadrature du Net a.o.*, *C-512/18 French Data Network a.o.* or *C-520/18 Ordre des barreaux francophones et germanophone a.o.*

standards in Europe. By exchanging legal principles and jurisprudential approaches, the CJEU and the ECtHR have the potential to strengthen the consistency and robustness of judicial independence protections across EU member states. However, it is also important to consider whether this collaboration could lead to divergent standards that may hinder the effective protection of judicial independence.

2.4.2 Unifying Standards to Strengthen Judicial Safeguards

2.4.2.1 Legal certainty and consistency of interpretation

The collaborative relationship between the CJEU and the ECtHR offers a distinctive opportunity to strengthen human rights protection and reinforce standards of judicial independence across the European judicial landscape.[244] The exchange of best practices between these two paramount institutions enables a cross-fertilisation of legal principles. As the CJEU interprets and applies the EU law, and the ECtHR safeguards fundamental human rights, their mutual interplay allows for a more comprehensive and harmonised understanding of the intersection between the EU legal standards and human rights protections.[245] This interplay not only fortifies the consistency of legal interpretation but also contributes to the refinement of judicial practices. By fostering mutual reinforcement, these courts collectively contribute to the evolution of a robust and cohesive framework that upholds the rule of law and safeguards the fundamental rights of individuals within the EU. This collaborative dynamic serves as a cornerstone in the continual advancement of legal standards, promoting a judiciary that is not only vigilant in upholding human rights but also resilient in defending its own independence.

The importance of consistency in legal interpretation becomes particularly paramount when the CJEU and the ECtHR collaborate and draw upon each other's line of argumentation.[246] A consistent legal interpretation ensures predictability and coherence in the application of legal principles. When these two influential courts align their interpretations, it creates a harmonious and unified approach to addressing legal questions, fostering legal certainty for individuals, businesses, and governments within the European Union. Consistency

---

[244] Karlsson (n 47).
[245] Amalie Frese and Henrik Palmer Olsen, 'Spelling It Out−Convergence and Divergence in the Judicial Dialogue between Cjeu and ECtHR' (2019) 88 Nordic Journal of International Law 429.
[246] Andrés Sáenz de Santa María (n 35); Braithwaite, Harby and Miletić (n 31).

in legal interpretation also promotes the development of a robust legal framework. By relying on shared principles and mutually reinforcing arguments, the CJEU and ECtHR contribute to the evolution of a cohesive jurisprudential narrative. This shared understanding not only enhances the effectiveness of the European legal system but also facilitates the exchange of best practices, promoting a commitment to upholding fundamental rights and the rule of law.[247]

Moreover, a consistent legal interpretation serves as a powerful tool for advancing judicial independence. When both courts adhere to a coherent legal reasoning, it strengthens the perception of a judiciary that is impartial, fair, and free from external influence. This, in turn, enhances public trust in the legal system, reinforcing the overall legitimacy of the judiciary and its role in safeguarding fundamental rights. The importance of consistency in legal interpretation, especially in the collaborative efforts of the CJEU and ECtHR, lies in its ability to provide legal clarity, foster a harmonised legal framework, and bolster the perception of an independent and trustworthy judiciary within the European Union.

2.4.2.2 Application of higher thresholds and resilience-building

In the *WŻ*, the CJEU not only specifically referred to Articles 6(1) and 13 ECHR to substantiate its findings, but cited the ECtHR's settled case law. In § 116, it emphasised the right pertaining to members of the judiciary to protection from 'arbitrary transfers' as a 'corollary to judicial independence', which in turn requires observation of procedural safeguards and the possibility to bring a legal challenge against the decision on transfer in order to ensure that no undue external pressure is taking place (*Bilgen v Turkey*, §§ 63, 96). In §§ 124–125, it elaborated on the reasoning from *Guðmundur Andri Ástráðsson v. Iceland* (hereinafter also referred to as *Ástráðsson v. Iceland*), a landmark judgment from 2020. In this judgment, the GC of the ECtHR examined whether the fact that Judge A.E. sat on the bench of the Court of Appeal which heard the applicant's appeal, translated into the deprivation of his right to have his trial heard by a 'tribunal established by law'.[248]

As a matter of fact, Judge A.E.'s appointment was deemed 'irregular' as it took effect in violation of the domestic procedural requirements on judicial appointments. The explicit recognition that the right to a 'tribunal established by law' in fact encompasses the *process of appointment* of judges, and that the "mere fact" that it has not been the case constitutes a breach

---

[247] Frese and Olsen (n 245).
[248] Ástráðsson v. Iceland (n 26) para 210.

under ECHR, constituted a big step forward in the ECtHR's interpretation of the so-called institutional benchmarks of Article 6 § 1 ECHR.[249] This set a precedent for future cases relating to the manner of judicial appointment.[250] In particular, it established a three-prong test used to determine whether irregularities in the appointment process were serious enough to violate the fundamental right to a 'tribunal established by law'. This test examines i) whether there has been a manifest breach of domestic law; ii) whether breaches of domestic law pertained to any fundamental rule of the judicial appointment procedure; and iii) whether the alleged violations of the right to a 'tribunal established by law' were effectively reviewed and remedied by the domestic courts.[251] In its later reasoning in *Simpson and HG*, the CJEU held that the right to the tribunal previously established by law, as guaranteed by Article 47 CFR, translates into the right of everyone, in principle, to challenge any violation of this right. Therefore, the EU Courts must be empowered to examine whether irregularities in the appointment process could result in a breach of this fundamental right.[252]

Without delving into additional pending or already adjudicated cases by the CJEU concerning matters pertinent to judicial independence in Poland, it is noteworthy that the European Commission initiated its initial infringement action based on unlawful judicial appointments to a national constitutional court against Poland.[253] According to the Commission, the appointments disregarded the "fundamental rules forming an integral part of the establishment and functioning of the system of constitutional review in the Member State"[254]. This, at least in its view, resulted in the Constitutional Tribunal at issue losing its status as a 'tribunal previously established by law' within the meaning of Article 19 § 1 TEU and Article 47 CFR.

Resilience in legal interpretation involves the ability to adapt and withstand challenges while maintaining the core principles of justice and human rights. By aligning their

---

[249] Xero Flor v. Poland (n 44); Reczkowicz v. Poland (n 76).
[250] Karlsson (n 47).
[251] *Ástráðsson v. Iceland* (n 48).
[252] *Simpson v HG*, para 55.
[253] European Commission, 'Rule of Law: Commission Launches Infringement Procedure' (*European Commission Press Corner*, 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070> accessed 26 June 2022.
[254] Steve Peers, 'EU Law Analysis: Update to the Commentary on the EU Charter of Fundamental Rights: Article 47 and the Rule of Law' (*EU Law Analysis*, 10 January 2022) <http://eulawanalysis.blogspot.com/2022/01/update-to-commentary-on-eu-charter-of.html> accessed 26 June 2022.

interpretations and reinforcing shared legal principles, as also illustrated through *Bosphorus*,[255] the ECtHR and the CJEU contribute to the development of a resilient legal infrastructure. This resilience is reflected in the judiciary's capacity to address emerging legal complexities, navigate evolving societal expectations,[256] and respond effectively to new challenges. While 'judicial activism' is often normatively portrayed as the Courts acting beyond their traditional boundaries, a more multileveled understanding reveals activism as an inherent feature of the CJEU due to its position in the European legal order. This demonstrates that it plays a crucial role in fostering resilience including by actively cooperating and interacting between the EU and its Member States, thus shaping the legal landscape dynamically.[257] Through their collaborative endeavours, the CJEU and ECtHR enhance the adaptability and endurance of the European legal system, ensuring its continued relevance and efficacy in safeguarding judicial independence. This 'resilience-building' process not only fortifies the judiciary's ability to weather external pressures but also underscores its commitment to upholding the rule of law and promoting enduring principles of justice.

2.4.3 The Pitfalls of Multiplication of Standards

The interplay between the CJEU and the ECtHR, however, also provides ground for situations that could inadvertently lead to a proliferation of legal standards.[258] This phenomenon introduces layers of complexity and ambiguity into the European legal landscape, potentially complicating matters for legal practitioners, individuals, and businesses alike who seek clarity and consistency. The divergence highlighted in recent case law, as discussed in scholarly analyses,[259] epitomises the risk of conflicting interpretations and standards across judicial independence cases. The CJEU's approach, particularly in instances where it may not adequately address violations of judicial independence or the legitimacy of judicial bodies under EU law, has raised concerns about consistency within the Union's legal framework. This

---

[255] In *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, the ECtHR developed the 'presumption of equivalent protection of fundamental rights afforded by EU law and by the Convention as a necessary compromise to hear cases involving EU law, acknowledging its lack of direct legal authority over such matters.

[256] This is also in line with the ECtHR's understanding of the ECHR as a living instrument evolving over time as established in *Tyrer v UK*.

[257] Valerie Dhooghe, Rosanne Franken and Tim Opgenhaffen, 'Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context' (2015) 20 Tilburg Law Review 122.

[258] Andrés Sáenz de Santa María (n 35).

[259] Jasper Krommendijk and Guus de Vries, 'Do Luxembourg and Strasbourg Trust Each Other? The Interaction Between the Court of Justice and the European Court of Human Rights in Cases Concerning Mutual Trust' [2021] European Journal of Human Rights 319.

is evident in situations such as the *Minister for Justice and Equality v. LM*, *Sharpston*, and *Getin Noble Bank* cases, where the CJEU's decisions have not aligned with the principles upheld by the ECtHR on fair trial rights and judicial independence.[260]

The consequences of such divergence are significant. Not only does it potentially lead to increased litigation and uncertainty for stakeholders operating within the EU, but it also poses challenges to the overarching goal of maintaining a unified and predictable legal environment. The problem lies particularly in the divergence, which risks undermining both the effectiveness of EU law and the coherence of the European system of fundamental rights protection.[261] Moving forward, as these courts navigate their collaborative relationship, there is a pressing need to mitigate the risk of conflicting standards. Achieving a harmonious balance that upholds the rule of law while respecting fundamental rights is paramount. Drawing lessons from European courts that have maintained principled positions on judicial legitimacy and human rights protections, such as the CJEU and ECHR, provides a pathway to preserving legal coherence within the EU. By adopting clearer and more consistent standards, the CJEU and ECtHR can contribute to a unified approach that safeguards judicial independence and reinforces the integrity of the European legal framework. While the interdependence of the CJEU and ECtHR is crucial for advancing European human rights protections, addressing the pitfalls of multiplying legal standards is essential to maintaining legal certainty and coherence. Striking a balance that respects both EU law imperatives and ECHR obligations will be pivotal in ensuring the continued effectiveness of the European legal order and protecting the rights of individuals across the Union.

2.4.4 The Implications and Relevance of 'Backlash' and 'Resistance' of National Courts

After the CJEU ruling in the *WŻ* case came out, the Polish PM Mateusz Morawiecki was quick to announce that it could potentially invalidate thousands of judgments based on an *ex post* assessment of how the particular judges adjudicating them were appointed to office.[262] This statement, whatever its motivation, clearly has its merit. There is no denying that, despite what the Court asserted in § 160 in respect of the principles of legal certainty and *res judicata*,

---

[260] Kochenov and Bárd (n 53).
[261] ibid.
[262] Piotr Macej Kaczyński, 'Court of Justice Slams Polish Judiciary Reform, Again' (*www.euractiv.com*, 7 October 2021) <https://www.euractiv.com/section/politics/short_news/court-of-justice-slams-polish-judiciary-reform-again/> accessed 25 June 2022.

subjecting decisions under review may undermine the latter, which paradoxically goes against the essence of the rule of law. However, in this case, emphasis should be placed on the lack of any kind of review of an order not to adjudicate which was simultaneously handed down in violation of another court's suspension order questioning the validity of the appointed judges. Accordingly, it follows from the clear lack of procedural safeguards, together with the documented politization of the NCJ, which gives reasonable doubts to the belief that its independence had been compromised,[263] that Polish courts must be in a position to review such orders. As long as a fair balance is struck between such judicial scrutiny, and the principles which are at the heart of rule of law, a review on a case-by-case basis is simply necessary in the context of rule of law backsliding in order to secure an appearance of independence. Drawing inspiration from the ECtHR, the three-prong test developed in *Ástráðsson* would ensure that the gravity of the issues at stake clearly legitimises such review and would thereby prevent its arbitrary use. The only matter of concern may be whether there will be an independent court left to conduct such review.[264]

The institutional crisis of the Polish Constitutional Tribunal has been up and running for some time now, and seems to only have gone from bad to worse.[265] It is difficult to establish whether there are any independent courts left in the country, or to what extent they remain independent, when in any event a handful of judges cannot save the shreds of a dismantled judiciary.[266] Legal experts in Poland and beyond assert that the Constitutional Tribunal has long lost its prerogative to decide on matters of constitutionality of law, and has embarked on a path of artificially creating legal issues to be solved in a manner the Government deems appropriate.[267] Perhaps most remarkably, the Court assessed the conformity of Articles 1 (establishment of the EU based on conferral of competences with the aim of creating and ever-closer union) and 19 (obligation of Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law') TEU – as interpreted by the CJEU – with the Polish Constitution in *K 3/21*, finding them in conflict.[268]

---

[263] Sadurski (n 1); Bober and others (n 2).
[264] Bober and others (n 2) 8.
[265] Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond' (n 5); Sadurski (n 25).
[266] Bárd (n 2).
[267] Fryderyk Zoll, Katarzyna Południak-Gierz and Wojciech Bańczyk, 'Primacy of EU Law and Jurisprudence of Polish Constitutional Tribunal: Recent Developmentsin the Light of the Polish Constitutional Tribunal's Case Law' (European Parliament 2022) <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf>.
[268] *K 3/21 Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union* (Constitutional Tribunal of Poland).

The judgment was delivered in response to a surprising – or not at all, if one considers the general climate in the country – motion filed by the Polish Prime Minister. The essence of the Court's argument is that the manner in which the CJEU interprets Article 1 TEU prevents Poland to act as an independent State, robbing its Constitution of the status of the highest legislative act, whereby the CJEU acts *ultra vires*. Similarly, according to the Court, the CJEU's appraisal of Article 19 TEU violates the Constitution by allowing the Polish courts to ignore constitutional provisions when adjudicating cases, to rule in line with those provisions which are no longer in place as a result of cancellation by parliament or the Court itself, and by laying down grounds for verifying the legality of judicial appointments of judges.[269] While the judgment explicitly says that, upon the condition that the EU does not act *ultra vires*, this judgment is not intended to question the principle of primacy of EU law, it is precisely what it does. A similar promise from a Member State's Constitutional Court in fact poses a direct challenge to the principle of primacy of EU law as such and has the potential of causing a domino effect far beyond a single country.[270]

Delivered by a panel of irregularly appointed 'fake' judges,[271] this judgment thus clearly seeks to provide 'fake' judges with a legal justification to ignore the line of case-law that does not fit the image of the current administration, and it simultaneously bans non-fake judges from invoking the judgments of the EU's most important judicial body in defence of the rule of law principles. To borrow from Lasek-Markey, the Government thereby conveniently obtains "all the answers it needed from a court it controls"[272]. Indeed, some analysts go as far as calling the ruling a legal 'Polexit', claiming it allows the judiciary to circumvent those provisions of EU law that would be seen as a constraint – which is in any event outside the competences of the Constitutional Tribunal – all while maintaining the benefits of EU membership.[273]

---

[269] Zoll, Południak-Gierz and Bańczyk (n 267).
[270] Anna Wójcik, 'Legal PolExit. Julia Przyłębska's Constitutional Tribunal Held That CJEU Judgments Are Incompatible with the Constitution' (*Rule of Law*, 8 October 2021) <https://ruleoflaw.pl/legal-polexit-julia-przylebskas-constitutional-tribunal-held-that-cjeu-judgments-are-incompatible-with-the-constitution/> accessed 27 June 2022.
[271] Zoll, Południak-Gierz and Bańczyk (n 267); Sadurski (n 25).
[272] Marta Lasek-Markey, 'Poland's Constitutional Tribunal on the Status of EU Law: The Polish Government Got All the Answers It Needed from a Court It Controls' (*European Law Blog*, 21 October 2021) <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/> accessed 6 January 2023.
[273] Peter Swiecicki, 'Why Is the Decision of the Constitutional Tribunal Such a Threat to the Rule of Law?' (*Rule of Law*, 18 October 2021) <https://ruleoflaw.pl/why-is-the-decision-of-the-constitutional-tribunal-such-a-threat-to-the-rule-of-law/> accessed 27 June 2022.

It should be stressed that for the CJEU, the principle of primacy is instrumental to ensuring the uniform application of EU law across the Member States, and it is equally important to values adjudication considering the whole system relies on Member States' compliance with the EU law as opposed to them challenging it on every turn. The danger here therefore lies in undermining the operation of the whole institution, and has adverse implications not only on the prospect of ensuring the observance of values, but all of EU *acquis*. Where the presumption of compliance with the CJEU judgments, or at the very least the foundational principles of the EU can no longer be secured, the EU's capacity to perform basic functions – let alone adjudicate on its values – is called into question. What can be only called the resulting institutional weakening may then prove devastating in the long run.

According to legal analysts, this judgment aims for the country to circumvent the "constraints of EU law while formally remaining a Member State"[274], and has the characteristics of a legal 'Polexit'.[275] Although the line of reasoning seems weak at best, Poland now procured a 'legal' argument it can put forward any time the EU institutions seek to sanction its departure from Rule of law – as the EU Commission did by requesting a fine of one million EUR per day for its non-compliance with the CJEU ruling concerning the suspension of the Disciplinary Chamber.[276] Essentially, though, the judgment establishes a legal basis "for ignoring the line of case law of which the *W.Ż.* judgment is part – and for attacking Polish judges who would refuse to follow the Constitutional Tribunal and continue to apply EU law"[277]. In this context, the *Case C-487/19 – WŻ* becomes even more relevant, not only because it affirms the primacy of EU law and provides a detailed legal reasoning challenging the independence of Polish courts, but also specifically in relation to Judge Żurek. On the same day the *K 3/21* ruling was delivered, Judge Żurek ruled on the unlawful appointment of three Supreme Court judges, following previous CJEU judgments and disregarding the *K 3/21* ruling altogether, which was according to some scholars the only reasonable solution to the 'legal reasoning' it had raised.[278]

---

[274] Peter Swiecicki, 'Why Is the Decision of the Constitutional Tribunal Such a Threat to the Rule of Law?' (*Rule of Law*, 18 October 2021) <https://ruleoflaw.pl/why-is-the-decision-of-the-constitutional-tribunal-such-a-threat-to-the-rule-of-law/> accessed 27 June 2022.
[275] Wójcik, 'Legal PolExit. Julia Przyłębska's Constitutional Tribunal Held That CJEU Judgments Are Incompatible with the Constitution' (n 270).
[276] Wójcik, 'Legal PolExit. Julia Przyłębska's Constitutional Tribunal Held That CJEU Judgments Are Incompatible with the Constitution' (n 152).
[277] Jaraczewski (n 102).
[278] ibid.

2.5 Summary and Reflections

The judgment in *WŻ* is another example of the Luxembourg court attempting to safeguard rule of law in the EU Member States. In response to the Civil Chamber of the Supreme Court' preliminary reference, it shed light on how the legality of non-consensual intra- and inter-court transfers, and judicial nomination procedure by the new NCJ, should be interpreted in light of EU law. In particular, it noted that forced transfers of judges may be liable to undermine the principles of their irremovability and of judicial independence. It also laid down the circumstances under which the Polish courts may find that a particular judge no longer translates into 'an independent and impartial tribunal previously established by law', and declare an order made by such a judge 'null and void' even if it is considered final.

Having established that the CJEU and the ECtHR may present a common front in tackling the attacks on the independence of Polish judges, the ECtHR's jurisprudence may reinforce the authority of the CJEU judgments, and apart from contributing to legal certainty, may also result in better prospects of redress. This holds true for judges who are in a position to adjudicate on cases in 'captured' judiciaries, judges who are in a position to file requests for preliminary references, but also individuals who may rely on the findings adopted by both the CJEU and the ECtHR. It also occurs against the backdrop of a wider trend where judges strategically use the preliminary ruling mechanism to defend against national rule of law backsliding, addressing issues such as forced judicial retirement, the legality of the new Disciplinary Chamber, and the independence of the NCJ.

While the CJEU ruling in *WŻ* marks a significant milestone in addressing judicial independence in Poland, its impact remains uncertain given the prevailing judicial climate, particularly highlighted by subsequent developments at the Polish Constitutional Tribunal in its decision *K 3/21*. The judgment can be viewed as a critical stance against ongoing attacks on judicial independence, yet its practical application may be constrained by political considerations. Nevertheless, while its direct influence on Judge Żurek's case may be limited, it provides a legal framework for judges facing similar challenges, particularly those appointed under contentious circumstances by the NCJ.

The CJEU's decision provides a basis for contesting the legitimacy of judges appointed during the *PiS* era, particularly within the Civil Chamber of the Supreme Court. This not only empowers judges to challenge their appointments but also clarifies the EU's commitment to upholding the rule of law, potentially serving as a benchmark for future administrations. In this

context, the European human rights framework, bolstered by CJEU jurisprudence, offers Polish judges authoritative interpretations of EU law concerning the issue of addressing the legality of an order of inadmissibility issued by a judge of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court appointed despite a court order suspending the effects of that resolution pending a preliminary ruling of the Court, and considering the judge's lack of independence and impartiality previously established by law. However, the effectiveness of these interpretations in addressing broader concerns raised by Polish judges through preliminary reference requests remains uncertain. The CJEU could have adopted stronger language or articulated a more expansive rationale encompassing a broader scope of issues. For instance, it could have addressed the underlying requirement of the 'independence' element under 'tribunal established by law'.

This could potentially strengthen its role in safeguarding judicial independence and the rule of law across member states, including Poland. However, it is essential to question whether greater intervention necessarily leads to greater effectiveness. This consideration is particularly pertinent in a political context where the government may deflect criticism by portraying CJEU rulings as external interference, thereby potentially undermining their impact. This scenario illustrates that a strategy of 'doing more' may not always translate into tangible changes on the ground. Alternatively, adopting a strategy of 'doing less', as suggested by the Court's approach, can be a calculated decision. When evaluating the ability of the CJEU and the ECtHR to mitigate attacks on judicial independence in Poland, it is crucial to weigh this perspective rather than simply faulting the CJEU for not pushing further.

2.6 To Give a Judge Hope: Leveraging Strasbourg Against Rule of Law Backsliding

2.6.1 Pre-existing Body of Jurisprudence on So-called Judicial Reforms

In the following subchapter, the ECtHR's judgment in *Żurek v. Poland* will be situated in the wider body of previous jurisprudence concerning applicants challenging the judicial reforms in Poland. Following that, a substantive analysis of the Court's reasoning will be developed in relation to its findings of violations of Articles 6 § 1 and 10 ECHR, and with an additional emphasis on whether the questions raised in this particular case are reminiscent of the settled case law or whether they bring new elements into play and hence introduce new standards. The context of implementation of *Baka v. Hungary*, as well as Poland's recent backslash against the ECtHR will be outlined in an attempt to provide a more realistic account of determining Judge Żurek's prospects of defending his and his country's independence, as they stem from the ruling. Lastly, a reflection on the ECtHR as part of the European Human Rights framework will be made for the purposes of inquiring whether it offers enough to tackle the attacks on the judicial independence of judges in Poland.

In 2021, the ECtHR issued a press release in relation to the Chamber's relinquishment of jurisdiction in favour of the GC in the case of *Grzęda v. Poland*.[279] Noting that there were, at the material time, 27 pending cases concerning various aspects of the most recent judicial reforms in Poland, the Court notified that all pending as well as future applications relating to the Polish judicial system reforms will be given priority.[280] In this context, it is to be asserted that the ECtHR priority policy, which is intended to streamline the processing and adjudication of particularly important cases, distinguishes between seven levels of priority,[281] while the 'Polish cases' have been classified as the most 'urgent' ones under Category I. Recently, a notice had been also given of a case involving lifting of a Polish Supreme Court judge's immunity in *Wróbel v. Poland*,[282] and another interim measure had been ordered in the case of

---

[279] Registrar of the ECtHR, 'Grand Chamber to Examine Case Concerning Judicial Reform in Poland. Press Release' (2021) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6943268-9336044&filename=Relinquishment%20in%20favor%20of%20the%20Grand%20Chamber%20in%20the%20case%20Grzeda%20v.%20Poland.pdf>.
[280] ibid.
[281] ECtHR, 'The Court's Priority Policy' (2017) <https://echr.coe.int/Documents/Priority_policy_ENG.pdf>.
[282] Registrar of the ECtHR, 'Notice given of Case Involving Lifting of Polish Supreme Court Judge's Immunity' (2022) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7254445-9876409&filename=Interim%20measures%20in%20the%20case%20of%20Polish%20Supreme%20Court%20judge%E2%80%99s%20immunity.pdf>.

Stępka v. Poland,[283] later followed by others.[284] In light of this development, the significance of these cases, and especially the serious nature of the interests at stake, becomes clear.

The Strasbourg court, similarly to Luxembourg, has been slowly developing what is now a growing body of case law 'on Poland'.[285] In comparison to the CJEU, the ECtHR cannot intervene pro-actively, that is to say, react to the ongoing developments as they emerge either through a preliminary reference procedure or an infringement action initiated by the EU Commission. Duty-bound to wait until the individual applicants had exhausted the domestic remedies, the ECtHR's reaction may thus not appear as swift.[286] That being said, the recent years have marked a steady increase in adjudicated cases with the Court delivering its decisions in *Broda v. Poland*, *Bojara v. Poland*, *Grzęda v. Poland*, *Xero Flor v. Poland*, *Reczkowicz and two Others v. Poland*, *Dolińska-Ficek and Ozimek v. Poland* or *Advance Pharma Sp. z o.o v. Poland* and *Tuleya v. Poland.* The issues at stake varied in substance from the premature termination of a judge's mandate,[287] the MoJ's power to replace court VPs without substantiating his decision,[288] to the unlawful appointment of the three Constitutional Court 'double judges' to already filled posts,[289] or the composition of the new NCJ and the newly established Chambers of the Supreme Court, namely dealing with disciplinary action.[290]

This allowed the Court to address a wide range of the post-2015 judicial reforms products, while also delivering a clear message to Poland that whatever the form of its particular restructuring, its system of justice remains subject to the ECtHR's scrutiny. The case *Żurek v. Poland* was an important addition. In this judgment, the Court did not only find a violation of Article 6 § 1 in relation to Judge Żurek's premature termination of office in the NCJ and the lack of judicial review thereof, but it also established a violation of his right to freedom of

---

[283] Registrar of the ECtHR, 'Interim Measures in Another Case of Polish Supreme Court Judge's Immunity' (2022) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7310815-9972372&filename=Interim%20measures%20in%20another%20case%20of%20Polish%20Supreme%20Court%20judge%27s%20immunity.pdf>.
[284] Wahl T, 'Poland: Rule-of-Law Issues July – Mid-October 2021' (2021) <https://eucrim.eu/news/poland-rule-of-law-issues-july-mid-october-2021/> accessed 28 June 2022.
[285] Meijers Committee, 'Rule of Law Cases – Poland – Safeguarding the Rule of Law in the European Union' (2022) <https://euruleoflaw.eu/rule-of-law/rule-of-law-dashboard-overview/polish-cases-cjeu-ecthr/> accessed 28 June 2022.
[286] Note that the first cases against Poland were communicated in 2019.
[287] Grzęda v. Poland (n 33).
[288] *Broda v Poland* [2021] ECtHR No. 26691/18.
[289] Xero Flor v. Poland (n 44).
[290] Reczkowicz v. Poland (n 76).

expression under Article 10 ECHR as a result of a variety of measures aimed at 'intimidating' and 'silencing' him.[291]

2.6.2 Overview of the Submission

2.6.2.1 Premature termination of office in the National Council of Judiciary and the subsequent lack of access to a court

For the sake of clarification, Judge Żurek had been appointed to the NCJ by the Representatives of the General Assemblies of the Regional Court judges for a four-year term starting in 2010, and then re-elected for another four-year term in 2014. In light of the foregoing, his second term was bound to last from March 2014 to March 2018. In addition to that, he had been elected the NCJ spokesperson in 2014, in which capacity he took part in many public debates covering recent legal developments as well as commented on legislative proposals in the media.[292] After *PiS*' election into office in 2015, the NCJ had become one of the legal bodies adopting opinions challenging the newly enacted bills.

As elaborated in the previous chapters, Judge Żurek himself has been quite active in voicing his criticism, pointing out that the legislative changes affecting the judiciary present a threat to the Rule of law in the country. Following the entry into force of a large-scale reform of the judiciary, namely the 2017 Act on the NCJ, his mandate had prematurely ended in 2018. The new legislation altered the procedure for appointment to the NCJ, having the effect of newly appointed members immediately taking office, and therefore replacing the former members at once. Judge Żurek had, however, not received any formal notification of the termination of his term. More importantly, there had been no legal avenue he could have used to contest the loss of his seat in that body.[293]

2.6.2.2 An alleged 'silencing campaign'

As a result of the loss of seat in the NCJ, Judge Żurek simultaneously lost his status as the NCJ spokesperson. Yet earlier in 2018, he had been also dismissed as the spokesperson of the Krakow Regional Court. While being in the capacity of the NCJ spokesperson, he took the

---

[291] *Żurek v. Poland* (n 3) para 1.
[292] ibid 8–11.
[293] ibid 8–39.

opportunity to comment on the ongoing legislative changes. In particular, he published a number of articles online, gave interviews to the media, appeared on the TV or presented opinions on behalf of the NCJ on its official YouTube channel. This had in turn, at least in his opinion, sparked the ruling party's interest in him.[294] In any case, a number of successive measures had been taken against him, including financial audits by the CBA, declassification of his financial statements and the already mentioned inspection of his work as a judge at the Krakow Regional Court. He asserted that at least five different sets of disciplinary proceedings had been launched against him, and in his opinion, these measures had been aimed at punishing him for openly questioning the legality of the ruling party's bills, and ultimately silencing both him and his colleagues.[295]

2.6.3 Violation of Article 6 § 1 of the European Convention on Human Rights

2.6.3.1 Following the line of reasoning in Grzęda v. Poland and repurposing the Eskelinen test

It should be noted that the Court's assessment of the substance of the claims raised under Article 6 ECHR had been rather short. The Court relied heavily on its earlier GC reasoning in *Grzęda v. Poland*, whereby it was called upon to adjudicate on a dispute arising from the applicant's premature termination of office as a NCJ member, too, and in which it summarised the applicable principles relating to the right to access to court specifically for judges.[296] The underlying question in *Grzęda v. Poland* was whether Article 6 § 1 had applied, as far as its civil head is concerned, to a dispute resulting from the premature termination of a judge's term of office in the NCJ while the latter had still remained a serving judge.[297] It was thus a matter of applicability of Article 6 in the first place, i.e., whether the dispute was civil in nature. Once the Court established that it was the case, it found a violation of Judge Grzęda's right of access to a court.[298] Similarly, even on account of the complaint brought by Judge Żurek under Article

---

[294] ibid 48.
[295] ibid 39–90.
[296] *Grzęda v. Poland* (n 33) paras 265, 342–343.
[297] Note that Judge Wojtyczek dissented from the majority in this respect, referring to his earlier assessment in *Grzęda v. Poland*. In his opinion, Judge Żurek's claim that he had a subjective right had not reached the threshold of arguability for the purposes of Article 6 and its civil head.
[298] *Grzęda v. Poland* (n 33) para 265.

6 § 1, emphasis has been placed on the *Eskelinen* test,[299] namely the applicability of Article 6 § 1 in the context of persons employed in a 'public service'.[300]

As suggested by legal commentators, the Court's previous jurisprudence concerning how the test should be applied — e.g., in *Bilgen v. Turkey*[301] or *Eminağaoğlu v. Turkey*[302] — resulted in more confusion instead of taking the opportunity to provide a much-needed clarification.[303] In the present case, whether there was indeed a 'right' to serve a full term of four years in the NCJ was disputed by the Government. According to the ECtHR, the rules relating to the NCJ appointments in place at the time when the applicant had been elected for office clearly established a list of 'exhaustively enumerated' grounds for 'removal' from office he could rely on, providing him with sufficient legal basis in the national law to that effect.[304]

2.6.3.2 No justification for the lack of judicial review

In any event, the Government argued that Judge Żurek was in fact excluded from access to court at all times, both before and after he held office,[305] implying that his status remained unchanged. In this vein, the ECtHR remarked that the Government had not attempted to provide any plausible explanation as to the lack of judicial review of the decision to prematurely end his term of office *ex lege*. In fact, the Government merely reiterated that Article 6 does not apply to the case at hand, relying on the *Eskelinen* test.[306] However, the Court held that with regard to the importance of a judicial member's mandate in the NCJ along with its function as a 'bulwark against political influence' over the judiciary, it did attract a higher level of protection. This, in the Court's opinion, held true especially in light of the strong public interest in upholding judicial independence and rule of law.[307]

---

[299] The test determines whether disputes involving public servants are covered under Article 6 § 1 of the ECHR, which guarantees the right to a fair trial. According to ECtHR, public servants are excluded from this protection only if domestic law (i) expressly denies access to a court for their category; (ii) and if there are objective grounds related to their duties and responsibilities justifying this exclusion. *Vilho Eskelinen and Others v Finland* [2007] ECtHR [GC] No. 63235/00 [62].
[300] *Żurek v. Poland* (n 3) 117–119, 122–123, 132–133, 146.
[301] *Bilgen v Turkey* [2021] ECtHR No. 1571/07 [66–68].
[302] *Eminağaoğlu v Turkey* [2021] ECtHR No. 76521/12 [66].
[303] David Kosař and Mathieu Leloup, 'Op-Ed: "Saying Less Is Sometimes More (Even in Rule-of-Law Cases): Grzęda v Poland"' (*EU Law Live*, 31 March 2022) <https://eulawlive-com.ezproxy.leidenuniv.nl/grzeda-v-poland-by-david-kosar-and-mathieu-leloup/> accessed 30 June 2022.
[304] *Żurek v. Poland* (n 3) paras 130–131.
[305] ibid 146.
[306] ibid 149.
[307] ibid 147–148.

Following this line of reasoning, the ECtHR asserted that the mandate of a judicial member of the NCJ warranted similar procedural safeguards to those applicable to removal or dismissal of judges from courts and tribunals. It stated that the autonomy of judicial councils in the face of the legislative and executive should be properly safeguarded given their role in judicial appointments. Any justification for excluding access to a court should be thus scrutinised. Importantly, as underlined in *Grzęda v. Poland*, there is clearly a need to take the wider context of weakened judicial independence in Poland into consideration when adjudicating similar cases.[308] By refusing Judge Żurek legal avenues to contest his removal from the NCJ, the 'essence of his right to access to court' was thus impaired.[309]

2.6.4 Violation of Article 10 of the European Convention on Human Rights

2.6.4.1 Existence of an interference

The ECtHR emphasised that in order to determine whether the measures complained of had in fact amounted to an interference with Judge Żurek's exercise of freedom of expression, one must not look at them in isolation, but rather as a part of a much more complex background.[310] The Court noted that while there is no such right to hold the position of a spokesperson of a judicial body, and the dismissal from a similar position therefore cannot in itself give rise to an interference with one's freedom of expression, the sequence of events is of particular relevance in this case.[311]

First, in line with the Court's previous assessment in *Grzęda v. Poland*, the sequence of events that took place in the country "vividly demonstrated that successive judicial reforms had been aimed at weakening judicial independence"[312], creating an environment where the applicant's exercise of freedom of expression had an important function. Second, there had been *prima facie* an apparent 'causal link' between Judge Żurek's exercise of his right to freedom of expression and the measures taken against him by the Government. Namely, it seems that all of the impugned measures had followed the successive timeline of Judge Żurek's public statements, interviews, articles and YouTube channel posts, respectively.[313] The 2016

---

[308] *Żurek v. Poland,* paras 147–149.
[309] Ibid, paras 150–151.
[310] ibid, para205.
[311] Ibid, para 208.
[312] Ibid, para 210.
[313] Ibid, para 211.

audit had been carried out after he gave a series of interviews and published an article – on both accounts, he criticised the proposed NCJ reform. Shortly after he published a number of comments on the NCJ YouTube channel in 2017, the MoJ ordered an inspection of his work as a judge. Lastly, his dismissal from the position of the Krakow Regional Court spokesperson and declassification of financial statements both occurred in 2018 after he had publicly expressed doubts of new policies *PiS* had been planning to undertake in the justice system.[314]

Furthermore, the Court pointed out that all the measures complained of by the applicant were undertaken by bodies which were either 'controlled or appointed by the executive'. In the case of the financial audits, it was the CBA, a governmental agency. In the case of the inspection of the applicant's work as a judge, it was the MoJ who made the decision, and as for the dismissal as a Krakow Regional Court spokesperson, the decision was taken by the court president, herself appointed by the MoJ.[315] In the Court's apprehension, none of these measures had been triggered by 'any substantiated specific irregularity' on the part of Judge Żurek either. For instance, the financial audit had been sparked by an unspecified 'irregularity' and then carried out for the period of 17 months, which strikes as disproportionate.

The Court noted in particular that "the anonymous letter – which prompted the inspection of the applicant's work in the Cracow Regional Court, merely one day after its receipt at the Ministry, was clearly and directly related to the applicant's public statements concerning the reform of the judiciary and his activity in the media, implying that this in itself was sufficient to compromise his performance as a judge"[316]. As a consequence, the Court did not find the Government's claim that the impugned measures were 'neutral' – as they did not specifically target him as a person, but were applied to all judges – convincing. It stated that there had been no specific evidence presented in support of such claim, and considering the numerous articles, reports and even a resolution – including by the CoE Commissioner for Human Rights and the Assembly of Judges of the Krakow Regional Court – finding otherwise, it could not but conclude that the measures constituted an interference with the applicant's exercise of the right to freedom of expression.[317]

---

[314] *Żurek v. Poland*, paras 211-213.
[315] ibid.
[316] ibid.
[317] ibid.

2.6.4.2 Interference not necessary in a democratic society

Having considered that the measures had some legal basis, even if the domestic law had not been duly respected, at least as regards the dismissal from the position of the Krakow Regional Court's spokesperson which required a prior approval of the Court college, the ECtHR decided to proceed with its analysis on the assumption that the interference was 'prescribed by law'.[318] Following that, it expressed serious doubts as to the 'legitimate aim' pursued by the Government, but concluding it is not necessary to provide a final answer as far as this question is concerned, it went directly to assessing the 'necessity' of the interference 'in a democratic society'.[319]

It its analysis, it reiterated that the measures had been clearly prompted by Judge Żurek's views and criticism he had directed against the Government. Furthermore, in the Court's view, the mandate of the NCJ spokesperson is one of importance, and one whose functions – and even duties – specifically include expressing views on the legislative changes affecting Rule of law. In fact, there is not only a right, but a duty of each judge to speak up in defence of Rule of law and to protect judicial independence.[320] Importantly, the Court seemed to attach particular importance to the fact that Judge Żurek's statements had been delivered from a strictly professional perspective. It accentuated that he had not in any way attacked other members of the judiciary nor had he related his statements to the conduct of judicial authorities in pending proceedings. It was thus the Court's belief that his statements did not go beyond mere professional assessment and hence fell in the context of a debate on matters of public interest.[321] This suggests that the scope and nature of the statements at issue bore relevance to the Chamber's assessment of the case, directly affecting the outcome thereof.

Reiterating that the judiciary occupies a prominent place among State organs in a democratic society operated by the principle of separation of powers, the Court held that the freedom of expression of judges is in line with the public interest and must be duly safeguarded as a result.[322] The degree of protection of the applicant had thus called for a high scrutiny in case of any interference by the Government. Considering the context, namely the fact that Judge Żurek had been considered 'one of the most emblematic' figures of the Polish judicial

---

[318] *Żurek v. Poland*, paras 214–215.
[319] Ibid, paras 216–217.
[320] Ibid, paras 220–222.
[321] Ibid, para 224.
[322] Ibid, paras 221–222.

community, and both the accumulation and timeline of the impugned measures had mirrored his public statements, the Court found no other plausible explanation than a strategy to intimidate or even silence him.[323] In concluding that the interference was not 'necessary in a democratic society' and thus in violation of Article 10 ECHR, it also pointed out that the measures translated into a chilling effect, discouraging not only him but also other judges from taking part in public debate concerning the administration of justice.[324]

In his *Partly Dissenting, Partly Concurring Opinion*, Judge Wojtyczek made a number of interesting observations as regards the Court's assessment of the case under Article 10. In his understanding, the latter does not extend to official speech of public office holders – one is either representing his own opinions (falling under the protection of Article 10), or, if acting in a professional capacity, the organ he is representing (beyond the scope of the protection awarded by Article 10).[325] This in turn creates a contradiction as regards the majority's assessment of a violation under Article 10 in the applicant's *professional* capacity. Furthermore, freedom of speech implies the freedom *from* obligation to speak, making the argument that Judge Żurek 'had to' speak up incompatible with him simultaneously exercising his *freedom* to speak.[326] In a similar vein, revocation from the function of a court's spokesperson falls within the discretion of the court president and does not constitute an 'element of interference'. Last, Judge Wojtyczek disagreed with the idea of 'categorisation' of persons while affording them various levels of protection under Article 10, referring to the ECHR as perceiving equality in freedom of speech as a fundamental value.[327]

The ECtHR's decision in *Żurek v. Poland* has profound implications for judicial independence and freedom of expression in democratic contexts. It upheld Judge Żurek's right to criticize legislative changes affecting the judiciary without facing repercussions, emphasizing the pivotal role of judges in defending the rule of law. The ruling establishes a precedent against political interference designed to silence judicial dissent, thereby safeguarding fundamental freedoms and reinforcing judicial autonomy. Judge Wojtyczek's opinion challenges the application of Article 10 ECHR to judges' professional communications, highlighting ongoing debates on balancing professional obligations with freedom of speech. In

---

[323] *Żurek v. Poland*, para 227.
[324] Ibid, paras 227–229.
[325] *See* his separate opinion in *Baka v. Hungary* for a more detailed analysis.
[326] Żurek v Poland Partly Dissenting, Partly Concurring Opinion of Judge Wojtyczek [2022] ECtHR No. 39650/18 [3].
[327] ibid.

sum, the case underscores the ECtHR's role in protecting judicial independence and ensuring accountability within legal systems across Europe.

2.7 Sustaining Jurisprudential Consistency and Relevance of Implementation Challenges

2.7.1 The Context of a Wider Pattern of Non-implementation

Without going into substantive details in the Court's reasoning, it can be alleged that the judgment fits into the wider body of the ECtHR jurisprudence concerning the composition and loss of seat in the NCJ, the new chambers of the Supreme Court or even the composition of the Constitutional Tribunal itself.[328] Indeed, it follows a similar line of reasoning and accumulates the various principles it previously applied in the cases 'on Poland', thereby contributing to the clarification and consistency of the Strasbourg-based standards.[329]

One of the preliminary questions which was of interest for examining the case at hand, was what kind of questions the Court asks and whether it brings any new elements into play. On this note, it can be maintained that the case is very similar to *Grzęda v. Poland* on account of both the substance of the claim under review and its assessment under Article 6 ECHR. However, it also concerns Article 10, in which it is more reminiscent of the Court's reasoning in *Baka v. Hungary* and *Kövesi v. Romania*. In the former, the applicant was a judge whose Supreme Court President's mandate terminated prematurely as a result of his views expressed publicly in his professional capacity (violation of Article 10), a decision which he later could not contest (violation of Article 6).[330] Somewhat in contrast to *Żurek v. Poland*, a single measure – the applicant's dismissal from the Supreme Court — had been deemed to amount to an interference as it occurred in response to his criticism of the Government. The dismissal itself was thus the substance of the claim both under Article 6 and Article 10. In the case of Judge Żurek, there were rather two separate claims, and he had in any case maintained the office of a District Court judge.

In relation to *Baka v. Hungary*, the Committee of Ministers had repeatedly pointed out Hungary's failure to fully execute the judgment, particularly in relation to establishing safeguards against the arbitrary removal of judges from higher positions, and the corresponding chilling effect.[331] Notably, eleven years have passed since Judge Baka had been dismissed as a

---

[328] Reczkowicz v. Poland (n 76); Broda v. Poland (n 163); Xero Flor v. Poland (n 44); Grzęda v. Poland (n 33).
[329] Braithwaite, Harby and Miletić (n 31).
[330] Baka v. Hungary (n 27).
[331] Nóra Novoszádek, 'The Council of Europe Is Losing Its Patience in the Baka Case' (*Hungarian Helsinki Committee*, 20 September 2021) <https://helsinki.hu/en/the-council-of-europe-is-losing-its-patience-in-the-baka-case/> accessed 1 July 2022.

judge from the Supreme Court, and already six more since the ECtHR judgment had been delivered on the matter, illustrating how difficult it is to enforce the judgments against States which lack judicial independence — and political will at that — to change the reality on the ground.[332]

Baka v. Hungary therefore provides a lens through which to examine the potential challenges in implementing recent judgments, such as *Żurek v. Poland*. However, it is crucial to avoid oversimplifying the diverse realities on the ground by using *Baka v. Hungary* as a definitive indicator of success or failure in the context of *Żurek v. Poland*. The situations in Poland and Hungary, while sharing common patterns in their restructuring of the judiciary, exhibit unique nuances. Therefore, *Baka v. Hungary* serves not as a direct predictor but rather as an illustrative example of how the broader context of national backlash against the rule of law can have practical implications for the implementation of judgments like *Żurek v. Poland*. The challenges faced by Hungary in fully executing the judgment, particularly in establishing safeguards against the arbitrary removal of judges, as pointed out by the Committee of Ministers, underscore the complexities and difficulties associated with enforcing judgments in states lacking judicial independence and the necessary political will to effect meaningful change on the ground. This historical perspective emphasises the ongoing struggle to translate legal decisions into tangible improvements within national judicial systems.

In relation to *Żurek v. Poland*, in its 2023 Report, the Committee of Ministers urged the authorities to consider measures to ensure robust protection of judges' freedom of expression and to promptly report the outcomes of such considerations.[333] They encouraged drawing inspiration from the Consultative Council of European Judges Opinion[334] on this matter. The Committee requested the authorities to develop measures ensuring that disciplinary actions related to judicial decisions occur only in exceptional cases and that grounds for such liability are applied in proceedings with adequate safeguards and reasonable durations. Until reforms ensuring compliance with Article 6 of the Convention are implemented, they recommended that disciplinary decisions be made by bodies meeting these requirements. Lastly, the Committee called for broader reform to limit executive influence on disciplinary proceedings

---

[332] ibid.
[333] Committee of Ministers of the Council of Europe, 'Supervision of the Execution of Judgments and Decisions of the European of Court of Human Rights 2023' (2024) Annual Report of the Committee f Ministers.
[334] Consultative Council of European Judges, 'CCJE Opinion No. 25 (2022) on Freedom of Expression of Judges' (2022).

against judges to prevent misuse, considering broader concerns raised by other Council of Europe bodies.[335]

2.7.2 The Context of a 'Constitutional Backlash'

The trend of non-compliance with judgments from the ECtHR among EU Member States poses a significant challenge to the effective protection of human rights within the European system. The track record of implementing leading judgments is a crucial indicator of the rule of law in a country. As of January 2024, nearly half (49%) of the principal judgments issued by the ECtHR in the past decade have yet to be implemented. In total, there are 1,326 such judgments awaiting implementation, with an average pending time of approximately six years and eight months.[336] Performance varies significantly among Member States, and around 40% of the ECtHR's leading judgments relating to EU Member States from the last 10 years remain unimplemented, reflecting a similar trend to the previous year.[337] This variability highlights the importance of monitoring and improving compliance to ensure the robustness of the rule of law across Europe.

While the ECtHR plays a pivotal role in safeguarding fundamental rights, the increasing instances of non-compliance erode the foundation of the European human rights protection system. Non-compliance undermines the authority and efficacy of the ECtHR's decisions, signalling a troubling departure from the commitment to uphold human rights obligations. This trend not only weakens the credibility of the European human rights framework but also jeopardizes the principles of mutual trust and cooperation among Member States. The reluctance or refusal to implement ECtHR judgments reflects a broader erosion of the rule of law and commitment to human rights within certain Member States, raising concerns about the overall resilience and effectiveness of the European human rights protection system. Addressing this trend is essential to ensure the continued integrity and vitality of the human rights framework in the European context.

In an analogous manner to *K 3/21*, where the CJEU ruled on the incompatibility of the TEU with the Polish Constitution, and refused to apply certain provisions of the EU law[338],

---

[335] Committee of Ministers of the Council of Europe (n 333).
[336] European Implementation Network, 'Country Map' (*European Implementation Network*) <https://www.einnetwork.org/countries-overview> accessed 19 June 2024.
[337] European Commission, 'Communication - 2023 Rule of Law Report - the Rule of Law Situation in the European Union' (2023).
[338] *K 3/21* (n 268).

followed in the aftermath of the ECtHR's judgment in *Xero Flor v. Poland*.[339] In the latter, the Court found a violation of Article 6 ECHR when a judge of the Constitutional Tribunal who has been appointed as a somewhat duplicate judge to a seat already occupied by another in a violation of the standards of due process of law and in clear disregard for the rules on judicial appointments and the Constitution, participated in the delivery of a ruling. Instead of resorting to an appeal through a request of referral to the Grand Chamber, as provided by the ECHR, the Constitutional Tribunal issued a judgment of its own, thereby introducing the doctrine of 'non-existent' judgments.[340]

Literally construing its reasoning around a Latin sentence *sententia non existens*, the Tribunal claimed that the ECtHR judgment clearly lacked knowledge of the Polish legal system, issuing a decision without a legal basis and therefore acting *ultra vires*.[341] For those reasons, *Xero Flor* should be considered non-existent to the Polish courts. In essence, of course, this is about non-compliance with the ECtHR judgments, with which Poland now has a lot of experience. Unfortunately, non-compliance is not an occurrence limited to Poland. For instance, in *Baka v. Hungary*, the Committee of Ministers had repeatedly pointed out Hungary's failure to fully execute the judgment, particularly in relation to establishing safeguards against the arbitrary removal of judges from higher positions, and the corresponding chilling effect.[342] Notably, eleven years have passed since Judge Baka had been dismissed as a judge from the Supreme Court, and already six more since the ECtHR judgment had been delivered on the matter, illustrating how difficult it is to enforce the judgments against States which lack judicial independence — and political will at that — to change the reality on the ground.[343]

However, one may argue that taking non-compliance to non-existence is a different, higher level of resistance against the Court's jurisdiction. Interestingly enough, the judgments of the Polish Tribunal, due to its grave deficiencies, should be considered as non-existent themselves according to some legal experts, which in turn creates even more confusion on the matter. In any event, the decisions of the Constitutional Tribunal challenge both the EU and the ECHR law. On both accounts, the Court recourses to the line of reasoning claiming that the

---

[339] *Xero Flor v. Poland* (n 101).
[340] Lawson (n 8).
[341] ibid.
[342] Nóra Novoszádek, 'The Council of Europe Is Losing Its Patience in the Baka Case' (*Hungarian Helsinki Committee*, 20 September 2021) <https://helsinki.hu/en/the-council-of-europe-is-losing-its-patience-in-the-baka-case/> accessed 1 July 2022.
[343] ibid.

issuing Court exceeded its competences, and bases its backlash on it acting *ultra vires* whilst emphasising the protection of national sovereignty.

2.7.3 Lack of Cross-Court Referencing and Disbalance in Intervening Parties

The disbalance between the Strasbourg and the Luxembourg ruling in the case of Judge Żurek manifests in explicit terms when the ECtHR did not explicitly reference or link its judgment *Żurek v. Poland*, which came out on 16 June 2022, to the case already decided by the CJEU in *WŻ* on 6 October 2021, which would have seemed like a predictable course of action.[344] This lack of linkage can create divergence in the interpretation and application of judicial independence standards. In practical terms, when the ECtHR issues rulings that are not aligned or do not consider precedents set by the CJEU, it can lead to inconsistencies in how the HCP interpret and adhere to these standards. This disjunction may stem from different approaches to legal interpretation, institutional mandates, or contextual considerations that are distinct between the two Courts.

In the case of *Żurek v. Poland*, §§ 126-127 show that a variety of third parties intervened to support the applicant's claims, including notable organisations such as the European Network of Councils for the Judiciary, Amnesty International, and the Helsinki Foundation for Human Rights. These entities provided detailed written comments on both the admissibility and merits of the complaint under Article 6 § 1 of the ECHR, Additionally, the Polish Judges' Association Themis highlighted the politicisation of the NCJ election procedure and its detrimental impact on judicial independence, urging the Court to consider relevant jurisprudence from the CJEU.[345]

In contrast, the CJEU's judgment in the *WŻ* case saw no recorded third-party interventions.[346] This disparity raises important questions about the role and impact of such interventions on judicial decision-making. Third-party interventions, akin to the *amicus curiae* practice in common law systems, can significantly enrich the court's understanding by offering additional viewpoints and contextual information. Their presence in the ECtHR case likely provided a comprehensive view of the challenges to judicial independence in Poland, contributing to a more informed and robust judgment.

---

[344] *Żurek v. Poland* (n 137).
[345] ibid.
[346] *W.Ż.* (n 167).

The absence of similar interventions in the CJEU's *WŻ* case suggests a missed opportunity for broader dialogue and advocacy on these issues within the EU legal framework. This contrast highlights the strategic nature of third-party interventions in litigation, where organizations carefully consider where and how to allocate resources for maximum impact.[347] The interventions in *Żurek v. Poland* underscored the wider significance of the case, potentially influencing public opinion and policy beyond the immediate legal context.

Moreover, while third-party interventions can aid judicial processes by providing valuable insights, they also raise questions about balancing external influences with judicial independence. Courts must carefully weigh these inputs to ensure that their decisions remain impartial and grounded in law. The varying practices between the ECtHR and CJEU regarding third-party interventions reflect broader differences in their legal traditions and procedural frameworks. The ECtHR, rooted in a human rights mandate, naturally attracts more intervention from rights-focused organizations, while the CJEU, dealing with EU law, might see fewer such interventions depending on the nature of the case.

This discrepancy has implications for the way the Courts go about interpreting the different elements pertaining to judicial independence, and 'tribunal established by law' more precisely. The interventions in *Żurek v. Poland* accentuated critical issues about the politicization of judicial appointments and the erosion of judicial independence, allowing the ECtHR to address not just legal, but also systemic and institutional concerns. The lack of similar interventions in the CJEU's *WŻ* case potentially limits the depth and breadth of the judicial discourse on these pressing issues within the EU framework.

In conclusion, studying the interplay and discrepancies between these courts in terms of cross-court referencing and third-party interventions provides valuable insights into how judicial independence standards are upheld and challenged in Europe. It highlights the importance of external contributions in shaping judicial outcomes and highlights the need for continued protection of judicial independence through both legal and procedural means. This is crucial for understanding the broader impacts of judicial interactions and the strategic considerations that shape legal advocacy and decision-making in the European context.

---

[347] Jasper Krommendijk and Kris van der Pas, 'Third-Party Interventions before the Court of Justice in Migration Law Cases – EU Immigration and Asylum Law and Policy' (29 November 2022) <https://eumigrationlawblog.eu/third-party-interventions-before-the-court-of-justice-in-migration-law-cases/> accessed 19 June 2024.

2.8 Reflections on Judicial Independence Safeguards, Judges, and the Two Courts

2.8.1 The Role of European Court of Human Rights' Rulings in Upholding Judicial Independence

The ECtHR ruling in *Żurek v. Poland* is a valuable addition to what is now a growing body of jurisprudence on judicial independence – and rule of law more generally – in Poland. In its analysis, the Court inspected the applicability of Article 6 § 1 to the premature termination of office in the NCJ *ex lege* and the subsequent lack of access to a court. Following its reasoning from *Grzęda v. Poland* as regards the *civil* nature of the claim, it concluded that article 6 § 1 did apply and was violated in this case. In doing so, it reiterated the prominent role of a judicial member's mandate in the NCJ, potentially laying foundations for other judges who were dismissed as a result of the NCJ reform. It also stated that the impugned measures constituted an interference with Judge Żurek's exercise of his right to freedom of expression, particularly as it found a causal link between the timeline of his public statements in which he challenged the legislative changes affecting the judiciary on one hand, and the measures instigated by the Government on the other. It emphasised that the measures were taken by bodies directly related to the Government, and that such an interference was not necessary in a democratic society as the latter did not present any plausible justification thereof. The chilling effect, which arose from the aforementioned measures, also seriously undermined the public debate on the judiciary and was in contradiction with the important function attached to judges in a democratic society operated by the principle of separation of powers.

2.8.2 Linking Judicial Freedom of Expression to Rule of Law Protection

While it may appear as a natural 'extension' of judicial independence to invoke Article 10 ECHR in cases where freedom of expression of judges has been impaired, as illustrated already by the case of *Baka v. Hungary*, it is worth noting that this invites important considerations and establishes a foundational basis for linking judicial freedom of expression to the protection of the rule of law, opening the door for future adjudications along these lines. Importantly, this is of practical relevance for judges openly speaking up against their authoritative Governments, and thus of direct relevance for establishing where the European Human Rights framework stands in terms of providing grounds for containing or even rolling back the attacks on their independence. To illustrate, the long-anticipated high-profile judgment

in *Tuleya v. Poland*, issued in July 2023, demonstrates the ongoing relevance of the development of these standards. Judge Igor Tuleya, against whom disciplinary measures were initiated as a result of his criticism of the so-called legislative changes to the judiciary as well as his public activities, faced multiple disciplinary proceedings since 2018.[348] These proceedings were part of a broader smear campaign against him, including derogatory information in the media, similarly to Judge Żurek. One issue began following his request for a preliminary ruling from the CJEU regarding the new disciplinary regime for judges. Additionally, Tuleya faced criminal proceedings related to his decision to allow the media to record a court session, whereby his judicial immunity was lifted, and he was suspended by the Disciplinary Chamber of the Supreme Court. However, the Chamber of Professional Liability later overturned his suspension, though the lifting of his immunity remains in force.[349]

2.8.3 Evaluating the Court of Justice of the European Union and the European Court of Human Rights' Impacts on Standard-setting

In this case, the ECtHR concluded that there had been violations of Article 6 § 1, Article 8, and Article 10 ECHR. The judgment highlighted that the disciplinary regime for judges in Poland and the measures against Tuleya were not in accordance with the law, lacked legitimate aims, and constituted a violation of his rights to a fair trial, respect for private life, and freedom of expression. Specifically, under Article 6 § 1, the Court found that the Disciplinary Chamber did not meet the standards of an independent and impartial tribunal. Under Article 8, the measures taken against Tuleya were deemed to interfere with his private life without proper legal basis. Under Article 10, the Court determined that the preliminary inquiries were a disguised sanction for Judge Tuleya's stance against the judicial reforms, with no legitimate aim justifying the interference with his freedom of expression. This ruling reinforces the principles established in Żurek and underscores the importance of judicial independence and freedom of expression in maintaining the rule of law.[350]

Returning to the question of whether the standards, as established by the CJEU and the ECtHR, adequately addresses the concerns surrounding the attacks against Polish judges, several points should be considered. On one hand, the level of political backing for the ECtHR and CJEU can be gauged by recent events. For instance, after the Polish Constitutional Tribunal

---

[348] *Tuleya v. Poland* (n 192).
[349] ibid.
[350] *ibid.*

nullified the ECtHR's *Xero Flor* judgment and affirmed that Article 6 of the ECHR, as interpreted by Strasbourg, is unconstitutional, there was a notable lack of response or controversy surrounding the decision. In fact, the EU Commission proceeded with disbursing €23.9 billion in grants and €11.5 billion in loans to Poland under the recovery and resilience facility (RRF), designed to aid economic recovery and bolster sustainable growth post-COVID-19.[351] However, disbursements are contingent upon meeting specific milestones,[352] which had prompted criticism that Poland's reforms addressing rule-of-law concerns have been largely superficial.[353] In the end, EU had frozen approximately €137 billion amid concerns over rule of law regressions under the *PiS* Government. Following legislative reforms to the disciplinary regime for judges and the adoption of an anti-fraud IT tool under the new Government in February 2024, Poland is now eligible to access these funds.[354] Notably, despite the existence of the Conditionality Regulation intended to safeguard the EU budget against similar democratic setbacks that could undermine the Union's spending due to national measures likely to systematically undermine the integrity, stability, or proper functioning of institutions and rule of law safeguards,[355] this mechanism has not been activated against Poland. This interplay between the ECtHR's judgments and Poland's responses underscores the complex dynamics shaping European legal and political landscapes.

Moreover, in the previous section, it has been outlined that a stronger language in the text of the judgment may have been warranted. However, practice shows that overly verbatim reasoning may fail to reach the ECHR standards, implying that *doing less* would be *doing more*. Open-ended judgments not only uphold flexibility in interpretation but also create space for subsequent legal developments and refinements. This approach allows for nuanced applications of human rights principles across diverse contexts and facilitates the evolution of jurisprudence. By avoiding overly prescriptive language, courts can encourage robust debates and

---

[351] European Commission, 'Commission Endorses Poland's €35.4 Billion RRF Plan' (European Commission Press Corner, 1 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3375> accessed 4 July 2022
[352] Thu Nguyen, 'How Much Money Is a Lot of Money?' [2021] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00011186> accessed 21 June 2024.
[353] Zosia Wanat, Lili Bayer and Paola Tamma, 'EU Gives Poland Route to Pandemic Recovery Cash' (*POLITICO*, 1 June 2022) <https://www.politico.eu/article/eu-vows-deal-to-unlock-poland-pandemic-cash-hinges-recovery-fund-covid-19-on-reforms/> accessed 21 June 2024.
[354] European Commission, 'Poland's Efforts to Restore Rule of Law Pave the Way for Accessing up to €137 Billion in EU Funds' (*European Commission Press Corner*, 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1222> accessed 21 June 2024.
[355] European Commission, 'EU Budget: Commission Proposes Measures to the Council under the Conditionality Regulation' (*Press Corner*, 18 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5623> accessed 21 December 2022.

contributions from legal scholars, practitioners, and civil society, ultimately fostering a deeper understanding and broader acceptance of judicial norms within national legal frameworks. Thus, while a tempered approach in judgment language may appear cautious, it often serves to strengthen the foundation upon which future legal precedents and interpretations can be built.

Similarly, the *Grzęda v. Poland* judgment highlights the pitfalls of overly verbose judgments that delve extensively into contentious issues. Despite the case's relatively straightforward nature, the Court chose to broaden its scope significantly, delving into Polish constitutional law and the jurisprudence of the Constitutional Tribunal. This expansive approach, while attempting to address systemic judicial reforms, risked diluting the clarity of its legal reasoning. Judge Wojtyczek's dissent raised valid questions about the necessity of such broad engagement in what could have been a more narrowly focused decision.[356] This critique underscores the importance of maintaining a balance in judicial reasoning – avoiding unnecessary verbosity while ensuring thorough analysis of critical legal issues. Such a balanced approach not only enhances the persuasiveness of the Court's arguments but also clarifies the applicability of human rights standards, contributing to a more coherent and effective jurisprudence under the ECHR.[357]

2.8.4 Using European Jurisprudence for National Reforms

The consistent issuance of judgments by the CJEU and ECtHR concerning Poland helps establish enduring legal principles. Although the direct execution of these judgments may encounter obstacles, they provide a foundational framework for independent judges within Poland to invoke binding interpretations from the CJEU. For instance, such interpretations can challenge the validity of judicial appointments made by politically aligned authorities deemed unconstitutional under EU law.[358] This reliance on established EU legal standards empowers judges to uphold judicial independence against governmental encroachments. Judgments rendered by European courts clearly delineate infringements on rule of law principles in Poland. By explicitly identifying transgressions and assigning culpability, these judgments serve as

---

[356] David Kosař and Mathieu Leloup, 'Op-Ed: "Saying Less Is Sometimes More (Even in Rule-of-Law Cases): Grzęda v Poland"' (*EU Law Live*, 31 March 2022) <https://eulawlive-com.ezproxy.leidenuniv.nl/grzeda-v-poland-by-david-kosar-and-mathieu-leloup/> accessed 30 June 2022.
[357] Kosař D and Leloup M, 'Op-Ed: "Saying Less Is Sometimes More (Even in Rule-of-Law Cases): Grzęda v Poland"' (EU Law Live, 31 March 2022) <https://eulawlive-com.ezproxy.leidenuniv.nl/grzeda-v-poland-by-david-kosar-and-mathieu-leloup/> accessed 30 June 2022.
[358] Mastracci (n 49); Karlsson (n 47).

authoritative statements of right and wrong under European legal standards. The European context gives these declarations heightened significance, effectively leveraging Europe as a witness to the erosion of the rule of law in Poland. This external validation strengthens domestic efforts to combat threats to judicial independence and the rule of law.

The accumulation of judgments from European courts represents a repository of legal authority that transcends current political dynamics.[359] While immediate compliance may be elusive under an illiberal government, this body of jurisprudence remains available for future utilisation. In theory, a political party advocating for the restoration of the rule of law could leverage these judgments to fortify its position. By citing EU legal rulings, a new administration could invoke European legal principles to recalibrate Poland's judiciary and reinstate compliance with rule of law standards. This scenario unfolded in Poland following the 2023 parliamentary elections, demonstrating the potential impact of European court judgments in shaping national judicial landscapes.

Importantly, enforcement issues are inherent to the broader framework of EU law and should not be construed as a deterrent to the efficacy of the system. The challenges associated with enforcement are not unique to the EU but are a common aspect of any legal system that operates on a multi-layered governance model.[360] While the European Commission sets binding regulations, it is up to Member States to implement EU law within their own administrative frameworks, adhering to basic EU procedural standards. Despite the absence of centralized enforcement authority, the EU has developed alternative enforcement mechanisms to ensure that Member States effectively apply and comply with EU law.[361]

Despite the perception that the EU sometimes acts as a 'soft power regulator', it is crucial to recognise that rulings from the CJEU are legally binding and carry significant authoritative weight. While the EU often employs a cooperative approach, emphasising dialogue and persuasion to ensure compliance among member states, this should not be mistaken for a lack of enforceability or legal rigor. The CJEU's judgments are definitive and must be implemented by the member states. Failure to comply with these rulings can lead to infringement proceedings and substantial penalties, thereby reinforcing the binding nature of

---

[359] Braithwaite, Harby and Miletić (n 31).
[360] Anthony Arnull, 'Enforcing EU Law' in Anthony Arnull, *European Union Law: A Very Short Introduction* (1st edn, Oxford University PressOxford 2017) <https://academic.oup.com/book/443/chapter/135231358> accessed 22 June 2024.
[361] Martina Anzini and others, 'Making European Policies Work Evolving Challenges and New Approaches in EU Law Enforcement' (European Institute of Public Administration 2021).

the Court's decisions.[362] Moreover, the EU's soft power strategies complement its hard law mechanisms, creating a dynamic regulatory environment where Member States are encouraged to adhere to EU principles and values voluntarily, but are also held accountable through binding legal processes when necessary. This dual approach equips the EU to promote and enforce its legal standards, even in complex and contentious areas such as the rule of law.

[362] Jakab and Kochenov (n 68); Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press 2016).

2.9 Conclusions

2.9.1 The Role of Judges in Defending Rule of Law

This chapter has underscored the evolving role of individual judges in defending judicial independence amidst evolving challenges within Poland's legal framework. It explored how a single judge, committed to preserving either their own independence or the broader judicial independence in their country, can seek redress through the European Court of Justice and the European Court of Human Rights. It examined whether the current framework offers sufficient mechanisms to counter or reverse the attacks on the judicial independence of Polish judges. The analysis was predominantly grounded in the case of Judge Żurek, a prominent figure in Poland's judiciary, who has faced prosecution for his criticism of recent legislative changes. The chapter contextualised Judge Żurek's prosecution within the broader judicial reforms in Poland and demonstrated the types of actions a judge can take to uphold judicial independence both at domestic and European level. Through this case study, it highlighted the role of judges as defenders of the rule of law and their potential to resist backsliding in judicial independence.

Through the case *WŻ*, this chapter exemplified the proactive role of judges in upholding judicial independence within the EU. The driving force behind the case was the strategic framing of the preliminary question by the judges of the Civil Chamber of the Supreme Court, which prompted a preliminary reference to the CJEU under Article 267 TFEU. This reference revolved around the legality of non-consensual intra- and inter-court transfers, questioning whether such practices undermine the principles of judicial irremovability and independence. The CJEU's response highlighted the significance of these principles under Article 19 § 1 TEU, which obliges Member States to ensure effective judicial protection and respect for judicial independence. The ruling clarified that forced transfers of judges can indeed compromise judicial independence by potentially subjecting judges to political influence or control over their decisions. This interpretation not only addressed the specific case but also set a precedent for safeguarding judges across Member States against politically motivated reassignments. Furthermore, the CJEU held that judicial appointments must adhere to national and EU legal standards, particularly scrutinising the independence and impartiality of the nominating bodies like the NCJ in Poland. By affirming that judges appointed under conditions undermining judicial independence may not constitute an 'independent and impartial tribunal previously established by law', the CJEU provided a framework for national courts to disapply national provisions conflicting with EU law. This decision not only protects individual judges from

undue political interference but also reinforces the EU's commitment to upholding the rule of law within its member states. Therefore, the *WŻ* case highlights how judges, through strategic legal actions and references to the CJEU, actively contribute to the maintenance of judicial independence under EU law. By challenging systemic changes and defending the integrity of the judiciary, judges play a critical role in ensuring that the principles of irremovability and impartiality are upheld, thereby strengthening the legal framework for judicial protection across the EU.

The case *Żurek v Poland* has significantly contributed to jurisprudence on judicial independence and the rule of law. By scrutinising the premature termination of Judge Żurek's office in the NCJ and the subsequent denial of access to a fair hearing, the ECtHR reinforced the applicability of Article 6 § 1 of the ECHR. This decision not only affirmed the civil nature of his claim but also highlighted the critical role of judicial mandates within the NCJ setting a precedent for other judges affected by similar reforms. Moreover, the ECtHR's recognition of the interference with Judge Żurek's freedom of expression brings forward the broader implications for judicial autonomy. The causal link established between his public dissent against legislative changes affecting the judiciary and retaliatory measures by government-related bodies exemplifies the chilling effect on judicial discourse. Such actions not only undermine the democratic principles of separation of powers but also stifle public debate essential for a robust judiciary. Furthermore, linking judicial freedom of expression to the protection of the rule of law, as seen in cases like *Baka v. Hungary* and *Tuleya v. Poland*, highlights the evolving standards within the European Human Rights framework. Ongoing struggles of judges across Europe, including disciplinary and criminal proceedings, illustrate the ongoing challenges faced by judges advocating against authoritarian reforms. Similarly to the Polish Constitutional Tribunal's ruling in *K 3/21*, however, it noted the very Tribunal's backlash against the ECtHR, as evidenced though its response to *Xero Flor,* raises doubts as regards Poland's willingness – or rather the lack of – to execute future judgments. This case illustrates how judges play a crucial role in defending the rule of law. Through their actions, judges contribute to the development and enforcement of standards that protect the judiciary from political interference and uphold the integrity of legal institutions.

2.9.2 The Role of Domestic Judicial Action and Resistance

By leveraging European legal standards, judges like Żurek, but also Baka, Grzęda or Tuleya, exemplify how principled judicial dissent can catalyse legal reforms and fortify

institutional resilience against political interference. While the efficacy of judgments of European courts in directly curbing infringements on judicial independence in backsliding EU Member States remains contingent upon political will and the strength of enforcement mechanisms, they nonetheless provide a robust framework for judicial recourse and international scrutiny. The proactive engagement of judges like Żurek and Tuleya, however, underscores their pivotal role not only as defenders of judicial independence but also as catalysts for broader legal reforms. As European legal norms continue to evolve, the proactive engagement of judges and the steadfast application of international human rights standards remain crucial in countering challenges to judicial independence across Europe.

Moreover, the political dimension of this legal discussion is striking. Constitutional denial and lack of political willingness often translate into cases that appear inconsequential and unlikely to be implemented on the ground. This situation may make the European framework seem like an ideal that cannot deliver concrete results. However, even minimal efforts can have significant impacts. Despite the daunting circumstances in backsliding countries, the CJEU and the ECtHR continue to do both 'more' and 'less' in providing legal grounds that bring judges closer to justice, establishing specific standards of judicial independence applicable to similar cases. Enforcement issues are inherent to the broader framework of EU law and should not be construed as a deterrent to the efficacy of the system.

Despite the perception that the EU sometimes acts as a soft power regulator, it is crucial to recognize that rulings from the CJEU are legally binding and carry significant authoritative weight – they are definitive and must be implemented by the Member States. Recognising these limits allows for strategic and impactful actions in the pursuit of judicial independence. As illustrated by the actions of judges like Żurek, the interplay between soft power strategies and hard law mechanisms provides a multifaceted approach to upholding judicial independence and the rule of law, highlighting the critical role of judicial actors in advancing legal standards and reinforcing democratic principles across Europe. This framework supports judges in captured judiciaries, those requesting preliminary rulings, and individuals seeking redress in Strasbourg or affected by EU law's binding interpretations. The strength of the two Courts Tandem is evident, though the required level of judicial independence to make these judgments meaningful can be challenging.

3. Judges as Facilitators of Rule of Law Backsliding: The Phenomenon of 'Fake' Judges Before the Court of Justice of the European Union

3.1 Introduction

Building on the proactive role of judges as actors capable of actively contributing to upholding judicial independence, or perhaps even as protagonists in what one might term 'judicial resistance',[363] the second part of this thesis scrutinises a less explored yet equally significant dimension of their involvement in the delivery of justice – their potential *complicity* in rule of law backsliding.[364] Navigating a complex interface between judiciary and politics, where lines between the two blur and dissipate, judges emerge also as potential facilitators of rule of law backsliding – as 'fake judges' complicit in lowering judicial independence standards and, in turn, advancing the illiberal governmental agendas.[365] As highlighted in Figure 3 in Chapter 1, depicting the ratio of regularly appointed to 'fake' judges in the Supreme Court from 2021 to 2023, the depth of this issue comes to stark focus. This compelling illustration underscores the necessity of examining this deeply entrenched phenomenon in detail to understand how judges, through their actions and decisions, undermine the rule of law.

As stipulated in the Introduction,[366] this approach does not seek to paint a black-and-white picture nor implicates judges personally in their intentions or agency, whatever they may be.[367] After all, it would be oversimplifying the reality to claim that judges either act in a way that defends the rule of law or contributes to its further backsliding, and such an approach would not only lack scientific legitimacy, but would hardly present an added value to the academic community. Instead, it serves as a conceptual framework which aims to underscore the duality in their impact – the positive and negative influence they can wield in shaping the future of the rule of law in Europe stemming from the *title of a judge*.[368] The emphasis here is on whether

---

[363] Matthes (n 13).
[364] Graver (n 2).
[365] ibid.
[366] See sections 1.5 Methodology and 1.6 Delimitations in the introductory chapter to this thesis.
[367] Graver (n 2) 53–86.
[368] For detailed methodological considerations on how this concept is used throughout the thesis as a conceptual lens, following a set of objective criteria and without prejudice to passing moral judgments, implicating judges personally or asserting a simplified binary classification, please see the dedicated sections on Methodology (1.5) and Delimitations (1.6) in the Introduction.

this title gives legal ground to a tribunal *established by law*, in line with the reading of Article 47 CFR and Article 6 (1) ECHR. This framework itself is grounded in objective criteria, namely as regards *irregular appointment* or *irregular promotion* of a judge, in a procedure which is more broadly encompassing a judicial body 'lacking guarantees to ensure an appearance of independence', 'manifestly lacking basic independence' and/or which was carried out 'in breach of the national rules governing the judicial appointment procedure', and therefore cannot be understood as a 'tribunal (previously) established by law'.[369] These criteria have emerged through both jurisprudence[370] and scholarly discourse,[371] and relate for instance to the judicial appointments made by the new NCJ in Poland.

In broader terms, the criteria for an independent and impartial tribunal established by law also extend to the composition of judicial panels. This encompasses ensuring the correct number of judges on a panel, identifying any specific incompatibilities related to individual judges that could warrant a challenge from a party to the dispute, and ensuring compliance with specific conditions at the time of delivering a judgment. These conditions may include the absence of a judge who has reached the legal retirement age or a lay judge who no longer resides within the court's jurisdiction. This also covers the actual appointment and adherence to the applicable procedural standards, the confirmation of the appointment itself; substantive irregularities related to eligibility criteria of the individual involved; or formal irregularities encompassing procedural flaws that impact the appointment process.[372] All these measures may give rise to a certain *irregularity* which risks compromising the judicial safeguards developed in both CJEU and ECtHR jurisprudence.[373]

This chapter critically examines how judges strategically manoeuvre the national legal framework, exploring their involvement in real-life scenarios that have resulted in undermining the rule of law standards. Such instances not only pose a challenge to the fundamental right to a fair trial, itself encapsulated in the right to a 'tribunal established by law', in the context of the EU legal framework,[374] but also unveil a diverse range of actions through which individual

---

[369] Article 47 CFR, Article 6(1) ECHR.
[370] *C-791/19 Commission v Poland (Independence of the Disciplinary Chamber of the Supreme Court)* (European Court of Justice); *Cases C-542/18 RX-II and C-543/18 Erik Simpson v Council of the European Union and HG v European Commission* (European Court of Justice); *Ástráðsson v. Iceland* (n 48).
[371] Pech (n 33).
[372] European Court of Justice, 'Research Note on the Possibility and Conditions of an Incidental Review of the Procedure Leading to a Judge's Appointment' (2019) <https://curia.europa.eu/jcms/jcms/p1_3586204/en/>.
[373] Andrés Sáenz de Santa María (n 35).
[374] Article 47 of the EU Charter.

judges obstruct the delivery of justice from *within the system*. By drawing on specific cases where their actions were scrutinised by the ECtHR or the CJEU, the analysis delves into how judges have impacted the standards governing judicial independence, and even their *own conduct*. In particular, this entails the potential for abuse of the preliminary ruling procedure, the narrowing of the normative scope of the concept of mutual trust, and the perpetuation of impunity by impeding the efficacy of judicial review, as will be explored in detail in the below subsections.

3.2 To Shoot Judicial Independence in the Foot: Allowing 'Fake' Judges to Request a Preliminary Ruling and Engage in Judicial Dialogue

3.2.1 'Fake' Judges vis-à-vis the Lowering of the Threshold for Preliminary Reference

3.2.1.1 'Tribunal Established by Law' as the Initial Requirement to Request a Preliminary Reference

The question of whether the appointment or promotion of a judge is irregular, and whether a tribunal meets the standard of being 'established by law', holds significant implications not only for the internal legitimacy[375] or implications of that specific court's decision-making, also in relation to the very right to court in the context of *ex lege* removal of judges.[376] Above all, it plays a crucial role in determining the very classification of the national body concerned as a *court* or *tribunal* within the meaning of Article 267 TFEU. In principle, national courts are the bodies responsible for applying EU law — that is how a German or a Dutch judge is in fact a *European* judge.[377]

When a matter involving the interpretation of EU law arises before a national court or tribunal, the judicial body may seek a preliminary ruling from the CJEU. This occurs when there is a novel question of interpretation that is of general interest for ensuring consistent application of EU law, or when existing case law does not provide sufficient guidance for addressing a new legal scenario.[378] The national court submits a question about the interpretation or validity of an EU law provision, following national procedural rules. It alone determines the necessity and relevance of the preliminary ruling request to the CJEU.[379]

The CJEU does not function as an appellate court deciding outcomes or directly interpreting national law. Instead, it provides EU law interpretations to guide the referring national court, which then applies the CJEU's interpretation in its decision. This process

---

[375] K Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 Fordham International Law Journal 1302.
[376] Szwed (n 6).
[377] European Commission, 'Commission Decides to Refer Poland' (n 16).
[378] Article 267 of the TFEU; Article 19 of the TEU.
[379] Official Journal of the European Union, 'Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings' (2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019H1108%2801%29> accessed 5 May 2024.

exemplifies the division of responsibilities between national courts and the CJEU, highlighting the collaborative nature of the EU legal system,[380] which however relies on the judicial independence of the referring bodies. This assumption has, however, already been rebutted in the context of 'fake' judges, and more significantly, 'fake' courts.[381] This raises questions about how to best address the challenges posed by the involvement of these irregular judicial bodies in a fundamentally cooperative process,[382] meant to be conducted in good faith to advance the interpretation of specific aspects of EU *acquis*.

The adherence to legal standards in appointing and operating judicial bodies affects their external legal status and capacity to participate in the EU's legal framework. Compliance with legal norms by national judicial processes not only impacts their internal functioning but also carries broader implications for their engagement with EU law and jurisprudence. The finding whether a tribunal fulfils the necessary threshold therefore dictates whether it has the authority to refer a particular matter for a preliminary ruling to the CJEU. When a tribunal acts as a court of final instance, the mandatory referral[383] of interpretative questions to the CJEU not only shapes the trajectory of legal reasoning but also provides a significant margin for national courts to advance their policy interests and influence the development of standards within the European legal framework, even to the extent of "stack[ing] the interpretive deck for the entire decision-making process"[384]. In fact, the preliminary ruling procedure has been instrumental in the evolution of EU law, with many of its foundational principles emerging from preliminary reference rulings.[385] At times, it was even dubbed by some as the 'infringement procedure of the European citizen', a term that reflects both its significance in clarifying the meaning of EU law and its criticism as a tool for supranational judicial review of national legislation.[386]

The strategic use of the preliminary ruling procedure goes both ways. In the second chapter of this thesis, which examines judges as defenders of the rule of law, section 2.4.2

---

[380] Morten Broberg and Niels Fenger, 'Preliminary References' in Morten Broberg and Niels Fenger, *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) <https://academic.oup.com/book/41926/chapter/354915956> accessed 10 May 2024.
[381] Koncewicz, 'The Court Is Dead, Long Live the Courts?' (n 103).
[382] Monica Claes, 'The Validity and Primacy of EU Law and the "Cooperative Relationship" between National Constitutional Courts and the Court of Justice of the European Union' (2016) 23 Maastricht Journal of European and Comparative Law 151.
[383] Official Journal of the European Union (n 379).
[384] Nyikos (n 188).
[385] Clelia Lacchi and Eleftheria Neframi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection* (Larcier 2020).
[386] Virginia Passalacqua and Francesco Costamagna, 'The Law and Facts of the Preliminary Reference Procedure: A Critical Assessment of the EU Court of Justice's Source of Knowledge' (2023) 2 European Law Open 322.

highlights how the tactical framing of a preliminary question — not only its wording but also its timing and scope — carries significant weight on the interpretation of particular standards. This strategic approach can have a tangible impact on ongoing political developments, particularly amid challenges to judicial autonomy. Namely, in response to the legislative changes post-2015, various courts in Poland, most notably the Supreme Court, have been strategically initiating requests for preliminary rulings. The first such request was made in August 2018, followed by six more in 2018 and two in 2019. Additionally, local and regional courts engaged in similar actions, addressing issues such as forced judicial retirement, the legality of the new Disciplinary Chamber, and the NCJ's independence.[387]

The Civil Chamber of the Supreme Court referred a question to the CJEU to clarify the interpretation of specific EU law provisions concerning judicial appointments. This referral stemmed from doubts about the legality of the appointment process for certain judges. The referring court aimed to use the CJEU's interpretation of the standard as a basis to disregard decisions issued by these judges, highlighting the contentious nature of the appointments and seeking authoritative guidance on their validity.[388] In 2018, the Polish Supreme Court sought to protect its independence from perceived subordination to the legislative and executive branches by requesting the CJEU's opinion on EU standards regarding the irremovability of judges as a fundamental aspect of judicial independence.[389] These cases illustrate the positive role of the preliminary ruling procedure, demonstrating how judges can leverage it to shape judicial independence standards and provide additional safeguards in Member States experiencing rule of law backsliding.[390]

However, a request for a preliminary reference can be strategically submitted to obtain an answer that could later serve as a legal justification for a country's actions, ultimately facilitating judicial backsliding.[391] This raises the question of admissibility of such preliminary reference request on account of the "flaws in the appointment of the judge, constituting the

---

[387] Matthes (n 13).
[388] *Case C-487/19* (n 184).
[389] Stanisław Biernat and Monika Kawczyńska, 'Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU Is Admissible after All' [2018] Verfassungsblog on Matters Constitutional <https://verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-cjeu-is-admissible-after-all/> accessed 10 May 2024.
[390] Matthes (n 13).
[391] Pech (n 33).

referring court, to the position of judge and the doubts which may legitimately be entertained as to his independence and impartiality"[392].

This scenario gives rise to several reflections, particularly concerning the potential involvement of 'fake' judges and the vulnerability of the judicial system to their exploitation. It highlights the impact of their actions on the integrity and uniformity of EU law and underscores the need for robust safeguards to preserve the integrity of the judicial system. Due to the irregularity of their appointment or promotion, within a broader context where the judicial body lacks essential guarantees to ensure an appearance of independence, these judges manifestly lack basic independence, or operate in breach of national rules governing judicial appointment procedures. Consequently, such judges would not satisfy the threshold of composing a 'tribunal established by law'.[393] Despite having such *irregular* status, these actors can exploit the system by requesting preliminary rulings from the CJEU, with the Court treating their submissions in the same way it would any other referring court.[394] This raises fundamental questions about the vulnerability of the system to strategic exploitation. Specifically, it prompts scrutiny into the possibility of individuals strategically leveraging their right to submit questions to the CJEU, even if their legitimacy as members of a *bona fide* tribunal is in question.

Similar to strategic litigation, where individual cases seek to trigger wider socio-political change,[395] judges may exploit the judicial framework to prompt systemic changes that would legitimise an *irregular*, 'fake' judiciary. [396] Once the CJEU delivers its ruling, the interpretation of the particular issue in question becomes applicable across all Member States and is effectively binding on all national courts and tribunals.[397] This helps ensuring uniform application of EU law throughout the Union — a process which underscores the importance of scrutinising the legitimacy of those requesting such rulings in the first place. By strategically framing their questions to the CJEU, 'fake' judges can influence the interpretation of EU law in ways that would support their own positions or the interests of the ruling party.

---

[392] Getin Noble Bank, para 61.
[393] To be read within the meaning of Article 47 CFR and Article 6(1) ECHR.
[394] Kochenov and Bárd (n 53).
[395] Amsterdam University, 'Workshop on Strategic Litigation in European Law' (21 March 2024) <https://vu.nl/en/events/2024/strategic-litigation-in-european-law> accessed 26 June 2024.
[396] Alejandro Sánchez Frías, 'A New Presumption for the Autonomous Concept of "Court or Tribunal" in Article 267 TFEU: ECJ 29 March 2022, Case C-132/20, *Getin Noble Bank*' (2023) 19 European Constitutional Law Review 320.
[397] Hugo Storey, 'Preliminary References to the Court of Justice of the European Union' (2010) <https://www.iarmj.org/images/stories/lisbon_sep_2010/storey.pdf>.

The ability to request a preliminary ruling should be taken seriously, especially in cases where general and systemic deficiencies to the rule of law have been observed, in order to prevent potential abuse and ensure the integrity of the judicial process. This phenomenon also outlines broader concerns about the integrity of the legal process and the potential for abuse or manipulation within the EU's judicial framework. Another dimension to consider is that, in the context of (not only) rule of law backsliding, even those judicial bodies which are deemed independent may refrain from requesting a preliminary ruling out of fear of sanctions or disciplinary action, as the decision ultimately rests with individual judges.[398] The interaction between the status of 'tribunal established by law' and the authority to refer questions to the CJEU marks the interplay between legal legitimacy and misuse of the preliminary ruling mechanism. The prospect of 'fake' judges exploiting procedural mechanisms to influence legal developments within the EU system highlights the imperative of robust safeguards to uphold the integrity of the European judicial processes.[399]

3.2.1.2 Lawfulness of a court as a determining factor in the European Court of Human Rights' jurisprudence

The ECtHR has set a rather high standard for what constitutes a 'tribunal established by law,' reflecting a rule of law-oriented reading of the ECHR.[400] Its jurisprudence has linked the concept of a 'tribunal established by law' to the rule of law, making it central to the Court's understanding of Article 6 § 1 ECHR, and reflecting an increasing emphasis on judicial independence and impartiality. This has translated into a broadened scope of 'tribunal established by law'.[401] The interpretation of Article 6 § 1 has revolved in equal measure around the concept of a 'tribunal established by law', as well as the requirements of 'independence' and 'impartiality' of judicial bodies, which are considered inter-linked.[402]

The 'established by law' element ensures that judicial processes are free from arbitrariness, which the Court finds incompatible with the rule of law. Drawing on previous case-law in *Amuur v. France* and *Baka v. Hungary*, the Court illustrates that procedural rights must be protected with the same rigour as substantive rights.[403] This robust threshold signifies

---

[398] Karin Leijon and Monika Glavina, 'Why Passive? Exploring National Judges' Motives for Not Requesting Preliminary Rulings' (2022) 29 Maastricht Journal of European and Comparative Law 263.
[399] Pech and Kochenov (n 222).
[400] Grzęda v. Poland, para 339.
[401] *Ástráðsson*, para 237.
[402] *Ástráðsson*, para 218.
[403] Grzęda v. Poland, para 339.

that any deviation from lawful judicial appointments and procedures not only undermines individual fair trial rights but also erodes the foundational democratic principle of the rule of law. Consequently, the ECtHR's approach reinforces the integrity of judicial independence and impartiality, making it a starting point for assessing the legitimacy of courts within the Convention's framework. Notably, the Court has stressed that a judicial body must be independent, particularly from the executive branch, and impartial, in order to qualify as a 'tribunal' within the meaning of Article 6 § 1. Additionally, determining whether a 'tribunal' is 'established by law' involves considering all aspects of domestic law, including those ensuring the independence of its members. Breaches of these provisions can lead to irregularities in judges' participation in a case.[404]

Indeed, the *Ástráðsson* case marked a significant advancement in the ECtHR's interpretation of the institutional benchmarks of Article 6 § 1 by explicitly recognizing that the right to a 'tribunal established by law' encompasses the judicial appointment process. The GC of the ECtHR emphasised that any deviation from this standard constitutes a breach of the Convention.[405] It stressed that judicial appointments must be merit-based, with judges selected for their technical competence and moral integrity, essential for their duties in a state governed by the rule of law.[406] The Court underscored that more rigorous selection criteria should apply to higher courts. Importantly, it found that rulings by judges appointed under irregular circumstances cannot be recognized as rulings by a tribunal established by law, even if there are no indications that the irregularity influenced the proceedings or the outcome of the case.[407] This implies that the irregularity itself is enough to trigger a violation of Article 6. This ruling has profound implications for addressing rule of law backsliding in countries like Poland, where judicial reforms have raised concerns about political influence over the judiciary.

The three-prong test from *Ástráðsson,* used to determine whether irregularities in the appointment process were serious enough to violate the fundamental right to a tribunal established by law, cumulatively lays down three elements: i) whether there has been a manifest breach of domestic law; ii) whether breaches of domestic law pertained to any fundamental rule

---

[404] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights - Right to a Fair Trial (Criminal Limb)' (2022) <https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng> accessed 4 November 2021.
[405] *Ástráðsson*, para 226.
[406] *Ástráðsson*, para 220.
[407] Hans Petter Graver, 'A New Nail in the Coffin for the 2017 Polish Judicial Reform' (*Verfassungsblog on Matters Constitutional*, 2020) <https://verfassungsblog.de/a-new-nail-in-the-coffin-for-the-2017-polish-judicial-reform/> accessed 7 June 2022.

of the judicial appointment procedure; and iii) whether the alleged violations of the right to a 'tribunal established by law' were effectively reviewed and remedied by the domestic courts.[408]

In Poland, this situation has led to the identification of significant violations concerning the irregular appointment of judges to various judicial posts.[409] These cases include instances of judges being unlawfully appointed to the Constitutional Tribunal and the Supreme Court,[410] particularly within the Disciplinary Chamber. In fact, ECtHR's *Xero Flor* judgment was groundbreaking in finding the capture of the Constitutional Tribunal as a violation of the ECHR, a stance not yet taken by the CJEU. Other chambers have also been implicated insofar as they included individuals appointed by the new NCJ.[411] As noted in the previous chapter, the post-2015 judicial reforms compromised the NCJ's independence by altering the election process for its judicial members and centralising judicial control within the executive branch. This shift allowed the executive to replace key court administration positions and reorganise the Supreme Court. Moreover, it enabled PiS to interfere in all judicial appointment procedures, systematically compromising them and resulting in the rise of 'fake judges'.[412]

3.2.1.3 The Standard Applied to Referring Courts in Preliminary References by the Court of Justice of the European Union

In parallel to the ECtHR, the CJEU has also introduced a rigorous standard for what a 'tribunal' means within the context of preliminary references.[413] This standard had previously been more lenient, encompassing any judicial body that met the criteria of being legally established, permanent, possessing compulsory jurisdiction, following an *inter partes* procedure, applying legal rules, and operating independently.[414] This development towards a stringent reading of 'tribunal' aligns with the CJEU taking an active role in strengthening

---

[408] *Ástráðsson*, paras 243-252.
[409] Kochenov and Bárd (n 53).
[410] Barbara Grabowska-Moroz, 'Strasbourg Court Entered the Rule of Law Battlefield – Xero Flor v Poland' (*Strasbourg Observers*, 15 September 2021) <https://strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/> accessed 27 June 2024.
[411] Kochenov and Bárd (n 53).
[412] Pech (n 129).
[413] Andrés Sáenz de Santa María (n 35).
[414] 'Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice? – European Sources Online' <https://www.europeansources.info/record/preliminary-references-by-public-administrative-bodies-when-are-public-administrative-bodies-competent-to-make-preliminary-references-to-the-european-court-of-justice/> accessed 27 June 2024.

European constitutionalism by prioritising the rule of law as a core EU value as a part of its ongoing response to rule of law backsliding in the EU Member States.[415]

Through a gradual, step-by-step approach, the Court has aimed to reinforce the legal framework to uphold the rule of law ever since its famous *ASJP* ruling, which linked the reading of EU values as they stem from Article 2 TEU to the principle of sincere cooperation from Article 4(3) TEU and the principle of effective judicial protection of rights of individuals under EU law in Article 19(1) TEU.[416] The basis of the *ASJP* judgment was the Court's finding that effective judicial review is fundamental to upholding the rule of law in the EU. Therefore, each Member State must ensure that its courts and tribunals, as defined under EU law, provide effective judicial protection. This includes maintaining the independence of these courts and tribunals to guarantee the integrity of the judicial system in fields governed by EU law.[417] The Court emphasised that independence of national courts is "essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that (…) that mechanism may be activated only by a body responsible for applying EU law which satisfies, intern alia, thee criterion of independence."[418]

The concept of an 'independent' tribunal was revisited in *Banco de Santander SA*,[419] advancing the effort to clarify and harmonise the standard of independence required of national courts under Article 267 TFEU, Article 19(1)(2) TEU, and Article 47 CFR.[420] The judgment specifically strengthened the minimum requirement for independence – a body without strict guarantees for the irremovability of its members does not satisfy the standard set by Article 267 TFEU.[421] The insistence on the irremovability of members as a core component of judicial independence is a clear message that any judicial body failing to meet this criterion cannot fulfil the requirements laid out in Article 267 TFEU. This reinforces the idea that judicial independence is not a mere formality but a substantive guarantee that is essential for the integrity and functionality of the EU legal system. Furthermore, a court whose final decisions can be challenged through extraordinary appeals is likewise not deemed a 'court or tribunal'

---

[415] Pech and Kochenov (n 222).
[416] Kochenov and Bárd (n 53).
[417] *Associação Sindical dos Juízes Portugueses* [2018] European Court of Justice C-64/16.
[418] *ASJP*, para 23.
[419] *C-274/14 - Banco de Santander* (European Court of Justice).
[420] Maciej Taborowski and Piotr Bogdanowicz, 'The Independence Criterion for National Courts in the Preliminary Reference Procedure after Banco de Santander: Still the Joker in the Deck?' (2023) 60 Common Market Law Review 763.
[421] Banco de Santander SA, para 67.

eligible to make preliminary references.[422] This exclusion is designed to ensure that only those courts whose decisions are final and binding — and therefore not easily overturned or re-examined by higher authorities upon appeal — are eligible to seek guidance from the CJEU on matters of EU law. Since the CJEU's role is to ensure greater consistency and stability in the application of EU law, this approach helps prevent conflicting interpretations.

However, some scholars point out that there are also downsides to restricting access to the preliminary ruling procedure for the sake of judicial independence, as it risks conflating the distinct functions of 'independence' under Article 267 TFEU and Article 19 TEU.[423] The strong standard of judicial independence established in *Banco de Santander* has sparked a discussion concerning its ambiguity between these provisions. Whilst the Court, with good intentions, relied on Article 267 TFEU to develop the concept of an 'independent' tribunal under Article 19 TEU, some argue that it must be able to substantively distinguish between these two articles in order to avoid the creation of the very adverse effects it seeks to prevent, such as the structural inadmissibility of preliminary ruling requests from Polish courts.[424]

This is where the dilemma comes into sharper focus. Should the Court allow non-independent courts to participate in the judicial dialogue, perhaps even to help it back on the "right track", or should it exclude them due to the risks connected with their participation in such dialogue, thereby potentially creating a significant "blind spot"? The potential consequences could be significant. Excluding courts on the grounds of insufficient independence could lead to situations where judges are effectively punished twice: first, their independence is compromised by external pressures, and second, they lose their access to the CJEU, further isolating them from the broader European judicial system.[425] This dual penalty not only undermines the ability of judges to seek clarification on EU law but arguably also erodes, to some extent, the principle of mutual trust. Such exclusion could even impede the uniform application of EU law across Member States, as Polish courts would be unable to refer questions for preliminary rulings, potentially leading to divergent interpretations of EU law. By not distinguishing adequately between the contexts of Articles 267 TFEU and 19 TEU, the

---

[422] Banco de Santander SA, para 73.
[423] Taborowski and Bogdanowicz (n 420).
[424] Charlotte Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' (2021) 17 European Constitutional Law Review 26.
[425] ibid.

Court could risk alienating entire judicial systems, which could exacerbate rather than alleviate issues related to judicial independence.

In this context, Reyns calls for a relativisation of how the preliminary ruling mechanism could be leveraged by 'fake' judges. She argues that ultimately, it is the CJEU who provides the accurate interpretation and guidance for application of EU *acquis*, so the only risk lies in incorrect implementation. However, "one does not need a rule of law crisis to run that risk"[426], as illustrated through previous stand-offs with Danish[427] and German[428] courts. Recent rulings, such as the *Openbaar Ministerie L and P*,[429] suggest that the Court prefers a more nuanced approach, indicating that structural deficiencies in a Member State's judiciary do not automatically render all decisions inadmissible. [430] The Court's finding that limitations should be exceptional and based on a thorough case-by-case assessment, involving a two-step process where it examines whether systemic deficiencies pose a specific threat to the independence of the referring court before declaring questions inadmissible, presents its own set of challenges. These issues will be explored in the following subsections.

3.2.1.4 Judicial Dialogue Over Lawful Judge Standard

The momentum towards establishing a higher standard of independence for national courts was rather short-lived. In the *A. B. and Others* judgment, the Court of Justice concluded that recent legislative changes in Poland, introduced while a case was pending before the CJEU, were developed with the 'specific intention' to obstruct judicial review of appointments to the Supreme Court.[431] These changes included amendments to the Law on Judicial Council, which compelled the Supreme Administrative Court to dismiss pending appeals crucial to the CJEU referral. Despite concerns about the compromised independence of the NCJ, influenced by the executive branch, the Supreme Administrative Court did not withdraw its questions.[432] However, the Court did not rule that the Polish Constitutional Tribunal ceases to qualify as a

---

[426] ibid.
[427] Mikael Madsen, Henrik Olsen and Urška Šadl, 'Legal Disintegration?: The Ruling of the Danish Supreme Court in AJOS' [2017] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00000877> accessed 29 June 2024.
[428] Annamaria Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank' (2020) 2020 5 European Papers - A Journal on Law and Integration 671.
[429] *C-354/20 PPU Openbaar Ministerie (Indépendance de l'autorité judiciaire'émission) L and P* [2020] European Court of Justice ECLI:EU:C:2020:1033.
[430] Reyns (n 424).
[431] *C-824/18 - AB and Others (Nomination des juges à la Cour suprême - Recours)* (European Court of Justice).
[432] *AB and Others*, paragraph 18-28.

'court' under EU law. In contrast, the ECtHR addressed the underlying question whether Poland's Constitutional Tribunal continued to qualify as a 'tribunal established by law' under Article 6(1) ECHR in *Xero Flor*.[433] The Court's assessment cantered on whether recent changes to the Tribunal's composition and functioning compromised its independence and impartiality. Key considerations included evaluating the legal basis of these changes, their impact on the Tribunal's ability to operate independently from the executive and legislative branches, and the effectiveness of domestic remedies available to challenge these alterations. Ultimately, the ECtHR concluded that the changes undermined the Tribunal's status as a 'tribunal established by law', thereby potentially violating individuals' rights to a fair trial under the ECHR.[434]

In *Getin Noble Bank*, the Court missed an opportunity to interpret Article 267 TFEU through the lens of Article 2 TEU insofar as it did not use this procedure to scrutinise Member States against the requirements of Article 19(1)(2) TEU.[435] The case addressed significant concerns regarding the independence of judges appointed under non-democratic regimes, including those through domestically unconstitutional procedures.[436] Essentially, it dealt with the issue of 'fake judges' and whether their participation on the bench casts sufficient doubt on the court's status as an 'impartial and independent tribunal' under EU law.[437] Instead of seizing the chance to use the case to clarify when a court ceases to function as a legitimate court for the purposes of EU law, the Court opted for a formalistic reading aimed at maintaining judicial dialogue with national judges.[438] While some commentators cautioned that this could lead to the legitimisation of 'fake' judges, and create divergence between the jurisprudence of the CJEU and the ECtHR, these concerns did not gain sufficient traction.[439]

The Court ruled in §§ 66-70 that it only assesses whether the referring body qualifies as a 'court or tribunal' under EU law, based on criteria articulated in *Banco de Santander* and previous jurisprudence.[440] In the case at hand, the referral came from the Supreme Court, which

---

[433] *Xero Flor v. Poland* (n 101).
[434] *ibid.*
[435] Taborowski and Bogdanowicz (n 420).
[436] *Case K 5/17 The Act on the National Council of the Judiciary* (Constitutional Tribunal of Poland).
[437] *C-132/20 Getin Noble Bank* [2022] European Court of Justice ECLI:EU:C:2022:235.
[438] In paragraph 73, the Court emphasises "Furthermore, it should be recalled that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".
[439] Pech and Platon (n 44).
[440] As noted earlier, these criteria include establishment by law, permanence, compulsory jurisdiction, *inter partes* procedure, application of legal rules, and independence. *Banco de Santander SA*, paragraph 51.

is considered to generally meet these criteria. The specific challenge concerned whether the individual judge, presiding over the panel that referred the question to the CJEU, met them.[441] The Court clarified that once a request for a preliminary ruling originates from a national court or tribunal, it is presumed to fulfil these criteria, irrespective of the composition of the specific panel or judge involved.[442] The assessment of compliance with these criteria falls within the competence of the national court. The CJEU emphasised that it does not intervene to determine if the national procedural rules governing the formation of the panel were followed: "it is not for the Court, in view of the distribution of functions between itself and the national courts, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure."[443] Therefore, the Court respects the referral made by a court of a Member State unless it has been overturned through national legal remedies.[444] This stance upholds the procedural autonomy of the national judiciary in initiating preliminary references under EU law, irrespective of the judiciary's composition or governance.

This decision reflects more than a mere reluctance to address underlying issues of judicial independence, which arguably deserves attention. It also signifies a deliberate choice to avoid questioning the legitimacy of an assessment of compliance with national appointment procedures conducted by judicial bodies that might benefit from irregular procedures, by judges who were appointed irregularly. This approach reveals a tension between the CJEU's commitment to maintaining a cooperative relationship with national courts and its role in safeguarding the integrity of judicial processes within the EU framework. By prioritising procedural autonomy, the CJEU reinforces the principle that national courts are the primary arbiters of their procedural legitimacy. However, this position may inadvertently permit the perpetuation of judicial practices that undermine the rule of law. The CJEU's deference to national legal remedies as the appropriate mechanism for challenging procedural irregularities highlights its reliance on Member States' internal legal systems to address and rectify such issues, which has already proved inefficient in the case of illiberal background such as that of

---

[441] *Getin Noble Bank*, paragraph 68.
[442] *Getin Noble Bank*, paragraph 69.
[443] *Getin Noble Bank*, paragraph 70.
[444] Ibid.

Poland.[445] This decision, therefore, draws attention to the complex interplay between national sovereignty and supranational oversight in the context of EU judicial cooperation.

As a result, *Getin Noble Bank* is the first ever recorded national request for a preliminary ruling request submitted by a judge who has been manifestly unlawfully appointed to a judicial position. [446] There were, of course, several considerations to be made in this case. Rejecting the Ombudsman's plea for inadmissibility based on established Article 267 TFEU criteria risked halting all future preliminary references originating from Poland. This risk stems from ongoing challenges to judicial independence in Poland, characterised by contentious judicial appointments and a punitive disciplinary framework targeting judges based on their decisions.[447] However, the concern over blocking preliminary reference requests does not justify the outcome where the Court does not require that a court be composed of lawfully appointed judges, thereby refraining from endorsing its own EU-wide definition of a 'court or tribunal' under Article 267 TFEU.[448] Furthermore, in this context, it is crucial to bear in mind that the individuals who benefited from the irregular appointments could not have been unaware that their appointments violated essential rules integral to the establishment and operation of the judiciary.[449] This awareness makes them complicit in taking up the positions and perpetuating the irregularities in judcial composition.

This case accentuates the CJEU's reluctance to autonomously assess the legitimacy of national judicial appointments, resulting in a discrepancy: courts can seek guidance from the CJEU, yet may be unable to enforce its rulings. This occurs against the backdrop of a national 'cancel culture',[450] where Polish courts not only fail to implement CJEU decisions but openly defy it, undermining the autonomy of the EU legal order.[451] It also highlights the delicate balance the CJEU must strike between upholding EU legal standards and respecting national

---

[445] European Commission Press Corner, 'The European Commission Decides to Refer Poland to the Court of Justice of the European Union for Violations of EU Law by Its Constitutional Tribunal' (*European Commission - European Commission*, 15 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842> accessed 29 June 2024; Agnes Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (2016) 94 Public Administration 685.
[446] Kochenov and Bárd (n 53).
[447] Paweł Filipek, 'Drifting Case-Law on Judicial Independence' [2022] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00012686> accessed 29 June 2024.
[448] Kochenov and Bárd (n 53).
[449] Pech (n 33).
[450] Lawson (n 24).
[451] European Commission Press Corner (n 445).

judicial autonomy, reiterating the ongoing challenges in preserving judicial integrity amidst broader rule of law concerns in Europe.[452]

The referring judge in *Getin Noble Bank*, despite being unlawfully appointed and therefore not fulfilling the criteria of a tribunal established by law, was able to instrumentalise the preliminary ruling procedure to undermine judicial independence standards.[453] By submitting a request to the CJEU, this judge effectively sought to gain legitimacy and validation from the highest court in the EU, despite the grave irregularities surrounding his appointment.[454] The CJEU's decision to consider the request without questioning the legitimacy of his appointment *per se* allowed the referring judge, a 'fake' judge, to cloak his actions with the appearance of legality and adherence to EU judicial processes. This maneuver not only undermined the standards of judicial independence but also exposed a critical vulnerability in the preliminary ruling procedure.[455]

By leveraging the procedural mechanisms designed to facilitate judicial dialogue and consistency in EU law, the referring judge exploited the CJEU's reluctance to delve into national appointment issues, thereby weakening the integrity of the judiciary. This case illustrates how the preliminary ruling procedure, intended to uphold the rule of law and judicial cooperation, can be subverted to erode the very principles it seeks to protect. Furthermore, this line of reasoning goes completely against the ECtHR's ruling in *Grzęda v Poland*, where the Court established that a judge appointed by an entity specifically aiming to undermine judicial independence cannot be considered lawfully appointed.[456] This epitomises the need for the CJEU to refine its approach in assessing the legitimacy of referring bodies, ensuring that its rulings reinforce, rather than compromise, judicial independence across Member States.

---

[452] Sánchez Frías (n 396); European Commission, 'Communication - 2023 Rule of Law Report - the Rule of Law Situation in the European Union' (n 337).
[453] Sánchez Frías (n 396).
[454] *Getin Noble Bank* (n 437).
[455] Pech and Platon (n 44).
[456] Kochenov and Bárd (n 53).

3.2.2 'Fake' Judges and the Principle of Mutual Trust Interpreted at the Expense of Rule of Law Standards

3.2.2.1 To execute European Arrest Warrants 'until proven otherwise'

Similar in status to the principles of primacy and direct effect, the principle of mutual trust has played an important role in shaping the EU *acquis*.[457] It has been disputed whether the duty of mutual recognition, which is inherently embedded in it, translates into a 'full-fledged' legal obligation,[458] i.e. one that would necessitate all deliberations on justice-related matters to depart from the assumption that the remaining Member States comply with the EU law in the same way as the executing State.[459] In any case, its impact on the field of security and justice has been undeniably significant, which is particularly evident when it comes to cooperation in criminal matters. In practical terms, mutual recognition directly correlates with the execution of the European Arrest Warrants (EAWs) intended for carrying out speedy cross-border judicial surrender procedure. This process is grounded in mutual trust, where judicial authorities across all Member States maintain direct contact and, notably, trust each other to the extent to surrender individuals with confidence in the administration of justice.[460] The Council Framework Decision on EAWs indeed emphasises that the mechanism requires 'high level of confidence' between Member States and its implementation can be suspended only if the Council determines a serious and persistent breach of Article 6(1) TEU principles by a Member State, as outlined in Articles 7(1) and 7(2) TEU.[461] This illustrates that trust in one another's judicial systems is the key presumption underpinning the EAW mechanism, even though there is a margin for suspension in cases of serious breaches.

However, case law demonstrates that suspending this trust is not straightforward. Recent CJEU jurisprudence has interpreted the principle of mutual trust in a manner that potentially

---

[457] Matti Pellonpää, 'Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe' in Katja Karjalainen, Iina Tornberg and Aleksi Pursiainen (eds), *International Actors and the Formation of Laws* (Springer International Publishing 2022) <https://link.springer.com/10.1007/978-3-030-98351-2_3> accessed 29 December 2022.

[458] Christiaan Timmermans, 'How Trustworthy Is Mutual Trust? Opinion 2/13 Revisited' in Koen Lenaerts and others (eds), *An ever-changing union? Perspectives on the future of EU law in honor of Allan Rosas* (1st edn, Bloomsbury Publishing 2021).

[459] *Opinion 2/13* [2014] European Court of Justice CLI:EU:C:2014:2454.

[460] Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law: Re-Examining the Notion from an Individual Rights Perspective with a View to Its Further Development in the Criminal Justice Area* (Intersentia Ltd 2015).

[461] Council of the European Union, '2002/584/JHA: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States - Statements Made by Certain Member States on the Adoption of the Framework Decision' (2002).

undermines fundamental values, namely by setting a dangerous course for the interpretation of judicial independence standards.[462] When addressing whether the executing judicial authorities should suspend judicial cooperation in cases where the issuing State may be far from independent in *Minister for Justice and Equality v. LM*, it somewhat unnecessarily relied on an earlier test from *Aranyosi and Căldăraru*. This test not only requires the executing judicial authorities to i) assess whether there are general deficiencies in the justice system of the issuing State as regards the independence of the judiciary; but ii) also to undertake a specific assessment of the individual concerned running "a real risk that the essence of his fundamental right to a fair trial will be affected",[463] if he or she were to be extradited. In doing so, it failed to address the lack of judicial independence as a fundamental rule of law issue, which it essentially is. Instead, it relied on a potential violation of the right to a fair trial, which inherently requires an independent and impartial tribunal.[464]

This approach, driven by the principle of mutual trust, suggests a default stance in favour of executing EAWs, even to Member States where systemic challenges to the rule of law have been observed. This raises concerns about potential violations of procedural and substantive rights of individuals.[465] Additionally, the presumption that any national court is lawfully established can only be overturned by a final judicial ruling at either the national or international level, setting a high threshold for challenging this presumption.[466] By maintaining such a default stance towards Member States with judicial weaknesses, seen as a "specific form of illegality and inter-systemic conflict"[467], there is a legitimate concern that both procedural and substantive rights of individuals will receive less protection.

3.2.2.2 A two-pronged test relying on a high threshold linked to the right to a fair trial assessed by the issuing court

This approach of the CJEU, apart from laying down a rigorous two-prong test, raises concerns on three additional levels. First, the Court repeated in § 70 that EAWs can only be suspended in case of a 'serious' and 'persistent' breach of EU values, as determined by the

---

[462] Kochenov and Bárd (n 53).
[463] *C-216/18 Minister for Justice and Equality v LM* [2018] European Court of Justice ECLI:EU:C:2018:586; §72.
[464] Petra Bárd and Wouter van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM' (2018) 9 New Journal of European Criminal Law 353.
[465] Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond' (n 5).
[466] Kochenov and Bárd (n 53).
[467] Armin Von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57 Common Market Law Review 705.

European Council on the basis of Article 7 TEU, in which case it is the Council's assessment that the situation is sufficiently serious to warrant such suspension. It is of course Article 7 that provides, at least in theory,[468] a mechanism for protecting the EU values by laying down a legal basis in the Treaties for establishing a risk or existence of a 'serious' and 'persistent' breach of EU values. Such finding may then be followed by sanctions which include suspension of certain rights such as voting in the Council.[469]

However, it has been repeatedly demonstrated that the procedure of Article 7 suffers from serious conceptual deficiencies. It is essentially a political mechanism requiring cooperation of different EU institutions with different agendas, including through a unanimous vote in the Council.[470] Procedurally, it leaves too many variables open to interpretation.[471] It has been long portrayed as a last-resort 'nuclear option' used only in the gravest of circumstances.[472] Additionally, it fails to act as an early detection instrument,[473] which may be problematic for assessing whether someone should be extradited or not.

Second, instead of approaching the lack of judicial independence as a rule of law concern, which it inherently is, the Court had decided to construe it from the angle of a possible violation of the right to fair trial. Despite extending the original *Arynosi* test to rule of law issues, such approach arguably leads to an extra burden placed on both judicial authorities and defence when establishing rule of law violations, and thus creates an additional obstacle to values-driven adjudication.[474] Third, such an approach in fact relies on judicial dialogue with 'fake' judges and courts, i.e. those judges and courts operating unconstitutionally or under the

---

[468] Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' [2022] Res Publica <https://link.springer.com/10.1007/s11158-021-09537-w> accessed 31 March 2022.
[469] This procedure was launched against Poland in 2017, and against Hungary in 2018. In February 2024, the EU Commission unblocked access to previously frozen EU funds for Poland after the new government implemented some reforms aimed at addressing rule-of-law concerns, but the European Commission continues to monitor the situation and the procedure was not formally discontinued. The procedure against Hungary is still ongoing, too.
[470] Tomasz Tadeusz Koncewicz, 'The Democratic Backsliding and the European constitutional design in error. When will HOW meet WHY?' (*Verfassungsblog on Matters Constitutional*, 2018) <https://verfassungsblog.de/the-democratic-backsliding-and-the-european-constitutional-design-in-error-when-how-meets-why/> accessed 4 January 2023.
[471] Leonard Besselink, 'The Bite, the Bark, and the Howl' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, vol 1 (Oxford University Press 2017) <https://academic.oup.com/book/26766/chapter/195670307> accessed 4 January 2023.
[472] Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer Berlin Heidelberg 2021) <https://doi.org/10.1007/978-3-662-62317-6_6>.
[473] Laurent Pech and Patryk Wachowiec, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)' (*Verfassungsblog on Matters Constitutional*, 2019) <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/> accessed 4 January 2023.
[474] Bárd and van Ballegooij (n 464).

political subordination to third parties, as the judicial agents from the issuing Member State are expected to take part in the assessment of their own independence.[475]

By laying down grounds for such cooperation between the executing and issuing court, the CJEU not only impedes the credibility of the question of assessment, but also legitimises those fake judicial agents in the eyes of the EU legislature. This further resonates with the CJEU's broader problem of addressing 'fake' judges who attempt to cooperate with the EU organs with an agenda of their own.[476] For example, through requests for preliminary rulings, these judges might aim to obtain legal justifications for their country's actions, which could then be used domestically to justify setbacks in judicial independence.[477]

3.2.2.3 Lessons from subsequent case-law

According to Pech and Bárd, the CJEU thus creates a situation in which it qualifies a 'fake' judge in a 'fake' court as a legitimate authority to issue an EAW, and the subsequent test to which the executing court recourses is "designed to justify even the most gruesome national-level rule of law deficiencies"[478]. After all, this has been confirmed in the Court's later case-law, namely *Openbaar Ministerie L and P*, and *WO and JL,* even though the Court agreed that the status of the issuing authority is not an absolute prerogative in *OG and PI*.[479] It, however, remains unclear whether the fact that the CJEU prevented the execution of EAWs issued by the German Public Prosecutor's Office as a result of merely incidental instruction from the executive, whereas it allowed Polish courts to retain such issuing authority subject to fulfilment of the two-prong test, is a step in the right direction.[480]

Intriguingly, the same line of reasoning is now extending to competition law cases, as it is apparent from the CJEU's recent ruling in *Sped-Pro*.[481] Notably, by relying on the *Minister*

---

[475] Kochenov and Bárd (n 53).
[476] ibid.
[477] Pech (n 33).
[478] Kochenov and Bárd (n 53).
[479] Thomas Vandamme, '"The Two-Step Can't Be the Quick Step": The CJEU Reaffirms Its Case Law on the European Arrest Warrant and the Rule of Law Backsliding' (*European Law Blog*, 10 February 2021) <https://europeanlawblog.eu/2021/02/10/the-two-step-cant-be-the-quick-step-the-cjeu-reaffirms-its-case-law-on-the-european-arrest-warrant-and-the-rule-of-law-backsliding/> accessed 5 January 2023.
[480] Kochenov and Bárd (n 53).
[481] David Pérez de Lamo, 'Mutual Trust and Rule-of-Law Considerations in EU Competition Law: The General Court Extends the "L.M. Doctrine" to Cooperation Between Competition Authorities' (*Kluwer Competition Law Blog*, 1 March 2022) <http://competitionlawblog.kluwercompetitionlaw.com/2022/03/01/mutual-trust-and-rule-of-law-considerations-in-eu-competition-law-the-general-court-extends-the-l-m-doctrine-to-cooperation-between-competition-authorities-sped-pro-t-791-19/> accessed 30 December 2022.

for Justice and Equality v. LM judgment, the Court ruled in §§ 83-90 that when determining which competition authority is best placed to examine a complaint, as the Commission and the competition authorities of Member States have parallel powers, the case-law sets out an obligation for the Commission to thoroughly and precisely evaluate the evidence provided by the complainant regarding 'generalised and systemic deficiencies in the rule of law' in the Member State before dismissing a complaint on the grounds that a Member State's competition authority is better positioned to assess it.[482]

In doing so, the Court extended the principles only applied in judicial cooperation in criminal matters, i.e. the exception to the principle of mutual trust previously developed in *Arynosi* – and the *Minister for Justice and Equality v. LM* case law – to competition law cases.[483] Another significant issue arising from this test is that presuming the independence of the issuing judicial authority unless proven otherwise conflicts with the Prosecutors' cases. In instances where structural independence within the judicial system is lacking, determining the independence of individual prosecutors becomes irrelevant.[484]

At the end, a principle originally designed to enhance cooperation between Member States foreshadows a failure to react in situations where serious rule of law deficiencies are present, and where judicial dialogue and mutual trust trumps over what it means to be an independent judge or court.[485] This, in turn, undermines the EU values as a whole, exposing the inherent complexities and potential vulnerabilities within the current judicial framework. As the CJEU navigates these complex issues, the balance between upholding mutual trust and safeguarding minimum rule of law safeguards remains precarious, highlighting the ongoing need for nuanced and principled judicial decisions not delivered in a legal vacuum.

3.2.3 To Give 'Fake Judges' Unambiguous Legal Mandate to Determine the Irregularity of Appointment

In the landmark case of *Simpson and HG*, the CJEU addressed the issue of irregularities in the judicial appointment procedures and their implications under Article 47(2) of the CFR.[486] This approach mirrors the reasoning previously set by the ECtHR in the *Ástráðsson* case, where

---

[482] *T-791/19 Sped-Pro* [2022] European Court of Justice ECLI:EU:T:2022:67.
[483] Lamo (n 481).
[484] Pech and Kochenov (n 222).
[485] Getin Noble Bank; Minister for Justice and Equality v LM.
[486] *Simpson and HG* (n 370).

it ruled that the involvement of a judge appointed in violation of national judicial appointment rules in a panel convicting an applicant of criminal offenses *automatically* violates Article 6(1) ECHR.[487] However, the *Simpson and HG* case marks the CJEU's first in-depth examination of when irregularities in judicial appointments violate the right to an effective remedy before an independent and impartial tribunal, as guaranteed by Article 47 CFR.[488] This was an important step towards recognising that the nature of appointment carries weight on the finding whether a tribunal is established by law or not, and therefore to better address the 'fake judges' issue.

A central element to the CJEU's ruling is the recognition that individuals must have recourse to challenge any such irregularity that could potentially undermine their right to judicial protection. Specifically, the Court makes the following finding:

> "It follows from the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, guaranteed by Article 47 of the Charter, that everyone must, in principle, have the possibility of invoking an infringement of that right. Accordingly the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure at issue could lead to an infringement of that fundamental right"[489].

According to legal commentators, the judgment is important on several levels.[490] First, the CJEU is building upon its previous case-law, namely *Egenberger,* where it held in § 70 that Article 47 of the Charter, which ensures the right to effective judicial protection, is self-sufficient and does not require further specification by EU or national laws to grant individuals a right they can directly rely on.[491] In doing so*,* the CJEU effectively introduced a 'new remedy' under Article 47 CFR, providing unequivocal legal mandate for national courts to scrutinise and potentially invalidate judicial appointments tainted by procedural irregularities under Article 47 CFR. In such situations, national courts are empowered by the CJEU's jurisprudence to set aside any conflicting national laws that undermine the full efficacy of Article 47 CFR.

---

[487] *Ástráðsson*, paragraphs 107, 108 and 123.
[488] Pech and Kochenov (n 222).
[489] *Simpson and HG*, paragraph 55.
[490] Janek Nowak, 'Op-Ed: "The Staff Case That You Will Never Forget! The Review Judgment of the Court in Simpson and HG"' (*EU Law Live*, 30 March 2020) <https://eulawlive.com/op-ed-the-staff-case-that-you-will-never-forget-the-review-judgment-of-the-court-in-simpson-and-hg-by-janek-nowak/> accessed 2 July 2024.
[491] *C-414/16 - Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* [2018] European Court of Justice ECLI:EU:C:2018:257.

Second, it stated that access to an independent and impartial tribunal is crucial for a the right to a fair trial, stating that courts must verify their own composition when serious doubts arise to maintain public confidence, as this is an essential procedural requirement.[492] Third, the Court states that the substantive conditions and procedural rules for appointing judges are designed to prevent reasonable doubts about their legitimacy. An irregularity in the appointment process,

> "particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system"[493]

infringes Article 47 of the Charter. The implications are significant – not only are national courts mandated to review and, if necessary, invalidate judicial appointments with procedural irregularities, overriding conflicting national laws. There is also an obligation for them to verify their own composition if serious doubts arise about their independence. The Court also seems to determine what irregularities are severe enough to trigger a violation of Article 47 CFR, emphasising in explicit terms the role of fundamental rights in this respect.[494]

A major issue arises regarding who is responsible for conducting the review of judicial appointments. In legal systems plagued by systematic rule of law deficiencies, there is a significant concern: can a court that itself may be illegitimate or improperly appointed — a 'fake' court — be trusted to assess the legitimacy of other judges' appointments? This situation presents a paradox where judges appointed through irregular procedures are given the authority to rule on the validity of other judicial appointments. Such empowerment raises doubts about the fairness and integrity of the review process, as it relies on potentially compromised judges

---

[492] In paragraph 57, the Court elaborates "the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion".
[493] *Simpson and HG*, paragraph 75.
[494] *Simpson and HG* (n 370).

to uphold judicial standards and independence. This approach risks perpetuating a cycle of illegitimacy, undermining public confidence in the judicial system, and failing to address the root causes of judicial appointment irregularities.

Moreover, the CJEU's distinction between fundamental and non-fundamental rules in appointment procedures, as seen in *Simpson and HG*, risks inadvertently facilitating executive overreach. This categorisation allows certain irregularities to be overlooked, potentially enabling autocratic regimes to maintain control over judicial appointments without facing substantial consequences. Such interpretations may lead to situations where even breaches of fundamental rules go unaddressed if there is no explicit 'evidence of intent to undermine judicial independence'.[495]

3.2.1 The When, the What and the Where of 'Fake' Appointments

The appointment of 'fake' judges not only subverts the purpose of preliminary references, but also lowers the threshold for such references, undermining the EU's credibility vis-à-vis its citizens and third parties. This practice also opens the door to strategic exploitation of this procedure, which can have more far-reaching consequences on the ground.[496] Cases such as *Getin Noble Bank* illustrate how 'fake' judges have exploited the CJEU's reluctance to address national appointment issues in an explicit and comprehensive manner, resulting in suboptimal standard-setting which on some instances contradicts with the jurisprudence of the ECtHR.[497] Additionally, the CJEU has developed what some may call disproportionately high two-pronged test for suspending the EAW mechanism in the context of sustained attacks on the judicial infrastructure in some Member States, which partly relies on an assessment by the very 'fake' courts it should protect individuals from being extradited to.[498]

While a number of stronger standards on judicial appointments have evolved in parallel, such as in *Simpson and HG*, significant weaknesses persist when the assessment of irregularity is entrusted to national courts whose integrity has already been compromised.[499] In fact, the fact that the Court leaves significant aspects of the judicial independence exercise to national judicial bodies, relying on their independence and willingness to participate, is becoming a pattern. This reliance on national courts, however, seems to lack operational effectiveness and

---

[495] Pech (n 33).
[496] Kochenov and Bárd (n 53).
[497] Xero Flor v Poland.
[498] Minister for Justice and Equality v LM.
[499] Simpson and HG.

fails to provide a solution in situations where systemic deficiencies to the rule of law are so deeply entrenched that there are no 'free courts' left to adjudicate impartially.[500] This approach overlooks the reality that in certain Member States, pervasive political influence over the judiciary undermines the very independence and impartiality that the CJEU seeks to protect.[501]

So *when* does an irregular appointment constitute a violation of the right to a tribunal established by law? *What* are the legal consequences if a tribunal fails to meet the 'established by law' standard? And *where* to strike balance between legal certainty, public interest, and intentional irregularities aimed at undermining the judicial system from within?[502] The previous sections have provided different answers to these questions, which in itself highlights the importance of devising a strong and unified reading of the 'tribunal established by law' standard, and how it should be interpreted in situations involving such 'fake' actors.

The *when* question remains the most re-visited and the most complex in legal discussions.[503] Despite numerous cases examined by both the CJEU and the ECtHR, their respective analyses provide only partial insights. The ECtHR's *Ástráðsson* established a three-step test to assess whether procedural irregularities in judicial appointments violate the fundamental right to a tribunal established by law.[504] In *Xero Flor*, the ECtHR found that a tribunal was not lawfully established due to the involvement of improperly appointed judges in rejecting a constitutional complaint, highlighting unlawful external influences on the judiciary.[505] Similarly, *Reczkowicz* concluded that certain chambers of the Supreme Court were not lawfully constituted due to flawed appointment procedures lacking independence.[506]

On the other hand, the CJEU emphasised in *ASJP* that judicial bodies must be free from external pressures to maintain impartiality and uphold the rule of law effectively.[507] In *Banco de Santander*, it underscored that judicial bodies must ensure strict guarantees for the

---

[500] Wolne Sądy (n 130).
[501] Leloup (n 37); Zoll and Wortham (n 60).
[502] Pech (n 33).
[503] Cecilia Rizcallah and Victor Davio, 'The Requirement That Tribunals Be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2021) 17 European Constitutional Law Review 581; Anna Mechlinska, 'When Is a Tribunal Not a Tribunal? Poland Loses Again as the European Court of Human Rights Declares the Disciplinary Chamber Not to Be a Tribunal Established by Law in Reczkowicz v. Poland.' (*Strasbourg Observers*, 26 October 2021) <https://strasbourgobservers.com/2021/10/26/when-is-a-tribunal-not-a-tribunal-poland-loses-again-as-the-european-court-of-human-rights-declares-the-disciplinary-chamber-not-to-be-a-tribunal-established-by-law-in-reczkowicz-v-poland/> accessed 4 July 2024.
[504] Ástráðsson.
[505] Xero Flor v Poland.
[506] Reczkowicz v Poland.
[507] Associação Sindical dos Juízes Portugueses.

irremovability of their members under Article 267 TFEU, emphasising that judicial independence is not merely procedural but a substantive requirement vital for the EU legal system's functionality.[508] However, cases like *Minister for Justice and Equality v. LM* and *Getin Noble Bank* reveal gaps where breaches of judicial independence or the lack of lawful establishment are inadequately addressed or "outright overlooked"[509]. As a result, 'fake' judges are given a legitimate platform to operate and adversely affect intra-EU legal cooperation.[510]

What may be less apparent from this discussion, and is worth highlighting, is that concept of an independent and impartial tribunal (previously) established by law, which typically demands a straightforward answer — whether the judge before them is independent or not — has evolved into a matter of 'context' in EU law.[511] This evolution means that assessing the legitimacy of a judge now depends on various factors, including the specific court they serve in, the nature of the case at hand, and other relevant variables. However, this ambiguity undermines clarity in upholding the rule of law, jeopardizing consistent application of EU law across Member States and adherence to rigorous human rights standards.[512] By emphasising contextual factors, such as the nature of the case and the overall environment in the country concerned, there is a risk that the core issue of irregular judicial appointments that is at stake may be overshadowed. This approach potentially weakens efforts to maintain a uniform standard of judicial independence.

What is evident from the discussion above is the necessity for a case-by-case assessment. The question *what* the legal consequences are when it comes to such finding, and *where* to strike balance between legal certainty, public interest and attempts to undermine the system, is however equally significant. As previously highlighted, determining that a particular entity does not meet the criteria of a 'tribunal established by law' has substantial implications, potentially leading to the invalidation of decisions made by such judicial entities.[513] As AG Tanchev has aptly suggested in her Opinion, if the CJEU were to find judicial appointment irregularities more severe than in previous cases like *Ástráðsson*, it could precipitate a wave of challenges in Strasbourg against judgments involving improperly appointed Supreme Court

---

[508] Banco de Santander.
[509] Kochenov and Bárd (n 53).
[510] Pech and Platon (n 44).
[511] Kochenov and Bárd (n 53).
[512] ibid.
[513] Szwed (n 6).

judges.[514] This thesis acknowledges the inherent complexity of this issue, refraining from offering simple solutions while acknowledging the multifaceted challenges it presents.

Against this backdrop, rather than providing a perfect go-to recipe, it seems to be more meaningful to approach this matter operationally. One practical aspect concerns the temporal implications of determining that a judge or a court does not meet the criteria of being 'established by law'.[515] While it is crucial to uphold legal certainty and not automatically invalidate previous judgments involving improperly appointed judges, there is a compelling need to implement a systematic review mechanism.[516] Such a mechanism would ensure thorough scrutiny, thereby preventing executive overreach from escaping accountability under the guise of legal certainty.[517] Factors such as the severity of the irregularities, the nature of the legal proceedings, and the potential consequences for individual rights and freedoms should all inform the approach to determining legal validity. Transparency in addressing the potential irregularities and demonstrating accountability, in dialogue with European institutions, could bolster public confidence in the fairness and integrity of the process.

To borrow from Sadurski, Pech and Scheppele, who were concerned that they may have prematurely assumed that the EU had already learned its lesson in reacting to rule of law backsliding in a pre-emptive manner:

> "Autocrats always move in quickly to change the facts on the ground so as to present the EU with *faits accomplis* such as the unlawful appointment of individuals masquerading as judges and establishment of new bodies masquerading as courts. Unless the Commission is prepared to seek the removal of sitting "judges," require the rehiring of suspended and fired formerly independent judges and demand the dismantling of existing "judicial" institutions, it must act before these changes become entrenched and before the Member State has the chance to complete its thorough destruction of the rule of law.[518]

---

[514] Pech and Kochenov (n 222).
[515] ibid.
[516] ibid.
[517] Pech (n 33).
[518] Wojciech Sadurski, 'Open Letter to the President of the European Commission Regarding Poland's "Muzzle Law"' [2020] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00008281> accessed 1 July 2024.

This underscores the imperative for timely and decisive action on the part of the European courts to prevent the entrenchment of systemic violations within Member States (and HCP), thereby safeguarding the foundational principles of the European landscape.

A promising step forward in making this work easier is the Court's advancement of the principle of non-regression.[519] In the *Repubblika* case, which dealt with the Maltese judiciary's constitutional appointment procedures, the Court introduced this principle to uphold EU values.[520] Previously applied mainly in environmental and human rights law, this principle now aims to prevent any national measures, including constitutional provisions, from weakening the protection of Article 2 values. The Court follows the reasoning that these protections cannot fall below the minimum standards established during the pre-accession phase. This development marks a significant step in combating potential declines in these fundamental values within EU Member States, effectively upgrading the EU values enforcement system.[521] Enforcing EU values has long been a challenging task,[522] fraught with operational difficulties and more questions arising,[523] but this principle potentially offers a new mechanism for the Court to address these issues.

A compelling approach forward equally involves giving more prominence to the CFR as a complementary force alongside Article 19(1) TEU. This perspective arises from the Court's interpretation of the Charter's scope, suggesting it can serve as a set of guiding principles when direct intervention by the CJEU is not forthcoming.[524] The Charter should be accorded greater significance to safeguard the independence of judiciaries within the EU, ensuring they adhere to standards established by the ECtHR.[525] This approach would strengthen the framework for judicial independence across Member States, promoting consistency and accountability in the application of fundamental rights within the EU legal landscape.[526] Instead of viewing the divergence in the protection of judicial independence between the two Courts in comparative terms, emphasis would be better-placed on how, thanks to their mutual interplay, more ground is covered and how enhanced cooperation can make a difference in the life of Europeans.[527]

---

[519] Mathieu Leloup, Dimitry Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru' (2021).
[520] *C-896/19 - Repubblika* [2021] European Court of Justice ECLI:EU:C:2021:311.
[521] Ibid.
[522] Besselink (n 471).
[523] Kozlová, 'Beyond Confirming Validity' (n 23).
[524] Hamuľák and Circolo (n 12).
[525] Braithwaite, Harby and Miletić (n 31).
[526] Pech and Kochenov (n 222).
[527] Andrés Sáenz de Santa María (n 35).

3.3 'Fake' Judges – And Next, 'Fake Courts'?

3.3.1 The Court of Justice of the European Union, a Tribunal Not Established by Law?

3.3.1.1 Advocating for a strong threshold… just not for itself

The independence of a judicial body should be an unquestioned pillar of its function. While some have criticised the CJEU for prioritising ever-closer integration over robust legal reasoning,[528] it has nonetheless been a staunch defender of judicial independence as the supreme authority on EU law. Partly in response to developments in Hungary and Poland, the CJEU, alongside the ECtHR, identified and applied substantive principles of judicial independence to the national courts of Member States,[529] which came as a particularly significant move for the future direction of the rule of law within the EU. In its jurisprudence, it established the criteria that other courts, including national supreme courts, must meet to ensure effective legal protection under Article 19(1) of the TEU, navigating sensitive limits of what falls under Member States' jurisdiction.[530]

The Court has also played a key role in progressively expanding the reach of EU competences across diverse areas of law, partly due to its dynamic approach.[531] However, despite its role in setting up these standards, it faced an unprecedented challenge to the principle of judicial independence in 2020-2021. The removal of AG Eleanor Sharpston before the planned end of her 6-year term amidst Brexit turmoil revealed a troubling willingness to sacrifice the rule of law for political expediency. The three separate proceedings not only cast doubt on the autonomy of the CJEU but also highlighted the dangerous precedent of undermining judicial independence, exposing an alarming double standard – one where EU Member States are expected to uphold judicial independence while the EU itself might be falling short of the same standard.[532]

Following the United Kingdom's (UK) departure from the EU, The Conference of the representatives of the governments of the Member States issued a Declaration, relying on the

---

[528] Gareth Davies, 'Legislative Control of the European Court of Justice' (2014) 51 Common Market Law Review 1579.
[529] Pech and Kochenov (n 222).
[530] Kieran Bradley, 'Appointment and Dis-Appointment at the CJEU: Part II – The Sharpston Litigation' (2022) 21 The Law & Practice of International Courts and Tribunals 178.
[531] De Somer (n 237).
[532] Dimitry V Kochenov and Graham Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2021) 27 European Law Journal 262.

reading of Article 50(3) TEU, to stipulate that any ongoing mandates of members of EU institutions would cease on the withdrawal date.[533] This implied the transition of the AG position initially assigned to the UK through a declaration accompanying the Act of Accession of 1995 into a rotational system to another Member State, and eventually led to Sharpston's *de facto* dismissal and appointment of a new AG, Athanasios Rantos, in her place.[534]

To provide a brief overview of the facts of the three separate proceedings and facilitate understanding of some of the following reflections related to elements of judicial independence, the applicant contested actions taken by the Council, the Conference of Representatives, and the Court of Justice. Specifically, she challenged (i) the declaration of a newly opened vacancy by the Conference, (ii) a letter from the President of the Court, and (iii) the decision by Member States to appoint Athanasios Rantos in her place.[535] She argued that the Conference lacked the authority to declare the vacancy, violated essential procedural requirements, misused powers, and infringed EU Treaties. She also claimed that Rantos' appointment was based on a misinterpretation of Article 50 TEU, violated judicial independence, and did not follow the prescribed procedures. Additionally, she contended that the Conference's actions should be subject to judicial review as they have legal effects within the EU legal order.[536]

The Court found the claim against the Council inadmissible, stating the Council did not issue the declaration or make the appointment decision. Regarding the President's letter, the Court determined it was merely an intermediary step without binding legal effect.[537] Finally, the Court ruled that the Conference is not an EU body subject to judicial review under Article 263 TFEU, as Member States acted in their national capacities when issuing the declaration and making the appointment.[538]

---

[533] Council of the European Union, 'Declaration by the Conference of the Representatives of the Governments of the Member States on the Consequences of the Withdrawal of the United Kingdom from the European Union for the Advocates-General of the Court of Justice of the European Union (XT 21018/20)'.
[534] *Case C-685/20 P Order of the Court in Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States* (European Court of Justice).
[535] *T-180/20 - Sharpston v Council and Conférence des Représentants des Gouvernements des États membres Order of the General Court (Second Chamber) of 6 October 2020* (General Court); *T-550/20 - Sharpston v Council and les Représentants des Gouvernements des États membres Order of the General Court (Second Chamber) of 6 October 2020* (General Court).
[536] *T-180/20 - Sharpston v Council and Conférence des Représentants des Gouvernements des États membres. Order of the General Court (Second Chamber) of 6 October 2020* (n 535).
[537] *T-184/20 - Sharpston v Court of Justice of the European Union Order of the General Court (Second Chamber) of 6 October 2020* (General Court).
[538] *T-180/20 - Sharpston v Council and Conférence des Représentants des Gouvernements des États membres. Order of the General Court (Second Chamber) of 6 October 2020* (n 535).

3.3.1.2 Membership as a ground for pre-mature end of mandate

The Declaration by the Conference was based on the assumption that the term of office of an AG mirrors that of a judge, while Article 19(2) TEU merely requires the Court to be composed of one judge per Member State, who are assisted by AGs.[539] Unlike judges, there is no stipulated national allocation or representation for AGs under Article 252 TFEU. Therefore, not only is there a clear distinction in the text regarding the tenure of judges and AGs, but Article 252 specifies the number of AGs without assigning national quotas, thus reinforcing the notion that AGs operate under different regulatory principles than judges. The central issue therefore revolves around whether similarly to judges themselves, an AG's mandate is inherently tied to their nominating Member State, necessitating its expiration upon withdrawal, or if it remains unaffected by changes in Member State status.[540]

According to Kochenov and Butler, the clear separation between the CJEU members in the text suggests that once an AG assumes a position on the Court, their tenure does not depend on the ongoing membership of the nominating Member State in the Union.[541] The eligibility of an AG, recognized as an independent official who issues non-binding Opinions, to serve on the CJEU must be read as not contingent upon the membership status of the nominating Member State within the Union during their term as arguing otherwise would imply the existence of an additional condition for AGs to remain on the bench, which is not explicitly stipulated in the *acquis*. This hypothesis is further substantiated by the fact that AG Sharpston, originally nominated by a withdrawing Member State, continued her tenure on the CJEU on the day of the Member State's withdrawal, while UK judges resigned immediately,[542] which differentiated her position from judges both *de iure* and *de facto*.

Reflecting on this analysis, it becomes clear that the tenure of AGs on the CJEU should be understood as inherently independent from the political shifts within Member States. This separation underscores the CJEU's commitment to maintaining a stable and impartial judicial

---

[539] Article 19(2) TEU reads "The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State.The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed."

[540] Sophie Bohnert, 'Predictable and Unsatisfying: The Sharpston Saga: The CJEU's Orders in Cases C-684/20 P and C-685/20 P' [2021] Verfassungsblog on Matters Constitutional <https://verfassungsblog.de/predictable-and-unsatisfying/> accessed 10 May 2024.

[541] Kochenov and Butler (n 532).

[542] ibid.

system that is insulated from the fluctuations of national politics. The premature termination of AG Sharpston's tenure has not been based as much on legal grounds as it has on Brexit, revealing an artificial and legally unsound rationale.[543] The CJEU and Member States implied that the UK's withdrawal justified amending the security of tenure for an AG retroactively, targeting Sharpston *ad personam*. This action did not follow the proper legal procedures, including non-retroactive application and an *erga omnes* scope, ensuring it applies universally rather than to a single individual. Therefore, it violated the principles of judicial independence and the rule of law.[544]

3.3.1.3 An ipso iure end of mandate, Constitutional implications without substantiation

The CJEU endorsed the Member States' perspective by ruling that AG Sharpston's mandate ceased automatically, *ipso iure*, upon the UK's withdrawal from the EU as per Article 50(3) of the TEU and the Withdrawal Agreement. This line of reasoning is striking as the EU legal framework does not explicitly authorise the 'automatic' termination of a Court of Justice member's term upon a Member State's withdrawal, very much contrary to the CJEU's assertion in § 49.[545] Even more importantly, the Court's decision lacks a thorough substantiation of its legal reasoning or its interpretation of EU primary law, which is directly linked to the questions arising from the case.[546]

In particular, the absence of explicit references to Article 6 of the Court Statute and Article 19(1) TEU in the Court's reasoning underscores a missed opportunity to substantively address the irremovability of judges and the overarching principle of judicial independence. Moreover, the Court did not clarify an important question whether Member States can in fact override Article 6 of the Statute, which governs the conditions under which a member of the Court may be deprived of their office, their right to a pension or other benefits.[547] Yet, by declaring the AG vacancy, the Member States effectively exercised a power that is, in principle,

---

[543] ibid.
[544] Bohnert (n 540).
[545] *C-684/20 P - Sharpston v Council and Conférence des Représentants des Gouvernements des États membres* (European Court of Justice).
[546] Bohnert (n 540).
[547] This can only occur if all Judges and AGs of the Court unanimously agree that the judge no longer meets the necessary conditions or obligations of the office. The judge in question cannot participate in these deliberations. If the judge is a member of the General Court or a specialised court, the Court of Justice must consult the concerned court before making a decision. The Court's Registrar must communicate this decision to the Presidents of the European Parliament, the Commission, and the Council. A vacancy on the bench is created upon notification to the President of the Council.

vested exclusively in the CJEU.[548] This is particularly striking given the constitutional significance of the case. While the withdrawal of a Member State does disqualify, *ipso iure*, the judge nominated by that state from serving on the Court of Justice, it does not in any way alter the primary EU law provisions governing the creation of vacancies for AGs. As commentators have noted, Article 50 TEU cannot be used as a justification for Member States to modify EU primary law through an *ad hoc* political declaration.[549] The procedural norms and legal frameworks established by EU primary law for appointing and replacing AGs must be considered unaffected by the political and legal circumstances surrounding a Member State's withdrawal.[550] By invoking non-reviewability rather than engaging in a thorough examination of the legality and proportionality of Sharpston's dismissal, the CJEU's stance therefore leaves room for doubt regarding its commitment to upholding judicial autonomy within the EU legal framework. It is put forward that dismissal of own member would require substantiation explicitly laying down legitimate and proportionate grounds, especially considering the implications for judicial independence of EU institutions.[551]

3.3.1.4 No judicial review of acts of Member States

What is particularly striking in this case is that the CJEU upheld the General Court's decision that acts adopted by representatives of the governments of Member States are not subject to judicial review by EU courts.[552] This effectively means that Member States have the power to dismiss members of the Court, with such decisions being beyond the reach of judicial scrutiny. This ruling, in essence, undermines the independence of the CJEU by allowing an *ad hoc* political body composed by Member States to override basic judicial protections.[553]

In its reasoning, the CJEU clarifies that Article 263 TFEU serves specifically to allow EU courts to review acts of EU institutions, bodies, offices, or agencies that are intended to have legal effects on third parties. Acts of representatives of Member State governments, when not acting as members of the EU Council, do not, fall under this scrutiny in the Court's view. These representatives are neither considered an institution under Article 13 TEU, nor a body,

---

[548] Bradley (n 530).
[549] Kochenov and Butler (n 532).
[550] ibid.
[551] Bradley (n 530).
[552] ibid.
[553] Dimitry Kochenov and Graham Butler, 'It's Urgent III' (*Verfassungsblog on Matters Constitutional*, 2020) <https://verfassungsblog.de/its-urgent-iii/> accessed 19 June 2022.

office, or agency of the EU.[554] In order to substantiate this position, The Court opted to cite previous case-law, which limits reviewability to acts explicitly within the EU institutional framework despite AG Sharpston's argument that previous case law had also illustrated that not all acts of these representatives are beyond review by EU court.[555] While it is to some extent the Court's prerogative to do so, there are several inconsistencies in its interpretation. Namely, some contend that representatives of Member States should be in any case considered a 'body' or 'agency' within the meaning of Article 263 TFEU.[556] This interpretation seems logical, given that the decisions of the Conference can, in practice, be equated to decisions of the Council.[557] Others seem to highlight the difficulties this interpretation faces due to the *ad hoc* nature of the Conference and its specific, temporary mandate, which makes it difficult to assess whether it is an institution within the meaning of Article 13 TEU.[558] The CJEU's line of reasoning suggests that whether these representatives acted within EU treaties or other legal sources, is irrelevant – what ultimately matters is the originator of the act, which in this case was the Conference.[559]

While the actions of Member State representatives were deemed beyond judicial review, they still had the legal standing to appeal against interim measures suspending their decisions.[560] This paradox allowed them to sue but not be sued, revealing a significant inconsistency in the application of judicial review.[561] In instances of major violations, especially those vital to the integrity of European integration, it is crucial to have effective countermeasures and remedies that reflect a strong system of checks and balances. Without such mechanisms, the foundational principles of the EU, including the rule of law and judicial independence, are at risk.[562]

---

[554] Bohnert (n 540).
[555] *C-685/20 P - Sharpston v Council and les Représentants des Gouvernements des États membres* (European Court of Justice).
[556] Kochenov and Butler (n 532).
[557] Bohnert (n 540).
[558] ibid; Serhii Lashyn, 'The Unsuccessful Bid of the British Advocate-General to Remain on the Bench Despite Brexit' (2021) 84 The Modern Law Review 1414.
[559] *Case C-685/20 P Order of the Court in Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States* (n 534).
[560] *C-685/20 P - Sharpston v Council and les Représentants des Gouvernements des États membres* (n 555).
[561] Kochenov and Butler (n 532).
[562] ibid.

3.3.2 Implications of the 'Sharpston Argument' on the Future of Judicial Independence Standards

3.3.2.1 Removability of tenure despite own case-law guarantees

The security of tenure and the principle of irremovability are fundamental components of judicial independence. These principles ensure that judges can perform their duties without external pressure or fear of arbitrary dismissal, which is crucial for maintaining an impartial judiciary. A premature termination of a judge's tenure, therefore, crosses a significant red line, undermining the very foundation of judicial independence. In its own jurisprudence, the CJEU has established stringent safeguards to ensure that Member States uphold the obligation of effective judicial protection, including as regards the principle of judicial irremovability and the right of access to a court of judges deprived of their judicial office.[563] Some may even go as far as calling the body of case law on rule of law matters an extensive "upgrade" in response to the irregular judicial appointments and dismissals, stemming from the political takeover of the judiciary in Poland between 2015-2023.[564]

In relation to the principle of irremovability, the Court stated in § 115 of the *Independence of ordinary courts* that it is so significant that any exception is "acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them"[565]. Despite these stringent safeguards against removal from office, and despite AG Sharpston's appointed term of six years, the Court opted to dismiss her prematurely. This action appears to set a double standard where the CJEU demands high standards of judicial independence from national courts, but it did not apply the same rigor to its own actions.[566] This is also in contrast to its previous finding that even decisions concerning judicial appointments to the CJEU were not immune from judicial review, as evidenced in

---

[563] *Associação Sindical dos Juízes Portugueses* (n 417); *Independence of the ordinary courts* (n 118); *Case C-619/18 Commission v Poland (Independence of the Supreme Court)* (CJEU); *C-791/19 Commission v Poland (Independence of the Disciplinary Chamber of the Supreme Court)* (n 370).
[564] Pech and Kochenov (n 222).
[565] *Independence of the ordinary courts* (n 118).
[566] Bohnert (n 540).

Simpson, despite the absence of any specific challenge to the Court's jurisdiction in that particular case.[567]

3.3.2.2 Tribunal not established by law

As noted earlier, in *Getin Noble Bank*, the Court framed its reasoning around the question under what circumstances a court would be considered an independent and impartial court 'previously established by law', in a case where a judge's appointment was clearly irregular.[568] Namely, in §130, the Court examined whether the irregularities in the appointment process were significant enough to create a substantial risk that other branches of the State, especially the executive, might exert "undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned"[569].

In this context, the *Getin Noble Bank* judgment touches on fundamental principles of judicial independence and the rule of law within the EU. A healthy system of balance and separation of powers inherently involves conflicts regarding the extent of influence one branch of government can exert over another.[570] In the EU, the principle of institutional balance is well-established, making the independence of the Court of Justice – often the final arbiter in inter-institutional conflicts – crucial.[571] The rule of law, a constitutional cornerstone of the Union, mandates that all decisions by EU institutions and Member States be firmly grounded in law.[572]

However, these principles were not upheld in the case involving the appointment of Mr. Rantos to replace AG Sharpston, whose term had not expired. This situation raised numerous questions, the most important being how to prevent such abuses of power by Member States, which result in a weakened Court of Justice and the explicit violation of the Union's core values.[573] In this case, in fact, we are presented with two CJEU Orders dismissing AG Sharpston's subsequent appeals. These appeals contested the General Court's rulings that acts by Member States' representatives concerning the AG position are not subject to judicial review

---

[567] *Simpson and HG* (n 370).
[568] *Getin Noble Bank* (n 437).
[569] *ibid.*
[570] Kochenov and Bárd (n 53).
[571] Claes (n 382).
[572] Kochenov and Butler (n 532).
[573] ibid.

by EU courts.[574] The CJEU upheld this decision, affirming that such acts do not fall within the scope of Article 263 TFEU, which allows review of EU acts intended to produce legal effects. It follows that by upholding this line of reasoning, the Court was indeed a body lacking the necessary independence and impartiality, failing to qualify as a 'tribunal' under EU law and not meeting the 'established by law' criterion under Article 6 ECHR.[575]

The paradox of having a court as the final arbiter to check rule of law inconsistencies, such as determining whether a court itself qualifies as a court, while it does not meet those qualifications, presents significant challenges. This situation undermines the very foundation of judicial independence and impartiality.[576] When the highest court responsible for upholding the rule of law is itself compromised, or appears to be compromised,[577] it erodes public trust and confidence in the legal system. This paradox can lead to a vicious cycle where legal and democratic norms are continuously weakened, making it difficult to hold other state actors accountable.[578] Moreover, it poses a risk of setting dangerous precedents where political influences can manipulate judicial appointments without adequate checks and balances.[579] This calls for urgent rethinking of the standards to ensure that the institutions designed to safeguard the rule of law are themselves protected from undue influence, thus maintaining the integrity of the entire legal system.

3.3.2.3 An irregular appointment with the Court's blessing

The appointment of Mr. Rantos as Advocate General marks a departure from routine procedure,[580] encompassing two key actions: the installation of a new AG and, more

---

[574] *T-184/20 - Sharpston v Court of Justice of the European Union. Order of the General Court (Second Chamber) of 6 October 2020* (n 537); *Case C-685/20 P Order of the Court in Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States* (n 534).
[575] To be read in conjunction with Article 52(3) CFR "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"; and Article 53 "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."
[576] Braithwaite, Harby and Miletić (n 31).
[577] Michał Krajewski and Michał Ziółkowski, 'The Power of "Appearances"' [2019] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00007891> accessed 5 July 2024.
[578] Closa and Kochenov (n 11).
[579] Blauberger and Martinsen (n 39).
[580] Kochenov and Butler (n 532).

controversially, the implicit validation of the *de facto* removal of an incumbent AG.[581] This decision stemmed from the declaration by the Conference, which lacked proper legal grounds and which was successful in circumventing established EU acquis concerning judicial vacancies, appointments, and security of tenure.[582]

Lacking a legal basis, the Conference sought to dismiss an AG, a power that resides exclusively with the CJEU. In response, the President of the CJEU declared the position vacant, effectively bypassing the issue of the legitimacy of the dismissal.[583] Subsequently, Mr. Rantos' credentials were verified, yet this process did not address the legality of the initial dismissal. Meanwhile, the Court members collectively failed to use the mechanisms available within their own Statute to challenge this irregular procedure, thereby neglecting an opportunity to contest the breach of protocol and safeguard judicial integrity.[584]

This situation reveals another paradox: a court, charged with determining the legality of appointments, becomes complicit in the very irregular appointments. Such actions undermine the principles of judicial independence and impartiality, core components of the rule of law. When the highest court itself engages in or endorses practices that contravene established legal norms, it severely erodes public confidence in the judiciary and the broader legal system. The implications are far-reaching. Firstly, it sets a dangerous precedent, suggesting that political pressure can influence judicial appointments with impunity. This weakens the separation of powers and allows the executive and other branches to exert undue influence over the judiciary.[585] Secondly, it calls into question the integrity and legitimacy of the Court's future rulings.[586] If the institution that is supposed to be the guardian of the rule of law cannot adhere to its own standards, its ability to enforce those standards on others is critically compromised.

This paradox highlights the need ensure that the judiciary remains independent and insulated from instances of executive overreach. It also showcases the necessity for robust mechanisms that can hold even the highest judicial bodies accountable to the principles they

---

[581] ibid.
[582] ibid.
[583] *T-550/20 - Sharpston v Council and les Représentants des Gouvernements des États membres. Order of the General Court (Second Chamber) of 6 October 2020* (n 535).
[584] Kochenov and Butler (n 532).
[585] Mastracci (n 49).
[586] Leloup (n 37).

are supposed to uphold.[587] Only by addressing these issues can the EU reinforce the rule of law and maintain public trust in its judicial system.

3.3.2.4 No available remedy, no fair trial guarantees

The Court's ruling on non-reviewability essentially places certain actions by Member States beyond the scope of judicial oversight within the EU framework,[588] thereby limiting the mechanisms available to challenge potentially unlawful or irregular decisions.[589] By excluding a decision on appointment to the Court from judicial review, the Court weakens the checks and balances essential for maintaining the rule of law and inherently present in the *acquis*. After all, judicial review is central to ensuring that decisions and actions of all bodies, including those of Member States acting in their national capacities, comply with legal standards and principles.[590] Moreover, the notion that the composition of a court could be arbitrarily influenced by the government without recourse to review in the national system cannot be used as an argument in favour of a judiciary's independence.[591] Without the possibility of judicial review, there is a risk that actions by legislative and executive bodies not adhering to democratically and constitutionally designated competences, go unchecked.[592] This leads to a deterioration, or the perception thereof, in the integrity of the legal system.

This situation has broader implications for public trust in the judiciary and the rule of law. When judicial decisions and conduct are subject to review by higher courts, it reinforces the idea that no entity is above the law and that errors or abuses can be rectified. It also ensures that legal principles are consistently applied, fostering a sense of fairness and accountability. However, by placing certain decisions beyond the reach of judicial scrutiny, the Court's ruling may erode confidence in the legal system's ability to uphold justice impartially and effectively. In this specific case, not only has there been no available remedy in the form of a judicial review, but AG Sharpston was also denied her right to a fair trial throughout the process.[593] Initially, the CJEU Vice-President made the legally questionable decision not to inform AG

---

[587] Bojarski (n 32).
[588] Closa and Kochenov (n 11).
[589] The CFR guarantees, via Article 47, the right to an effective remedy and to a fair trial, which ensures that individuals have the right to challenge decisions affecting their rights under EU law.
[590] Karlsson (n 47).
[591] Kochenov and Butler (n 532).
[592] Allison Östlund, 'A Review Review: Mapping Judicial Scrutiny in the Fields of Migration, Trade and the EMU' (2024) 30 European Public Law 133.
[593] Kochenov and Butler (n 532).

Sharpston about the appeals lodged by the Member States and the Council against an interim relief order. Additionally, she was denied the right to a (fair) hearing regarding these appeals, despite there being no urgency to justify such an action.[594] This failure indicates that the CJEU falls short of its own standards. Furthermore, *Ástráðsson* emphasises "availability of suitable judicial review based on Convention standards" as a critical component of the 'established by law' test in the ECHR framework – yet here, the CJEU even fails to meet the ECtHR standard.

3.3.2.5 Concluding remarks

The *Sharpston* case highlights internal challenges in upholding judicial independence by exemplifying a situation where Member States collectively exerted influence over the CJEU, thereby compromising judicial independence, in order to serve their interests. This situation reveals vulnerabilities *within* the European judiciary, suggesting that despite its perceived strength, it can be influenced by external pressures.[595] This indicates that an additional layer of scrutiny is needed regarding 'fake' actors involved in the judicial landscape. Not only are there 'fake' judges, but the very courts responsible for establishing the legal standards for judicial independence may also fail the 'fakeness' test when assessed against their own metrics.[596]

The Sharpston Affair serves as a stark example of compromised justice, where the CJEU failed to uphold its role as an independent entity. Rather than preventing the Member States from unlawfully dismissing AG Sharpston, the Court endorsed this breach of the rule of law. This action resulted in a further erosion of the rule of law, marked by a perceived lack of impartiality and independence, thus undermining the separation of powers and the Court's duty under Article 19(1) TEU to ensure the observance of the law in interpreting and applying the Treaties.[597] Claiming that decisions which are unreviewable and potentially unlawful comply with legal standards undermines the structural independence of the CJEU.[598] This flawed reasoning implies that judicial independence can be overridden by the very rules that constitute the judiciary. To address these issues, it is essential to reinforce the institutional balance and

[594] ibid.
[595] ibid.
[596] Pech (n 33).
[597] Kochenov and Butler (n 532).
[598] Bohnert (n 540).

separation of powers within the EU. Ignoring such violations not only weakens the EU's legal framework but also risks diminishing public trust in its institutions.[599]

Going forward, the Court of Justice must address the issue of the non-reviewability of acts adopted by Member States in unison, which currently exist in a regulatory void. The mechanisms designed to ensure the Court's independence proved insufficient in the Sharpston Affair, resulting in its failure to protect one of its own members. This calls for urgent reforms to rectify these deficiencies and uphold the rule of law within the EU.[600]

3.4 Reflections and conclusions

3.4.1 The Role of Judges in Facilitating Rule of Law Backsliding

3.4.1.1 Legitimacy-related challenges

This chapter has illustrated how judges can become complicit in facilitating rule of law backsliding, embodying the role of 'fake judges' who undermine judicial independence standards to advance illiberal governmental agendas. By examining their strategic manoeuvres within national legal frameworks, it explored real-life scenarios where judges have eroded standards of the rule of law. The analysis not only revealed challenge to the fundamental right to a fair trial, encapsulated in the right to a 'tribunal established by law' within the EU legal framework, but also unveil a spectrum of actions through which individual judges can instrumentalise the EU mechanisms and further undermine judicial independence. Namely, drawing on the jurisprudence of the ECtHR or CJEU, this analysis has illustrated how judges influence standards of judicial independence and their own conduct, including potential misuse of the preliminary ruling procedure, narrowing of the normative scope of mutual trust, and perpetuation of impunity by hindering effective judicial review.

Allowing 'fake' judges to participate in the EU law process through requests for preliminary ruling references raises significant concerns regarding judicial integrity, the rule of law, and the potential manipulation of legal processes. By leveraging their right to submit questions to the CJEU, even amid legitimacy doubts, judges can strategically influence the interpretation of EU law to align with their interests and potentially legitimise irregular judicial

---

[599] Kochenov and Butler (n 532).
[600] ibid.

appointments. The CJEU's responses in cases like *A. B. and Others* and *Getin Noble Bank* underscore the challenges in maintaining judicial integrity amid political pressures. These decisions, while aiming to maintain dialogue with national judiciaries, risk legitimizing irregular judicial appointments and diluting EU standards of judicial independence. Addressing these issues is crucial to uphold the EU's commitment to the rule of law and judicial autonomy across Member States, as they compromise judicial independence and undermine the credibility of the EU legal system by extending recognition to judges whose legitimacy is in question. Such actions threaten the foundational principles of the judiciary and pose a risk of eroding rule of law standards within the EU, making it imperative to safeguard the credibility and effectiveness of the European legal framework.

3.4.1.2 Substantive lowering of judicial independence standards

This chapter has outlined how the involvement of 'fake' judges inevitably involves compromising on the substance of judicial independence standards on one hand, and adversely affecting their content and scope on the other. This can occur when conflicting aims are at stake, such as in the case of 'judicial dialogue' or 'mutual trust' with national judiciaries, whatever their composition. It happens through formalistic reading and structural disregard to critically assess the composition and judicial appointments to national judicial bodies. It also happens through divergent assessments across various EU legal subfields like in the case of EAW, where recent CJEU jurisprudence has raised significant concerns by interpreting the principle of mutual trust at the expense of fundamental values.

The fact that in *Minister for Justice and Equality v. LM*, the executing judicial authorities had to conduct a two-pronged test from *Aranyosi* in order to determine if it should suspend the EEAW mechanism, which partly relies on assessment of the 'fake' courts assessing their own independence, reveals the CJEU reliance on the national courts. It also suggests a default stance in favour of executing EAWs, even to Member States where systemic challenges to the rule of law have been observed, and results in lowered protection of substantive and procedural fair trial rights for the individuals concerned. Even where stronger safeguards are devised, significant weaknesses persist when the assessment of irregularity is entrusted to national courts whose integrity has already been compromised. The recurring pattern is that the CJEU relies on the independence and willingness of the national courts to do their part of the exercise, which creates a paradox in the case of judiciaries suffering from such systemic deficiencies, as illustrated through *ASJP*, *Simpson and HG* or *Minister for Justice and Equality v. LM*.

Moreover, the differentiation between fundamental and non-fundamental rules in appointment procedures, exemplified in cases like *Simpson and HG*, does not take 'fake' judges into consideration and poses a risk of enabling executive overreach, leading to certain type of irregularities not meeting the threshold being disregarded.

The Court's counterintuitive stance assumes that national judges can maintain full independence within systems that are already systemically corrupt and structurally captured, including at the highest levels. This highlights a tension between preserving judicial integrity and ensuring consistent application of EU law across member states. The differing approaches underscore the complexities in harmonizing standards of judicial independence within a diverse legal landscape. Addressing these discrepancies is essential for upholding the rule of law uniformly across the EU, particularly in sensitive areas like extradition and criminal justice cooperation. Achieving this balance requires ongoing scrutiny and adaptation of legal principles to maintain the EU's commitment to fundamental rights and legal certainty.

3.4.2 Challenges related to exploitation of gaps between the European Court of Justice and the European Court of Human Rights

Recent developments in jurisprudence regarding judicial independence standards within the EU and Article 6(1) of the ECHR highlight a shift where the *Bosphorus* presumption, which once presumed equivalence in fundamental rights protection between the CJEU and ECtHR, no longer holds. The CJEU's indecisiveness in defining a clear argumentative stance to that effect has contributed to this divergence. To illustrate, in *Grzęda v Poland*, the ECtHR established that a judge appointed by an entity specifically aiming to undermine judicial independence cannot be considered lawfully appointed. Its ruling in *Ástráðsson* emphasised that a judge not lawfully established under national law cannot ensure fair trial rights under Article 6(1) ECHR. In contrast, the CJEU's decision in *Getin Noble Bank*, addressing a preliminary ruling from a judicial body not established by law, left the question of that very body's composition unanswered. Additionally, the *Sharpston* case underscored the CJEU's reluctance to submit its composition to the same standards it expects from the Member States. It failed its own standard of 'tribunal established by law', sanctioned the removal of a judicial office holder's tenure contrary to established case law guarantees, endorsed an irregular appointment without offering a legal remedy, and ultimately asserted that its actions were beyond judicial review. This revealed vulnerabilities to external influences from Member States

seeking to advance their interests, undermining the CJEU's role as an independent entity and its duty under Article 19(1) TEU to uphold the rule of law.

The CJEU's varying depiction of judicial independence, often justified by procedural concepts such as 'judicial dialogue' and 'mutual trust', introduces significant complexities. This fluctuation presents challenges in standardizing judicial norms and undermines confidence in the cohesion of the EU's legal framework. Bridging the gaps between the CJEU and ECtHR requires a nuanced approach that balances judicial autonomy with the need for unified fundamental rights protection. It necessitates clearer standards from the CJEU to ensure robust judicial independence within the EU, aligning with the principles upheld by the ECtHR. This ongoing dialogue and refinement of legal principles are essential to uphold the rule of law consistently across Europe and safeguard fundamental rights effectively.

4. Conclusions

4.1 The Role of Judges in the Future of Judicial Independence

4.1.1 Judges as Defenders of Rule of Law

In Harper Lee's *To Kill a Mockingbird*, Judge Taylor, initially portrayed as fair, ultimately upholds a racist verdict under societal pressure, revealing the profound challenges judges face within flawed judicial systems that compromise their independence.[601] Today, Europe presents a similarly complex arena for judges. EU Member States grapple with 'systemic and generalised deficiencies' in the rule of law, exacerbated by instances of 'constitutional cancel culture' and resistance against regional courts. Judges are cast as central figures – some defending the rule of law despite adverse environment, while others facilitate further rule of law backsliding. This stark contrast underscores the pivotal role judges play in shaping the future of judicial independence standards across Europe.

This thesis has highlighted how judges actively contribute to advancing judicial independence standards through strategic use of mechanisms such as the preliminary ruling procedure and engagement with the ECtHR framework. The driving force behind the CJEU's case *WZ* was the strategic framing of the preliminary question by the judges of the Civil Chamber of the Supreme Court, which prompted a preliminary reference to the CJEU under Article 267 TFEU. This reference revolved around the legality of non-consensual intra- and inter-court transfers, questioning whether such practices undermine the principles of judicial irremovability and independence. The Court's response highlighted the significance of these principles under Article 19 § 1 TEU, which obliges Member States to ensure effective judicial protection and respect for judicial independence. The ruling clarified that forced transfers of judges can indeed compromise judicial independence by potentially subjecting judges to political influence or control over their decisions.

This interpretation not only addressed the specific case but also set a precedent for safeguarding judges across Member States against politically motivated reassignments. Furthermore, the CJEU held that judicial appointments must adhere to national and EU legal standards, particularly scrutinising the independence and impartiality of the nominating bodies like the NCJ in Poland. By affirming that judges appointed under conditions undermining

---

[601] Harper Lee, *To Kill a Mockingbird* (94th pr, Grand Central Publ 2006).

judicial independence may not constitute an 'independent and impartial tribunal previously established by law', the CJEU provided a framework for national courts to disapply national provisions conflicting with EU law. This decision not only protects individual judges from undue political interference but also reinforces the EU's commitment to upholding the rule of law within its member states. Therefore, the *WŻ* case highlights how judges, through strategic legal actions and references to the CJEU, actively contribute to the maintenance of judicial independence under EU law. By challenging systemic changes and defending the integrity of the judiciary, judges play a critical role in ensuring that the principles of irremovability and impartiality are upheld, thereby strengthening the legal framework for judicial protection across the EU. This occurs against the backdrop of a wider trend where judges strategically use the preliminary ruling mechanism to defend against national rule of law backsliding, addressing issues such as forced judicial retirement, the legality of the new Disciplinary Chamber, and the independence of the NCJ.

The case *Żurek v Poland* has significantly contributed to jurisprudence on judicial independence and the rule of law. By scrutinising the premature termination of Judge Żurek's office in the NCJ and the subsequent denial of access to a fair hearing, the ECtHR reinforced the applicability of Article 6 § 1 of the ECHR. This decision not only affirmed the civil nature of his claim but also highlighted the critical role of judicial mandates within the NCJ setting a precedent for other judges affected by similar reforms. Moreover, the ECtHR's recognition of the interference with Judge Żurek's freedom of expression brings forward the broader implications for judicial autonomy. The causal link established between his public dissent against legislative changes affecting the judiciary and retaliatory measures by government-related bodies exemplifies the chilling effect on judicial discourse.

Such actions not only undermine the democratic principles of separation of powers but also stifle public debate essential for a robust judiciary. Furthermore, linking judicial freedom of expression to the protection of the rule of law, as seen in cases like *Baka v. Hungary* and *Tuleya v. Poland*, highlights the evolving standards within the European Human Rights framework. Ongoing struggles of judges across Europe, including disciplinary and criminal proceedings, illustrate the ongoing challenges faced by judges advocating against authoritarian reforms. Similarly to the Polish Constitutional Tribunal's ruling in *K 3/21*, however, it noted the very Tribunal's backlash against the ECtHR, as evidenced though its response to *Xero Flor,* raises doubts as regards Poland's willingness – or rather the lack of – to execute future judgments. This case illustrates how judges play a crucial role in defending the rule of law.

Through their actions, judges contribute to the development and enforcement of standards that protect the judiciary from political interference and uphold the integrity of legal institutions.

4.1.2 Judges as Facilitators of Rule of Law Backsliding

Conversely, this thesis has investigated how judges emerge as potential facilitators of rule of law backsliding – as 'fake judges', who achieve this title through irregular procedures and who leverage the same rules to enable rule of law backsliding. By analysing the jurisprudence of the CJEU and the ECtHR, it has uncovered how judges can exploit legal frameworks and their limitations to undermine judicial independence. This includes the tactical use of the preliminary ruling procedure, limiting the principle of mutual trust, and nullifying the purpose of judicial review. These actions highlight the vulnerability of the EU legal framework to internal subversion by those meant to uphold it.

Allowing 'fake' judges to participate in the EU law process through requests for preliminary ruling references raises significant concerns regarding judicial integrity, the rule of law, and the potential manipulation of legal processes. By leveraging their right to submit questions to the CJEU, even amid legitimacy doubts, judges can strategically influence the interpretation of EU law to align with their interests and legitimise irregular judicial appointments. The CJEU's responses in *A. B. and Others* and *Getin Noble Bank* underscore the challenges in maintaining judicial integrity amid political pressures. These decisions, while aiming to maintain dialogue with national judiciaries, risk legitimising irregular judicial appointments and diluting EU standards of judicial independence. The involvement of 'fake' judges inevitably compromises the substance of judicial independence standards on one hand and adversely affects their content and scope on the other.

This erosion of standards can occur when conflicting aims are at stake, such as in the case of 'judicial dialogue' or 'mutual trust' with national judiciaries, irrespective of their composition. It happens through formalistic readings and structural disregard for critically assessing the composition and judicial appointments to national judicial bodies. Recent CJEU jurisprudence, particularly in the area of the EAW, has raised significant concerns by interpreting the principle of mutual trust at the expense of fundamental values. The case of *Minister for Justice and Equality v. LM* is particularly illustrative, where executing judicial authorities had to conduct a two-pronged test from *Aranyosi* to determine if they should suspend the EAW mechanism. This test partly relies on assessing the 'fake' courts' own independence,

revealing a pattern of CJEU's short-sighted reliance on national courts, even those compromised by systemic challenges to the rule of law.

The CJEU's default stance in favour of executing EAWs, even to Member States with systemic rule of law deficiencies, results in lowered protection of substantive and procedural fair trial rights for individuals. Even where stronger safeguards are devised, significant weaknesses persist when the assessment of irregularity is entrusted to national courts whose integrity has already been compromised. This creates a paradox, as seen in cases like *ASJP*, *Simpson and HG*, and *Minister for Justice and Equality v. LM*, where the CJEU relies on the independence and willingness of national courts to uphold judicial standards, despite systemic corruption and structural capture.

Moreover, the differentiation between fundamental and non-fundamental rules in appointment procedures, exemplified in cases like *Simpson and HG*, does not take 'fake' judges into consideration and poses a risk of enabling executive overreach. This leads to certain irregularities not meeting the threshold being disregarded, further compromising judicial independence standards. The CJEU's counterintuitive stance assumes that national judges can maintain full independence within systems already systemically corrupt and structurally captured, including at the highest levels. This highlights a tension between preserving judicial integrity and ensuring the consistent application of EU law across Member States.

The participation of 'fake' judges in the EU legal process poses a significant threat to judicial integrity and the rule of law. Their strategic use of EU mechanisms, coupled with the CJEU's reliance on compromised national judiciaries, undermines the credibility and effectiveness of the EU legal system. Addressing these issues is crucial for maintaining a unified and predictable legal environment that upholds the foundational principles of the judiciary and ensures the protection of fundamental rights across the EU. This requires a concerted effort to scrutinize and adapt legal principles, ensuring that judicial independence standards are consistently applied and safeguarded across all Member States.

Ultimately, this thesis has highlighted the indispensable role of judges in shaping the future of judicial independence standards in the EU. Whether acting as defenders or detractors, their influence can be substantial and far-reaching, underscoring the necessity for vigilant, adaptive, and robust legal standards to safeguard the rule of law in an increasingly complex and challenging judicial landscape.

4.1.3 The Impacts of the Interplay of the Court of Justice and the European Court of Human Rights

The rich interplay between the CJEU and the ECtHR in addressing real-time rule of law developments vividly demonstrates both the effectiveness and constraints of their combined endeavours, underlining the need for steadfast and rigorous judicial practice. While both Courts have developed their own set of judicial independence safeguards in response to emerging challenges, particularly as regards 'tribunal established by law', their interpretations differ. This results in varying levels of protection for individuals. Judges are key actors in this interplay, not only through their interpretation of specific standards set by these Courts, but also through their active contribution to shaping these standards at the national level.

Judges can leverage the jurisprudence of the Courts to uphold judicial independence, using preliminary references to the CJEU to seek guidance on interpretation of specific elements in the national context in defense of the rule of law. Conversely, they can also exploit pre-existing gaps between the CJEU and ECtHR jurisprudence to further undermine judicial independence, taking advantage of jurisdictional ambiguities or inconsistencies in rulings to weaken the enforcement of standards and legitimise their own irregular appointments. As their involvement can both reinforce and undermine the rule of law, understanding the current legal framework established by the CJEU and ECtHR is crucial for informing ongoing developments in interpreting and applying relevant standards.

Neither the CJEU nor the ECtHR is bound by the doctrine of precedent in the same way common law systems are, they employ *de facto* precedent to ensure legal certainty. This approach allows them to establish and refine coherent lines of reasoning, occasionally using cases as "trial balloons" to gauge reactions from national jurisdictions. The ECtHR's jurisprudence has historically influenced the CJEU's approach to fundamental rights, though the introduction of the CFR has complicated this relationship. Nevertheless, the ECtHR's rulings continue to inform the CJEU's legal interpretations, and *vice versa*.

This thesis has shown that the overlap between the CJEU and the ECtHR can strengthen judicial independence standards by reinforcing legal certainty, consistency of interpretation, and resilience-building against emerging threats. It illustrated the added value of judicial independence being addressed from multiple legal perspectives and how it reinforces standards across different sub-fields. The continuous dialogue between the two Courts facilitates the evolution of legal standards. However, there are significant risks. Gaps between the CJEU and

ECtHR interpretations can lead to lesser protection and can be exploited by 'fake' judges seeking to undermine judicial independence.

Despite efforts at harmonisation, significant inconsistencies in judgments between the two Courts have weakened judicial independence standards, creating legal uncertainties and undermining the effectiveness of judicial protection. The divergence in recent case law, namely *Minister for Justice and Equality v. LM* and *Getin Noble Bank*, underscores the need for alignment to maintain a unified legal environment. A significant pattern in the practice of both Courts is their reliance on the independence and willingness of national judiciaries to implement their decisions and accurately assess particular standards, despite systemic deficiencies and executive influence over these courts. When Member States selectively comply with judgments or fail to conduct thorough assessments, it weakens the enforcement of judicial standards, erodes public trust and emboldens 'fake' actors seeking to erode judicial independence.

In conclusion, while the interplay between the CJEU and the ECtHR is crucial for advancing human rights protections, addressing the risks of multiplying legal standards is essential. This analysis highlights the importance of both courts in shaping the landscape of judicial independence in Europe. It also shows that the ECtHR currently offers higher standards of protection — standards that the CJEU should draw inspiration from to ensure robust judicial independence throughout the EU.

4.2 Ideas for further research

Building on existing scholarship that has examined judicial independence and backsliding in EU Member States, as well as the findings on the role of judges in shaping those standards as outlined in the present thesis, future research should delve deeper into several areas to enhance our understanding and inform policy responses.

i) Comparative analysis of judicial resistance

While scholars have highlighted instances of judicial resistance in EU member states like Poland, further comparative studies across other jurisdictions could shed light on commonalities and divergences in strategies employed by judges to uphold the rule of law. Such studies could explore variations in judicial responses to executive and legislative pressures, as well as the effectiveness of different legal and procedural tactics used by judges.

ii) Impact of international human rights law

Investigating the influence of international human rights norms, particularly those articulated by human rights bodies, on judicial decisions and institutional resilience against political pressures is crucial. Understanding how judges interpret and apply these norms in the face of domestic challenges can provide insights into the efficacy of international legal frameworks in safeguarding judicial independence.

iii) Role of civil society and media

Exploring the role of civil society organisations, legal associations, and media in supporting judicial independence movements is essential. Investigating how these actors collaborate with judges, advocate for legal reforms, and mobilise public opinion can shed light on broader societal responses to threats against the rule of law.

iv) Global comparative studies

Drawing comparisons with judicial independence challenges in other regional contexts, such as the Americas or Africa, could provide valuable insights into transnational patterns and strategies for protecting judicial autonomy worldwide. Understanding how different regions address similar challenges could inform the exchange of best practices.

v) Interdisciplinary approaches

Employing interdisciplinary methodologies, including insights from political science, sociology, and psychology, could enrich our understanding of the motivations behind judicial behaviour in authoritarian contexts. Exploring factors such as judicial ethics, professional norms, and the psychological impacts of political pressures on judges can offer holistic perspectives on judicial decision-making.

vi) Empirical analysis of the impacts of international pressure

Further empirical studies could investigate the direct impacts of international pressure to validate or challenge the assumption that such pressure positively influences judicial practices and safeguards judicial independence. This could include a quantitative analysis of international interventions and their measurable impacts on judicial decisions, in-depth case studies of national responses to international pressure, perceptions of judicial actors regarding the effectiveness of international pressure, comparative studies of different international mechanisms, linear studies tracking changes over time in response to international pressure, and assessments of the broader

impacts on rule of law indicators such as transparency and accountability. This comprehensive empirical investigation would provide a nuanced understanding of the role of international bodies and mechanisms in maintaining upholding the rule of law.

By exploring these research areas in greater depth, future studies could contribute to a better understanding of the multifaceted dynamics of judicial independence both within the EU and beyond. This would provide critical insights for policymakers, legal practitioners, scholars, activists, judges and individuals dedicated to upholding democratic principles and the rule of law in Europe, especially in relation to the potential systemic blind spots.

The pressing need to safeguard judicial independence within the EU borders cannot be overstated. The complex interplay between national and international judicial bodies, the pressures faced by judges in the context of systemic deficiencies relating to systems of checks and balances, highlights the intricate challenges at hand. As this thesis has illustrated, maintaining the rule of law is an ongoing challenge that requires vigilance, adaptability, and a deep commitment to democratic principles. Future research, as outlined, will be instrumental in navigating these challenges and ensuring that the judiciary remains a bulwark against illiberalism and politicisation of independent institutions. This work contributes to the foundation upon which these future endeavours will build, marking a step forward in the collective effort to preserve judicial integrity and the rule of law in Europe.

Bibliography

Legislation

Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14' (4 November 1950)

European Union, 'Charter of Fundamental Rights of the European Union. 2012/C 326/02' (26 October 2012)

European Union, 'Consolidated Version of the Treaty on European Union 2008/C 115/01' (2007)

European Union, 'Consolidated Version of the Treaty on the Functioning of the European Union. OJ L. 326/47-326/390'

Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget 2020 (OJ L)

National Assembly of Poland, 'Constitution of the Republic of Poland' (1997)

Jurisprudence

Court of Justice of the European Union

Associação Sindical dos Juízes Portugueses [2018] European Court of Justice C-64/16

C-132/20 Getin Noble Bank [2022] European Court of Justice ECLI:EU:C:2022:235

C-156/21 Hungary v Parliament and Council (European Court of Justice)

C-192/18 Commission v Poland (Independence of ordinary courts) (European Court of Justice)

C-204/21 R (European Court of Justice)

C-216/18 Minister for Justice and Equality v LM [2018] European Court of Justice ECLI:EU:C:2018:586

C-274/14 - Banco de Santander (European Court of Justice)

C-354/20 PPU Openbaar Ministerie (Indépendance de l'autorité judiciaire'émission) L and P [2020] European Court of Justice ECLI:EU:C:2020:1033

C-414/16 - Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV [2018] European Court of Justice ECLI:EU:C:2018:257

C-487/19 WŻ (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) [2021] European Court of Justice ECLI:EU:C:2021:798

C-558/18 - Miasto Łowicz (Régime disciplinaire concernant les magistrats) [2020] European Court of Justice ECLI:EU:C:2020:234

C-585/18 AK (Independence of the Disciplinary Chamber of the Supreme Court) [2019] European Court of Justice ECLI:EU:C:2019:982

C-684/20 P - Sharpston v Council and Conférence des Représentants des Gouvernements des États membres (European Court of Justice)

C-685/20 P - Sharpston v Council and les Représentants des Gouvernements des États membres (European Court of Justice)

C-791/19 (European Court of Justice)

C-791/19 Commission v Poland (Independence of the Disciplinary Chamber of the Supreme Court) (European Court of Justice)

C-824/18 - AB and Others (Nomination des juges à la Cour suprême - Recours) (European Court of Justice)

C-896/19 - Repubblika [2021] European Court of Justice ECLI:EU:C:2021:311

Case C-441/17 R Commission v Poland (Białowieża Forest) [2018] European Court of Justice EU:C:2017:877

Case C-487/19: Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 26 June 2019 — WŻ (European Court of Justice)

Case C-619/18 Commission v Poland (Independence of the Supreme Court) (CJEU)

Case C-685/20 P Order of the Court in Eleanor Sharpston v Council of the European Union and Representatives of the Governments of the Member States (European Court of Justice)

Cases C-542/18 RX-II and C-543/18 Erik Simpson v Council of the European Union and HG v European Commission (European Court of Justice)

Opinion 2/13 [2014] European Court of Justice CLI:EU:C:2014:2454

T-180/20 - Sharpston v Council and Conférence des Représentants des Gouvernements des États membres Order of the General Court (Second Chamber) of 6 October 2020 (General Court)

T-184/20 - Sharpston v Court of Justice of the European Union Order of the General Court (Second Chamber) of 6 October 2020 (General Court)

T-550/20 - Sharpston v Council and les Représentants des Gouvernements des États membres Order of the General Court (Second Chamber) of 6 October 2020 (General Court)

T-791/19 Sped-Pro [2022] European Court of Justice ECLI:EU:T:2022:67

European Court of Human Rights

Baka v Hungary [2016] ECtHR [GC] No. 20261/12

Bilgen v Turkey [2021] ECtHR No. 1571/07

Catană v the Republic of Moldova [2023] ECtHR No. 43237/13

Eminağaoğlu v Turkey [2021] ECtHR No. 76521/12

Grzęda v Poland [2022] ECtHR [GC] No. 43572/18

Guðmundur Andri Ástráðsson v Iceland [2020] ECtHR [GC] No. 26374/18

Reczkowicz v Poland [2021] ECtHR No. 43447/19

Tuleya v Poland [2023] ECtHR No. 21181/19 and 51751/20

Tyrer v the United Kingdom [1978] ECtHR No. 5856/72

Vilho Eskelinen and Others v Finland [2007] ECtHR [GC] No. 63235/00

Xero Flor w Polsce sp z o.o v Poland [2021] ECtHR No. 4907/18

Żurek v Poland [2022] ECtHR No. 39650/18

National Courts of the Member States

Case K 5/17 The Act on the National Council of the Judiciary [Judgment of 20 June 2017] (Constitutional Tribunal of Poland)

K 3/21 Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union [Judgment of 7 October 2021] (Constitutional Tribunal of Poland)

K 1/20 [Judgment of 22 October 2020] (Constitutional Tribunal of Poland)

Academic articles, monographs, and chapters in edited books

Andrés Sáenz de Santa María P, 'Rule of Law and Judicial Independence in the Light of CJEU and ECtHR Case Law' in Cristina Izquierdo-Sans, Carmen Martínez-Capdevila and Magdalena Nogueira-Guastavino (eds), *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer International Publishing 2021)

Argyropoulou V, 'Enforcing the Rule of Law in the European Union, Quo Vadis EU?' (2019) 11 Harvard Human Rights Journal <https://harvardhrj.com/2019/11/enforcing-the-rule-of-law-in-the-european-union-quo-vadis-eu/> accessed 21 December 2022

Arnull A, 'Enforcing EU Law' in Anthony Arnull, *European Union Law: A Very Short Introduction* (1st edn, Oxford University PressOxford 2017)

Ballegooij W van, *The Nature of Mutual Recognition in European Law: Re-Examining the Notion from an Individual Rights Perspective with a View to Its Further Development in the Criminal Justice Area* (Intersentia Ltd 2015)

Bárd P, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2021) 27 European Law Journal 185

Bard P and Kochenov DV, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for An EU Constitutional Awakening' (24 May 2022) <https://papers.ssrn.com/abstract=4169856> accessed 23 September 2022

Bárd P and van Ballegooij W, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM' (2018) 9 New Journal of European Criminal Law 353

Batory A, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (2016) 94 Public Administration 685

Belavusau U, 'Mnemonic Constitutionalism and Rule of Law in Hungary and Russia' (2020) 1 Interdisciplinary Journal of Populism 16

Besselink L, ‘The Bite, the Bark, and the Howl’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, vol 1 (Oxford University Press 2017) <https://academic.oup.com/book/26766/chapter/195670307> accessed 4 January 2023

Blauberger M and Martinsen DS, ‘The Court of Justice in Times of Politicisation: “Law as a Mask and Shield” Revisited’ (2020) 27 Journal of European Public Policy 382

Bober M and others, *Justice Under Pressure - Repressions as of Means of Attempting to Take Control over the Judiciary and the Prosecution in Poland Years 2015-2019* (Jakub Koscierzynski ed, Association of Polish Judges ‘Iustitia’ 2019)

Bojarski Ł, ‘Judicial Resistance – Missing Part of Judicial Independence? The Case of Poland and Beyond’ <https://www.researchgate.net/publication/375838108_Judicial_Resistance_-_missing_part_of_Judicial_independence_The_case_of_Poland_and_beyond>

——, ‘Judicial Resistance against the Rule of Law Backsliding —Judges and Citizens—the Case of Poland’ (PhD Thesis, University of Oslo 2023)

Breuer M (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer 2019)

Broberg M and Fenger N, ‘Preliminary References’ in Morten Broberg and Niels Fenger, Oxford Principles Of European Union Law: The European Union Legal Order: Volume I (Oxford University Press 2018) <https://academic.oup.com/book/41926/chapter/354915956> accessed 10 May 2024

Claes M, ‘The Validity and Primacy of EU Law and the “Cooperative Relationship” between National Constitutional Courts and the Court of Justice of the European Union’ (2016) 23 Maastricht Journal of European and Comparative Law 151

Closa C and Kochenov D (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) <http://ebooks.cambridge.org/ref/id/CBO9781316258774> accessed 14 July 2021

Davies G, ‘Legislative Control of the European Court of Justice’ (2014) 51 Common Market Law Review 1579

Dhooghe V, Franken R and Opgenhaffen T, ‘Judicial Activism at the European Court of Justice: A Natural Feature in a Dialogical Context’ (2015) 20 Tilburg Law Review 122

Djajic S, '"The Concept of Precedent at the European Court for Human Rights and Nation-al Responses to the Doctrine With Special Reference to the Constitutional Court of the Republic of Serbia"' (2018)

Duncan AK and Macy J, 'The Collapse of Judicial Independence in Poland: A Cautionary Tale' (2020) 104 Judicature International <https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/> accessed 18 June 2022

Fachhochschule für Verwaltung und Dienstleistung and others, '"The Rule of Law Mechanism" and the Hungarian and Polish Resistance: European Law Against National Identity?' (2021) 14 Journal of the University of Latvia. Law 49

Faix M and Jamali A, 'Is the African Court on Human and Peoples' Rights in an Existential Crisis?' (2022) 40 Netherlands Quarterly of Human Rights 56

Frese A and Olsen HP, 'Spelling It Out−Convergence and Divergence in the Judicial Dialogue between Cjeu and ECtHR' (2019) 88 Nordic Journal of International Law 429

Gliszczyńska-Grabias A and Sadurski W, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20' (2021) 17 European Constitutional Law Review 130

Granat M and Granat K, *The Constitution of Poland: A Contextual Analysis* (Paperback edition, Hart 2021)

Graver HP, *Judges Against Justice: On Judges When the Rule of Law Is Under Attack* (Springer Berlin Heidelberg 2015) <https://link.springer.com/10.1007/978-3-662-44293-7> accessed 12 July 2023

Hamuľák O and Circolo A, 'Challenges and Possibilities of Enforcing the Rule of Law within the EU Constitutional Edifice—The Need for Increased Role of Court of Justice, EU Charter and Diagonality in Perception' in David Ramiro Troitiño and others (eds), The EU in the 21st Century (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-030-38399-2_10> accessed 31 March 2022

Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (First edition, Oxford University Press 2017)

Jamali A, 'Human Rights Courts Under Attack: Analysis of Resistance Against Regional Human Rights Courts in Europe, the Americas, and Africa' (PhD Thesis, Palacky University Olomouc 2023)

Jaremba U, ‘At the Crossroads of National and European Union Law. Experiences of National Judges in a Multi-Level Legal Order’ (2013) 6 Erasmus Law Review 191

Karlsson HL, ‘The Emergence of the Established “By Law” Criterion for Reviewing European Judicial Appointments’ (2022) 23 German Law Journal 1051

Kochenov D, ‘Article 7: A Commentary on a Much Talked-About “Dead” Provision’ in Armin von Bogdandy and others (eds), Defending Checks and Balances in EU Member States: Taking Stock of Europe’s Actions (Springer Berlin Heidelberg 2021) <https://doi.org/10.1007/978-3-662-62317-6_6>

Kochenov DV and Bárd P, ‘Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe’ [2022] JCMS: Journal of Common Market Studies jcms.13418

Kochenov DV and Butler G, ‘Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair’ (2021) 27 European Law Journal 262

Koncewicz T, ‘The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux’ (2018) 43 Review of Central and East European Law 116

——, ‘The Democratic Backsliding in the European Union and the Challenge of Constitutional Design’ in Xenophōn I Kontiadēs and Alkmēnē Phōtiadou (eds), Routledge handbook of comparative constitutional change (Routledge, Taylor & Francis Group 2021)

Kosař D and Leloup M, ‘Op-Ed: “Saying Less Is Sometimes More (Even in Rule-of-Law Cases): Grzęda v Poland”’ (EU Law Live, 31 March 2022) <https://eulawlive-com.ezproxy.leidenuniv.nl/grzeda-v-poland-by-david-kosar-and-mathieu-leloup/> accessed 30 June 2022

Kozlová A, ‘Losing Through Winning: The European Court of Justice Vis-À-Vis the Rule of Law Backsliding In Hungary’ (PRIGO University 2021) <https://www.researchgate.net/publication/357930320_Losing_Through_Winning_The_European_Court_of_Justice_Vis-A-Vis_the_Rule_of_Law_Backsliding_In_Hungary>

——, ‘Beyond Confirming Validity: Implications of the CJEU Rule of Law Conditionality Cases on the Scope of EU Values’, Post-Pandemic Challenges and Opportunities of the Czech and European Policy (PRIGO University 2022)

——, ‘Poland’s Rule of Law Breakdown Continued: Judge Żurek’s Battle for Judicial Independence Within the European Human Rights Framework’ (2023) 48 Review of Central and East European Law 63

Krommendijk J and de Vries G, ‘Do Luxembourg and Strasbourg Trust Each Other? The Interaction Between the Court of Justice and the European Court of Human Rights in Cases Concerning Mutual Trust’ [2021] European Journal of Human Rights 319

Lashyn S, ‘The Unsuccessful Bid of the British Advocate-General to Remain on the Bench Despite Brexit’ (2021) 84 The Modern Law Review 1414

Lee H, *To Kill a Mockingbird* (94th pr, Grand Central Publ 2006)

Leijon K and Glavina M, ‘Why Passive? Exploring National Judges’ Motives for Not Requesting Preliminary Rulings’ (2022) 29 Maastricht Journal of European and Comparative Law 263

Leloup M, ‘Who Safeguards the Guardians? A Subjective Right of Judges to Their Independence under Article 6(1) ECHR’ (2021) 17 European Constitutional Law Review 394

Leloup M, Kochenov D and Dimitrovs A, ‘Non-Regression: Opening the Door to Solving the “Copenhagen Dilemma”? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru’ (2021)

Lenaerts K, ‘How the ECJ Thinks: A Study on Judicial Legitimacy’ (2013) 36 Fordham International Law Journal 1302

Lobina B, ‘Between a Rock and a Hard Place: The Impact of Rule of Law Backsliding on the EU’s Response to the Russo-Ukrainian War’ (2023) 8 European Papers 1143

Madsen MR, ‘Resistance to the European Court of Human Rights: The Institutional and Sociological Consequences of Principled Resistance’ in Marten Breuer (ed), Principled Resistance to ECtHR Judgments - A New Paradigm?, vol 285 (Springer Berlin Heidelberg 2019) <http://link.springer.com/10.1007/978-3-662-58986-1_2> accessed 7 January 2023

Mastracci M, ‘Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland’ (2019) 5 Athens Journal of Law 323

Matthes C-Y, ‘Judges as Activists: How Polish Judges Mobilise to Defend the Rule of Law’ (2022) 38 East European Politics 468

Nyikos SA, ‘Strategic Interaction among Courts within the Preliminary Reference Process – Stage 1: National Court Preemptive Opinions’ (2006) 45 European Journal of Political Research 527

Orenstein MA and Kelemen RD, ‘Trojan Horses in EU Foreign Policy’ (2017) 55 JCMS: Journal of Common Market Studies 87

Östlund A, ‘A Review Review: Mapping Judicial Scrutiny in the Fields of Migration, Trade and the EMU’ (2024) 30 European Public Law 133

Passalacqua V and Costamagna F, ‘The Law and Facts of the Preliminary Reference Procedure: A Critical Assessment of the EU Court of Justice’s Source of Knowledge’ (2023) 2 European Law Open 322

Payandeh M, ‘Precedents and Case-Based Reasoning in the European Court of Justice’ (2014) 12 International Journal of Constitutional Law 832

Pech L and Scheppele KL, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 3

Pech L, Wachowiec P and Mazur D, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ (2021) 13 Hague Journal on the Rule of Law 1

Pellonpää M, ‘Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe’ in Katja Karjalainen, Iina Tornberg and Aleksi Pursiainen (eds), *International Actors and the Formation of Laws* (Springer International Publishing 2022) <https://link.springer.com/10.1007/978-3-030-98351-2_3> accessed 29 December 2022

Ploszka A, ‘It Never Rains but It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional’ (2023) 15 Hague Journal on the Rule of Law 51

Raube K and Costa Reis F, ‘The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis’ in Marianne Riddervold, Jarle Trondal and Akasemi Newsome (eds), The Palgrave Handbook of EU Crises (Springer International Publishing 2021) <https://link.springer.com/10.1007/978-3-030-51791-5_37> accessed 31 March 2024

Reyns C, ‘Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?’ (2021) 17 European Constitutional Law Review 26

Rizcallah C and Davio V, 'The Requirement That Tribunals Be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2021) 17 European Constitutional Law Review 581

Saatçioğlu B, 'De-Europeanisation in Turkey: The Case of the Rule of Law' (2016) 21 South European Society and Politics 133

Sadurski W, *Poland's Constitutional Breakdown* (1st edn, Oxford University Press 2019)<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198840503.001.0001/oso-9780198840503> accessed 17 June 2022

Saenz Perez C, 'What about Fundamental Rights? Security and Fundamental Rights in the Midst of a Rule of Law Breakdown' (2022) 13 New Journal of European Criminal Law 526

Sánchez Frías A, 'A New Presumption for the Autonomous Concept of "Court or Tribunal" in Article 267 TFEU: ECJ 29 March 2022, Case C-132/20, Getin Noble Bank' (2023) 19 European Constitutional Law Review 320

Scheppele KL, 'Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press 2016)

Scheppele KL, Kochenov DV and Grabowska-Moroz B, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) 39 Yearbook of European Law 3

Śledzińska-Simon A, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19 German Law Journal 1839

Soley X and Steininger S, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 International Journal of Law in Context 237

Stiansen Ø and Voeten E, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 International Studies Quarterly 770

Szwed M, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 Hague Journal on the Rule of Law 353

Taborowski M and Bogdanowicz P, 'The Independence Criterion for National Courts in the Preliminary Reference Procedure after Banco de Santander: Still the Joker in the Deck?' (2023) 60 Common Market Law Review 763

Theuns T, ‘The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7’ [2022] Res Publica <https://link.springer.com/10.1007/s11158-021-09537-w> accessed 31 March 2022

Timmermans C, ‘How Trustworthy Is Mutual Trust? Opinion 2/13 Revisited’ in Koen Lenaerts and others (eds), An ever-changing union? Perspectives on the future of EU law in honor of Allan Rosas (1st edn, Bloomsbury Publishing 2021)

Tinière R, ‘The Use of ECtHR Case Law by the CJEU: Instrumentalisation or Quest for Autonomy and Legitimacy?’ (2023) 2023 8 European Papers - A Journal on Law and Integration 323330

Viterbo A, ‘The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank’ (2020) 2020 5 European Papers - A Journal on Law and Integration 671

Von Bogdandy A, ‘Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States’ (2020) 57 Common Market Law Review 705

von Bogdandy A and Spieker LD, ‘Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges’ (2019) 15 European Constitutional Law Review 391

Wennerås P, ‘Saving a Forest and the Rule of Law: Commission v. Poland’ (2019) 56 Common Market Law Review 541

Winczorek J and Muszyński K, ‘The Access to Justice Gap and the Rule of Law Crisis in Poland’ (2022) 42 Zeitschrift für Rechtssoziologie 5

Zgut E, ‘Informal Exercise of Power: Undermining Democracy Under the EU’s Radar in Hungary and Poland’ [2022] Hague Journal on the Rule of Law <https://doi.org/10.1007/s40803-022-00170-0> accessed 31 March 2022

Zoll F and Wortham L, ‘Judicial Independence and Accountability: Withstanding Political Stress in Poland’ (2019) 42 Fordham International Law Journal 875

Reports and authoritative opinions

Amnesty International, ‘Poland: Briefing on the Rule of Law and Independence of Th Judiciary in Poland in 2020-2021’ (2021)

Anzini M and others, ‘Making European Policies Work Evolving Challenges and New Approaches in EU Law Enforcement’ (European Institute of Public Administration 2021)

Braithwaite B, Harby C and Miletić G (eds), ‘Independence and Impartiality of the Judiciary: An Overview of Relevant Jurisprudence of the European Court of Human Rights’ <https://www.rolplatform.org/wp-content/uploads/2021/09/independence-and-impartiality-of-judiciary-eng.pdf>

Committee of Ministers of the Council of Europe, ‘Supervision of the Execution of Judgments and Decisions of the European of Court of Human Rights 2023’ (2024) Annual Report of the Committee of Ministers

Consultative Council of European Judges, ‘CCJE Opinion No. 25 (2022) on Freedom of Expression of Judges’ (2022)

Council of the European Union, ‘2002/584/JHA: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States - Statements Made by Certain Member States on the Adoption of the Framework Decision’ (2002)

——, ‘Declaration by the Conference of the Representatives of the Governments of the Member States on the Consequences of the Withdrawal of the United Kingdom from the European Union for the Advocates-General of the Court of Justice of the European Union (XT 21018/20)’

European Commission, ‘Annual Sustainable Growth Survey 2023’ (2022) COM(2022) 780

——, ‘EU Budget: Commission Proposes Measures to the Council under the Conditionality Regulation’ (Press Corner, 18 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5623> accessed 21 December 2022

——, ‘Communication - 2023 Rule of Law Report - the Rule of Law Situation in the European Union’ (2023)

European Commission. Directorate General for Justice and Consumers., The 2023 EU Justice Scoreboard :Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. (Publications Office 2023) <https://data.europa.eu/doi/10.2838/619558> accessed 2 April 2024

European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights - Right to a Fair Trial (Criminal Limb)' (2022) <https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng> accessed 4 November 2021

European Court of Justice, 'Research Note on the Possibility and Conditions of an Incidental Review of the Procedure Leading to a Judge's Appointment' (2019) <https://curia.europa.eu/jcms/jcms/p1_3586204/en/>

European Implementation Network, 'Country Map' (European Implementation Network) <https://www.einnetwork.org/countries-overview> accessed 19 June 2024

Official Journal of the European Union, 'Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings' (2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019H1108%2801%29> accessed 5 May 2024

PACE, 'Resolution 2188 (2017) - New Threats to the Rule of Law in Council of Europe Member States: Selected Examples' (2017) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en> accessed 29 March 2022

Pech L, 'Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG' (2020) https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf

Pech L and Kochenov D, 'Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3403355 <https://papers.ssrn.com/abstract=3403355> accessed 18 July 2021

Pech L and Kochenov D, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (20 May 2021) <https://papers.ssrn.com/abstract=3850308> accessed 17 June 2024

Pornschlegel S and Cramer CS, 'No Power without Values: Why the EU Needs to Embrace Political Leadership If It Wants to Safeguard Democracy' (European Policy Centre 2022)

'Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice? – European Sources Online' <https://www.europeansources.info/record/preliminary-references-by-public-administrative-bodies-when-are-public-administrative-bodies-competent-to-make-preliminary-references-to-the-european-court-of-justice/> accessed 27 June 2024

Venice Commission, 'Opinion No. 832/2015. Russian Federation Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e>

——, 'Opinion No. 833/2015. Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e>

——, 'Opinion No. 892/2017. Opinion on the Act on the Pulic Prosecutor's Office As Amended' <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e>

——, 'Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Amendments to the Law on the Common Courts, the Law on the Supreme Court, and Some Other Laws [in Poland]' (2020) https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)002-e

Wolne Sądy, '2000 Days of Lawlessness' (2021) <https://wolnesady.org/files/2000_days_of_Lawlessness_FreeCourts_Report.pdf>

——, '3000 Dni Bezprawia [3000 Days of Lawlessness]' (2021) <https://wolnesady.org/files/3000-dni-bezprawia-Raport-WS-1.pdf>

Zoll F, Południak-Gierz K and Bańczyk W, 'Primacy of EU Law and Jurisprudence of Polish Constitutional Tribunal: Recent Developmentsin the Light of the Polish Constitutional Tribunal's Case Law' (European Parliament 2022) <https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732475/IPOL_STU(2022)732475_EN.pdf>

Blogs, press releases, online articles and other internet sources

Amsterdam University, 'Workshop on Strategic Litigation in European Law' (21 March 2024) <https://vu.nl/en/events/2024/strategic-litigation-in-european-law> accessed 26 June 2024

Biernat S and Kawczyńska M, 'Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU Is Admissible after All' [2018] Verfassungsblog on Matters Constitutional <https://verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-cjeu-is-admissible-after-all/> accessed 10 May 2024

Bill S, 'What Does Jarosław Kaczyński Want? Poland and the Rule of Law' (Notes From Poland, 18 June 2017) <https://notesfrompoland.com/2017/06/18/what-does-jaroslaw-kaczynski-want-poland-and-the-rule-of-law/> accessed 20 June 2022

Bohnert S, 'Predictable and Unsatisfying: The Sharpston Saga: The CJEU's Orders in Cases C-684/20 P and C-685/20 P' [2021] Verfassungsblog on Matters Constitutional <https://verfassungsblog.de/predictable-and-unsatisfying/> accessed 10 May 2024

Bradley K, 'Appointment and Dis-Appointment at the CJEU: Part II – The Sharpston Litigation' (2022) 21 The Law & Practice of International Courts and Tribunals 178

Csaky Z, 'Nations in Transit 2020: Dropping the Democratic Facade' (Freedom House, 2020) <https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade> accessed 17 June 2022

De Somer M, 'Precedents and Judicial Politics – Why Studying the CJEU Requires a Long-Term Perspective' (EU Immigration and Asylum Law and Policy, 2018) <https://eumigrationlawblog.eu/precedents-and-judicial-politics-why-studying-the-cjeu-requires-a-long-term-perspective/> accessed 10 June 2024

European Commission, 'Commission Decides to Refer Poland' (European Commission Press Release, 15 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842> accessed 2 April 2024

——, 'Poland's Efforts to Restore Rule of Law Pave the Way for Accessing up to €137 Billion in EU Funds' (European Commission Press Corner, 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1222> accessed 21 June 2024

——, 'The European Commission Decides to Refer Poland to the Court of Justice of the European Union for Violations of EU Law by Its Constitutional Tribunal' (European

Commission - European Commission, 15 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842> accessed 29 June 2024

Filipek P, 'Drifting Case-Law on Judicial Independence' [2022] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00012686> accessed 29 June 2024

Gałczyńska M, 'Attack of the Disciplinary Commissioners on Judge Żurek. "They Are Ridiculing Themselves"' (Rule of Law, 2022) <https://ruleoflaw.pl/attack-of-the-disciplinary-commissioners-on-judge-zurek-they-are-ridiculing-themselves/> accessed 18 June 2022

Grabowska-Moroz B, 'Strasbourg Court Entered the Rule of Law Battlefield – Xero Flor v Poland' (Strasbourg Observers, 15 September 2021) <https://strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/> accessed 27 June 2024

——, 'A New Nail in the Coffin for the 2017 Polish Judicial Reform' (Verfassungsblog on Matters Constitutional, 2020) <https://verfassungsblog.de/a-new-nail-in-the-coffin-for-the-2017-polish-judicial-reform/> accessed 7 June 2022

IJRC, 'Benin and Côte d'Ivoire to Withdraw Individual Access to African Court' (International Justice Resource Center, 6 May 2020) <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/> accessed 21 December 2022

Jałoszewski M, 'Kaczyński directly announced a purge among judges for the first time' (Stowarzyszenie Sędziów THEMIS, 2020) <http://themis-sedziowie.eu/materials-in-english/kaczynski-directly-announced-a-purge-among-judges-for-the-first-time-mariusz-jaloszewski-oko-press-22-december-2020/> accessed 19 June 2022

——, 'The Prosecutor General Goes for Judge Żurek. He Is Digging into His Private Affairs – Rule of Law' (2021) <https://ruleoflaw.pl/the-prosecutor-general-goes-for-judge-zurek-he-is-digging-into-his-private-affairs/> accessed 22 June 2022

Jaraczewski J, 'Op-Ed: One Man against the System – the Story of Judge Waldemar Żurek and the Court of Justice's Judgment in W.Ż.' [2021] EU Law Live <https://eulawlive-com.ezproxy.leidenuniv.nl/op-ed-one-man-against-the-system-the-story-of-judge-waldemar-zurek-and-the-court-of-justices-judgment-in-w-z-by-jakub-jaraczewski/> accessed 23 June 2022

Kaleem J, '"Poland Is the New Battleground": Judges Face Peril, Even Death Threats, for Criticizing Right-Wing Government' (Los Angeles Times, 27 February 2020) <https://www.latimes.com/world-nation/story/2020-02-27/poland-government-judges-nationalism> accessed 20 June 2022

Kochenov D and Butler G, 'It's Urgent III' (Verfassungsblog on Matters Constitutional, 2020) <https://verfassungsblog.de/its-urgent-iii/> accessed 19 June 2022

Koncewicz T, 'The Court Is Dead, Long Live the Courts?: On Judicial Review in Poland in 2017 and „judicial Space" beyond' [2018] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00003254> accessed 1 July 2024

Koncewicz TT, 'The Democratic Backsliding and the European constitutional design in error. When will HOW meet WHY?' (Verfassungsblog on Matters Constitutional, 2018) <https://verfassungsblog.de/the-democratic-backsliding-and-the-european-constitutional-design-in-error-when-how-meets-why/> accessed 4 January 2023

Krommendijk J and van der Pas K, 'Third-Party Interventions before the Court of Justice in Migration Law Cases – EU Immigration and Asylum Law and Policy' (29 November 2022) <https://eumigrationlawblog.eu/third-party-interventions-before-the-court-of-justice-in-migration-law-cases/> accessed 19 June 2024

Lacchi C and Neframi E, Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection (Larcier 2020)

Lamo DP de, 'Mutual Trust and Rule-of-Law Considerations in EU Competition Law: The General Court Extends the "L.M. Doctrine" to Cooperation Between Competition Authorities' (Kluwer Competition Law Blog, 1 March 2022) <http://competitionlawblog.kluwercompetitionlaw.com/2022/03/01/mutual-trust-and-rule-of-law-considerations-in-eu-competition-law-the-general-court-extends-the-l-m-doctrine-to-cooperation-between-competition-authorities-sped-pro-t-791-19/> accessed 30 December 2022

Lasek-Markey M, 'Poland's Constitutional Tribunal on the Status of EU Law: The Polish Government Got All the Answers It Needed from a Court It Controls' (European Law Blog, 21 October 2021) <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/> accessed 6 January 2023

Krajewski M and Ziółkowski M, 'The Power of "Appearances"' [2019] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00007891> accessed 5 July 2024

Lawson R, '"Non-Existent": The Polish Constitutional Tribunal in a State of Denial of the ECtHR Xero Flor Judgment' (Verfassungsblog on Matters Constitutional, 2021) <https://staging.verfassungsblog.de/non-existent/> accessed 13 March 2022

Madsen M, Olsen H and Šadl U, 'Legal Disintegration?: The Ruling of the Danish Supreme Court in AJOS' [2017] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00000877> accessed 29 June 2024

Matczak M, '10 Facts on Poland for the Consideration of the European Court of Justice' (Verfassungsblog on Matters Constitutional, 2018) <https://verfassungsblog.de/10-facts-on-poland-for-the-consideration-of-the-european-court-of-justice/> accessed 19 June 2022

Mechlinska A, 'When Is a Tribunal Not a Tribunal? Poland Loses Again as the European Court of Human Rights Declares the Disciplinary Chamber Not to Be a Tribunal Established by Law in Reczkowicz v. Poland.' (Strasbourg Observers, 26 October 2021) <https://strasbourgobservers.com/2021/10/26/when-is-a-tribunal-not-a-tribunal-poland-loses-again-as-the-european-court-of-human-rights-declares-the-disciplinary-chamber-not-to-be-a-tribunal-established-by-law-in-reczkowicz-v-poland/> accessed 4 July 2024

Mijatović D, 'The Independence of Judges and the Judiciary under Threat' (The Council of Europe Commissioner for Human Rights, 2019) <https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/the-independence-of-judges-and-the-judiciary-under-threat> accessed 6 June 2022

Mycielski M and others, 'Polish Public Prosecutor's Office: Selected Cases of Malicious Prosecution and Dereliction of Duties' (Open Dialogue Foundation, 16 February 2022) <https://en.odfoundation.eu/a/190999,polish-public-prosecutors-office-selected-cases-of-malicious-prosecution-and-dereliction-of-duties/> accessed 2 July 2022

Nguyen T, 'How Much Money Is a Lot of Money?' [2021] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00011186>

Nowak J, 'Op-Ed: "The Staff Case That You Will Never Forget! The Review Judgment of the Court in Simpson and HG"' (EU Law Live, 30 March 2020) <https://eulawlive.com/op-ed-the-

staff-case-that-you-will-never-forget-the-review-judgment-of-the-court-in-simpson-and-hg-by-janek-nowak/> accessed 2 July 2024

Ojczyk J and Rojek-Socha P, 'Kaczyński zapowiada spłaszczenie struktury sądów' (Prawo, 16 October 2021) <https://www.prawo.pl/prawnicy-sady/dalsza-reforma-sadow-jaroslaw-kaczynski,511223.html> accessed 19 June 2022

Parliament, 'Parliament Concerned about the Rule of Law in Slovakia' (European Parliament Press Release, 17 January 2024) <https://www.europarl.europa.eu/news/en/press-room/20240112IPR16770/parliament-concerned-about-the-rule-of-law-in-slovakia> accessed 2 April 2024

——, '7 Years Later: Poland as a Legal Black Hole' [2023] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00014945> accessed 1 July 2024

Pech L and Platon S, 'How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling' [2021] Verfassungsblog On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00011004> accessed 29 June 2024

Pech L and Wachowiec P, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part I)' (Verfassungsblog on Matters Constitutional, 2019) <https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-i/> accessed 4 January 2023

Sadurski W, 'Open Letter to the President of the European Commission Regarding Poland's "Muzzle Law"' [2020] Verfassungsblog: On Matters Constitutional <https://intr2dok.vifa-recht.de/receive/mir_mods_00008281> accessed 1 July 2024

Siedlecka E, 'To Shoot Down a Judge: The Endless Hounding of Judge Waldemar Żurek' (Verfassungsblog on Matters Constitutional, 2020) <https://verfassungsblog.de/to-shoot-down-a-judge/> accessed 17 June 2022

Sikora A, 'EU Law Analysis: The CJEU and the Rule of Law in Poland: Note on the Polish Supreme Court Preliminary Ruling Request of 2 August 2018' (EU Law Analysis, 4 August 2018) <http://eulawanalysis.blogspot.com/2018/08/the-cjeu-and-rule-of-law-in-poland-note.html> accessed 3 July 2024

'Statement by Prime Minister Mateusz Morawiecki in the European Parliament' (The Chancellery of the Prime Minister of Poland, 2021)

<https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament> accessed 13 July 2023

Storey H, 'Preliminary References to the Court of Justice of the European Union' (2010) <https://www.iarmj.org/images/stories/lisbon_sep_2010/storey.pdf>

Swiecicki P, 'Why Is the Decision of the Constitutional Tribunal Such a Threat to the Rule of Law?' (Rule of Law, 18 October 2021) <https://ruleoflaw.pl/why-is-the-decision-of-the-constitutional-tribunal-such-a-threat-to-the-rule-of-law/> accessed 27 June 2022

The First News, 'PACE Committee Calls for the Rejection of Polish Candidates for European Court' (2021) <https://www.thefirstnews.com/article/pace-committee-calls-for-the-rejection-of-polish-candidates-for-european-court-21239> accessed 14 February 2023

The Warsaw Institute Review, 'The Context and Meaning of Judicial Reforms in Poland after 2015' (The Warsaw Institute Review, 18 April 2021) <https://warsawinstitute.review/issues-2021/the-context-and-meaning-of-judicial-reforms-in-poland-after-2015/> accessed 18 June 2022

Vandamme T, '"The Two-Step Can't Be the Quick Step": The CJEU Reaffirms Its Case Law on the European Arrest Warrant and the Rule of Law Backsliding' (European Law Blog, 10 February 2021) <https://europeanlawblog.eu/2021/02/10/the-two-step-cant-be-the-quick-step-the-cjeu-reaffirms-its-case-law-on-the-european-arrest-warrant-and-the-rule-of-law-backsliding/> accessed 5 January 2023

Walsh A, 'What Are Poland's Controversial Judicial Reforms?' (DW Akademie, 2019) <https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>

Wanat Z, Bayer L and Tamma P, 'EU Gives Poland Route to Pandemic Recovery Cash' (POLITICO, 1 June 2022) <https://www.politico.eu/article/eu-vows-deal-to-unlock-poland-pandemic-cash-hinges-recovery-fund-covid-19-on-reforms/> accessed 21 June 2024

Wójcik A, 'Constitutional Tribunal Ruled: CJEU Interim Orders Do Not Apply in Poland – Rule of Law' (2021) <https://ruleoflaw.pl/constitutional-tribunal-ruled-cjeu-interim-orders-do-not-apply-in-poland/> accessed 22 June 2022

——, 'Judge Żurek: The Authorities Will Try to Bribe and Intimidate the Judges. But This Won't Work' (Rule of Law, 2021) <https://ruleoflaw.pl/judge-zurek-the-authorities-will-try-to-bribe-and-intimidate-the-judges-but-this-wont-work/> accessed 18 June 2022

——, ‘Legal PolExit. Julia Przyłębska’s Constitutional Tribunal Held That CJEU Judgments Are Incompatible with the Constitution’ (Rule of Law, 8 October 2021) <https://ruleoflaw.pl/legal-polexit-julia-przylebskas-constitutional-tribunal-held-that-cjeu-judgments-are-incompatible-with-the-constitution/> accessed 27 June 2022

Zoll F and Worrtham L, ‘Weaponizing Judicial Discipline: Poland’ in Richard Devlin and Sheila Wildeman (eds), Disciplining judges : contemporary challenges and controversies (Edward Elgar Publishing 2021) <https://www-elgaronline-com.ezproxy.leidenuniv.nl/view/edcoll/9781789902365/9781789902365.00018.xml>