Judicial Independence in European Constitutional Law

Rafael Bustos Gisbert*

Judicial independence in the context of rule of law backsliding – a systematisation of case law from the Court of Justice and the European Court of Human Rights – classic dimensions of objective and subjective independence of judges – a new third dimension: the right of judges to their own independence as final safeguard

In recent years, judicial independence has become one of the 'trending topics' of European constitutional law in the wake of rule of law backslidings in Europe. Dozens of judgments issued by both the European Court of Human Rights and the European Court of Justice have addressed the matter.[1] In this case law judicial independence appears as a *polyhedral* legal concept. First, every litigant has the right to have his or her disputes decided by an independent body. In this sense, it arises from the right to a fair trial. Second, judicial independence is an indispensable feature of one of the state's primary branches of government and, at the supra-national level, of the powers of both the EU and the Council of Europe. Judicial independence is, in this sense, an assumed yet vital corollary of the theory of the division of powers. But a third dimension is being built: judicial independence as an essential element of the rights and duties that integrates the legal status of the judge. It is hence a defining element of the judges' status.

In this article we will try to address the principle of judicial independence to tie together these three aspects by reviewing 50 years of jurisprudential and normative casuistry. The main thesis could be summarised as follows: the new and partially developed element of the judge's status may perform as the cement that glues together the subjective and objective components of judicial independence.

*Professor in Constitutional Law University Complutense of Madrid. Spanish member of the Venice Commission.

[1]For a full account of this case law until September 2021, *see* R. Bustos Gisbert, *Independencia Judicial e Integración Europea* [*Judicial Independence and European Integration*] (Tirant lo Blanch 2022).

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To sustain this thesis, we will first examine the central features of judicial independence as defined in European constitutional law and then try to assess its basic classical content in two fundamental components: subjective and objective. Last, we will try to sustain the birth of a third component within the concept of judicial independence, which we can label as the *judiciary's status dimension* insofar as it describes the legal status of European judges.

Core features of judicial independence in European constitutionalism

The plethora of rulings on the subject in recent years makes it difficult to grasp which aspects of judicial independence have been stressed in European case law. Therefore, in order to fully understand the specific content of the principle, it is useful to summarise the core features of judicial independence highlighted in that case law

Judicial independence is an autonomous concept of European law

The starting point for the analysis of judicial independence, both for the Council of Europe and the EU, was assessing whether bodies that are not part of the judiciary of member states could be considered 'courts'. To this end, the European Court of Human Rights and the European Court of Justice opted for a 'material' definition in which independence remains essential whether expressly formulated (in the case of the European Convention on Human Rights) or derived from its definition (in the case of the EU).

In the context of the Council of Europe, the issue to be addressed traditionally concerned the right to an independent and impartial tribunal. That is, determining in the circumstances of the case the content of the right to effective judicial protection boiled down to the need for national courts to be free from external pressures. Other aspects of the principle were hardly examined or developed. This jurisprudence was extremely cautious, as it was intended to leave a wide margin of national appreciation to avoid constricting the constitutional self-organisation of member states.[2]

In the EU context, the main issue was not the rights of the parties in judicial proceedings. The basic issue was the safeguard of European citizens' access to the Court of Justice via preliminary rulings and strengthening dialogue between national courts and the Court of Justice in order to ensure the uniform application

[2]*See* the leading cases in the ECtHR: 28 June 1981, No. 6878/75, *Le Compte et al.* v *Belgium*; 28 June 1984, No. 7819/77, *Campbell and Fell* v *United Kingdom*; 22 June 1984, No. 8790/79, *Sramek* v *Austria*; 27 June 1989, No. 11179/84, *Langborger* v *Sweden*; 6 May 2003, No. 39651/98, *Kleyn et al.* v *The Netherlands*.

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of EU law. To make possible the fulfilment of both goals, the Court understood judicial independence in rather generous terms.[3] The main result of this understanding was a broad concept of judicial independence that comprehends as many bodies as possible as a 'judicial body' able to request preliminary ruling from the Court.[4] Only when the concern for the enforcement of fundamental rights reached the EU did the Court of Justice define judicial independence in a more sophisticated fashion in the *Wilson* case, although, for the most part, it has only entailed the transposition of the criteria previously set out in Strasbourg.[5]

Both Courts affirmed that 'judicial body' was an autonomous concept of European law. It was therefore not identical to the concepts adopted at the national level. Although not all bodies qualified as 'judicial' at the national level can automatically be considered as judicial bodies at the European level, in practice they were always considered as such. In the same direction, judicial independence was also defined as autonomous, even if both supranational courts undoubtedly draw on the constitutional traditions of the member states.

Judicial independence is a 'living' concept of European law

The word 'living' obviouslys refer to the idea, often evoked by the Strasbourg Court, that European constitutional norms adapt to changes and developments through constant redefinition of their content. This is particularly the case with judicial independence.

Since the turn of the millennium, the role of the judiciary in Europe has shifted. In some states, it has often become an alternative democratic arena where political minorities gain power denied them in the ordinary democratic process. This has exacerbated the well-known tension between democracy and constitutionalism. This tension has, on the one hand, triggered attacks by democratically elected political powers against the limits imposed on them by institutionally independent judiciaries, and on the other, led to a certain judicial activism in defence of their own independence.

It is therefore unsurprising that the evolution of the concept of judicial independence in Europe is connected to the crises caused by the rule of law backsliding in certain Council of Europe and EU member states. The phenomenon first appeared in the Council of Europe, given its greater scope and the lesser intensity of the pre-accession control exercised over the states, and some of the

[3]*See* e.g. ECJ 14 February 1971, Case C-43/71, *Politi*; ECJ 11 June 1987, Case C-14/86, *Prettore di Salò*; ECJ 30 March 1990, Case C-24/92, *Corbiau*; ECJ 21 March 2000, Case C-110/98, *Gabalfrisa*; and ECJ 29 November 2001, Case C-17/00, *De Coster*.

[4]As was underlined by AG Ruiz Jarabo in his highly critical Conclusions to the *De Coster case*, 21 November 2001. This approach has changed substantially, *see* nn. 29 and 30.

[5]As early as 2006: ECJ 19 September 2006, Case C-506/94, *Wilson*.

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problems were already evident from 2010 onwards. In the EU, the perception of regression took longer to sink in, but the signs first appeared in Hungary (2010) and then in Poland (2015) before threatening to spread to other EU member states.

Within the Council of Europe, a highly elaborated acquis on the concept of judicial independence in soft law instruments was developed in two phases (from 1990–2010 and from 2010 onwards) whose importance should not be underestimated[6] even if it cannot be studied in these pages.[7]

In this article we must draw attention to the leap in the European Court of Human Rights' jurisprudence from 2013 onwards. Prior to that year most of its jurisprudence concerned appellants' allegations that the court deciding their case at national level was not independent, in breach of Article 6(1) ECHR. It was during this period that the basic elements of an 'independent' court were defined

But after 2013, the Council of Europe saw the renewal of the European Court of Human Rights case law, which developed, based on European soft law, the statutory aspects of judicial independence (*see* below) mostly after claims made by judges in defence of their rights. The timeline of the leading cases is certainly straightforward: *Oleksandr Volkov* v *Ukraine* (2013);[8] *Baka* v *Hungary* (2014 Chamber and 2016 Grand Chamber);[9] *Nunes de Carvalho e Sa* v *Portugal* (2016 Chamber and 2018 Grand Chamber);[10] *Alpasarian* v *Turkey* (2019);[11] *Eminagaoglu* v *Turkey* (2021);[12] *Reczkowicz* v *Poland* (2021).[13] To these cases, since 2020, must be added those rulings coming from plaintiffs who claim that their cases were not adjudicated by independent tribunals because they were not established by law: *Guðmundur Andri Ástráðsson* v *Iceland* (2020);[14] *Xero Flor w Polsce sp z.o.o.* v *Poland* (2021).[15]

[6]For an account of this influence even at EU level, especially in the EU accession of central and eastern Europe countries, *see* A. Siebert Fohr, 'Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle', 52 *German Yearbook of International Law* (2009) p. 418.

[7]For an explanation on the content of this *soft* law and its influence, *see* R. Bustos Gisbert, 'La influencia de los Textos no vinculantes del Consejo de Europa sobre independencia judicial en TEDH y en la UE' [*The Influence of Non-binding Council of Europe Documents on Judicial Independence at the ECtHR and within the EU*], 47 *Teoría y Realidad Constitucional* (2021) p. 161.

[8]ECtHR 9 January 2013, No. 21722/11, *Oleksandr Volkov* v *Ukraine*.

[9]ECtHR 27 May 2014, No. 20261/12, *Baka* v *Hungary* and Grand Chamber 23 June 2016.

[10]ECtHR 21 June 2016, No. 55391/13 and others, *Ramos Nunes de Carvalho e Sá* v *Portugal* and Grand Chamber 6 November 2018.

[11]ECtHR 16 April 2019, No. 12778/17, *Alpasarlan Altan* v *Turkey*.

[12]ECtHR 9 March 2021, No. 76521/12, *Eminagaoglu* v *Turkey*.

[13]ECtHR 22 July 2021, No. 43447/19, *Reczkowicz* v *Poland*.

[14]ECtHR 1 December 2020, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*.

[15]ECtHR 7 May 2020, No. 4907/18, *Xero Flor w Polsce sp z.o.o.* v *Poland*.

Events at the EU were similarly clear. At first, the Court of Justice was only concerned with the independence of the judicial bodies that could request a preliminary ruling. In a second phase, it introduced the right to an independent tribunal. In the last phase of this evolution, however, the temporal succession of the leading cases becomes significant and undoubtedly revolutionary. This is because, in less than five years, the manner in which judicial independence has been approached has shifted dramatically from a strictly functional or utilitarian (and thus *narrow*) approach to a truly constitutional one.[16] This is evident in, among other cases, *Associaciao Sindical dos Juizes Portugueses (ASJP)* (2018);[17] *Minister for Justice* (2018);[18] *Achmea* (2018);[19] *CETA* (2019); *Commission* v *Poland* (2019 – two cases on the independence of the Supreme Court and the independence of the ordinary courts);[20] *A.K.* (2019);[21] *Miasto Lowicz* (2020);[22] *A.B. and others (Nomination of Supreme Court Judges)* (2021);[23] *Repubblika* (2021);[24] *Asociația 'Forumul Judecătorilor Din România'* (*AFJR*) (2021);[25] *Commission* v *Poland (Disciplinary Regime of Judges)* (2021).[26] Moreover, the sheer number of cases pending before the European Court of Human Rights and the European Court of Justice augurs further development in the coming years.

The conceptual development of judicial independence is closely related to the deepening of European constitutional discourse

The developments just examined are not only due to changes in the constitutional political context of integration. They are also related to the incorporation of constitutional discourse into European integration through the progressive formulation and application of categories and concepts from constitutional law.[27]

[16] *See* e.g. P. Andrés de Santamaría, 'Rule of Law and Judicial Independence in the Light of the CJEU and ECtHR Case Law', in C. Izquierdo Sanz et al., *Fundamental Rights. Challenges, Horizontal Effectiveness, Rule of Law and Margin of National Aprreciation* (Springer 2021) p. 168-170.

[17] ECJ 27 February 2017, Case C-64/16, *Associaçao Sindical dos Juizes Portugueses* (*ASJP)*.

[18] ECJ 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality.*

[19] ECJ 6 March 2018, Case C-284/16, *Achmea*.

[20] ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland (Independence of Supreme Court)*; ECJ 5 November 2019, Case C-192/18, *Commission* v *Poland (Independence of Ordinary Courts)*.

[21] ECJ 19 November 2019, Case C-585/18, *A.K. (Independence of the Disciplinary Chamber)*.

[22] ECJ 12 June 2020, Case C-558/18, *Miasto Lowicz*.

[23] ECJ 2 March 2021, Case C-824/18, *A.B. and others (nomination of Supreme Court Judges)*.

[24] ECJ 20 April 2021, Case C-896/19, *Repubblika*.

[25] ECJ 18 May 2021, Case C-83/19, *Asociația 'Forumul Judecătorilor Din România'* (*AFJR*).

[26] ECJ 15 July 2021, Case C-791/19, *Commission* v *Poland (Disciplinary Regime of Judges)*.

[27] In the classical approach of N. Walker, 'The Idea of Constitutional Pluralism', 65(3) *Modern Law Review* (2002) p. 317.

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The concept of judicial independence has developed in parallel to and because of the transposition of other constitutional categories into European integration structures. This phenomenon has served as a 'key' to introduce the notion of independence into legal arguments at the European level. Four milestones should be particularly emphasised.

The first relevant milestone came about in the case law of the European Court of Human Rights, when the right of access to a court, in its civil aspect, was read as applicable to the claim of any right recognised in the national legal system. This interpretation first extended the scope of Article 6 of the Convention to the labour rights of civil servants enshrined in national law,[28] which included national judges. The *Eskelinen* judgment (2006) had two positive effects on the way in which the Court deals with overseeing the compliance with judicial independence: it ensured that decisions concerning the legal status of judges be reviewed by courts or equivalent bodies; and judges dissatisfied with the authorities' protection of their rights, and in particular with the consideration of judicial independence, could challenge national decisions before the European Court. In short, the widening of the scope of Article 6 made national decisions concerning the appointment, promotion, dismissal and, above all, the disciplinary regime of judges subject to review by the Strasbourg Court.

A second essential milestone was the full acceptance of fundamental rights in the EU legal order. Fundamental rights were of course integrated into EU law as early as the 1970s, but from 2000 and especially after the entry into force of the Charter of Fundamental Rights in 2009 they became fully embedded in the reasoning of the case law of the Court of Justice. This evolution made possible the incorporation of the subjective aspect of judicial independence (as a citizen's right), which although announced much earlier, did not take place until 2006 with the *Wilson* ruling. This ruling is seminal because it partially freed the discourse on judicial independence in the EU from the straitjacket that had confined its assessment to the dimension of the preliminary ruling.[29] After *Wilson*, not only did the definition of the concept of judicial independence in the EU expand, but

[28]ECtHR 19 April 2007, No. 63235/00, *Vilho Eskelinen and others* v *Finland*.

[29]A slight redrawing of the criterion of independence more in line with the Strasbourg parameters can be found in some ECJ decisions concerning judicial bodies, and this may raise questions for preliminary rulings issued before 2018. *See* ECJ 14 May 2008, Case C-109/07, *Pilato*; ECJ 22 December 2010, Case C-517/09, *RTL Belgium*; ECJ 14 June 2011, Case C-196/09, *Miles and Others*; ECJ 31 January 2013, Case C-394/11, *Belov and Others*; ECJ 28 November 2013, Case C-167/13, *Devillers*; ECJ 9 October 2014, Case C-222/13, *TDC*; ECJ 16 February 2017, Case C-503/15, *Margarit Panicello*; ECJ 16 November 2017, Case C-476/16, *Air Serbia*. However, it is not yet fully embedded in all cases, as shown in: ECJ 17 July 2014, Case C-58/13, *Torresi*; ECJ 6 October 2015, Case C-203/14, *Consorci Sanitari del Maresme*; ECJ 24 May 2016, Case C-396/14, *MT Hojgaard and Züblin*.

the necessary bridges for such expansion were built in accordance with the case law of the European Court of Human Rights, on which the Court of Justice openly relied. In this way, the full incorporation of the EU rights discourse, especially that of the Court, not only deepened the concept of judicial independence, but did so in a manner consistent with the Strasbourg case law.[30]

The third milestone for the development of the concept was the EU's creation of the Area of Freedom, Security and Justice. Among many other effects, it created a space for the 'free movement of judicial resolutions'. This space permits automatic recognition of judicial decisions between states; that is, there is room for unprecedented judicial cooperation in the history of international organisations, drawing the EU much closer to a quasi-federal structure. This space collapses in the absence of the utmost trust between states in the functioning of their judiciaries and, in particular, of their respect for fundamental rights.[31] Mutual recognition of judicial decisions is simply inconceivable without mutual trust among member states. Trust between judiciaries can only arise when they recognise each other as independent from the other branches of government. Thus, judicial independence in member states is a precondition for mutual trust and for the whole architecture of the Area. Immediate effects on this common space from any significant regression in judicial independence are thus easy to imagine. It is precisely in order to guarantee such independence that the EU has had to develop its discourse on judicial independence by drawing the red lines that domestic designs of the judiciary may not cross.[32]

The latest and possibly most important milestone in this evolution is found in the *ASJP* case. This judgment affirms, on the basis of Article 19(1) TEU, the constitutional duty of member states to respect their judiciary's independence. It thereby firmly anchors judicial independence as a core constitutional principle of the EU. From this decision has arisen case law crucial for the definition of the principle at the European level; case law which flows from the sources previously established by the soft law of the Council of Europe and by the European Court of Human Rights. Through this jurisprudence, the principle of judicial independence has been horizontally spread across the entire EU legal system. It has subsequently influenced the definition of a judicial body in Article 267

[30]*See* ECJ 31 January 2013, Case C-175/11, *D & A* and, in particular, ECJ 13 December 2017, Case C-403/16, *El Hassani*. Even if the ECJ is not eager to quote ECtHR judgments, it will rely explicitly and heavily in its case law not only in *Wilson* but in another landmark decision, *A.K. (Independence of the Disciplinary Chamber)*, *supra* n. 21.

[31]*See* e.g ECJ 21 December 2011, Case C-411/10, *N.S.* v *Secretary of State* and ECJ 5 April 2016, Case C-404/15, *Aranyosi and Caldararu*.

[32]Which does not mean that we share the approach adopted by the ECJ in the judgments on the topic quoted below in n. 34.

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TFEU,[33] the meaning of independent court referred to in Article 47-2 Charter regarding compliance with mutual trust among EU member states judiciaries,[34] the minimum requirements that the judicial bodies must meet for dispute settlement in EU law,[35] criteria for the nomination of judges in member states[36] and, above all, backstops on the regressions in judicial independence in some member states.[37]

Judicial independence is an existential prerequisite for European integration

Judicial independence has thus become a cornerstone of European integration, where the principle plays a more prominent role than it does in the individual member states. It is not only that integration (both through the EU and the Council of Europe), to which the principle of judicial independence is inseparably connected, rests on the defence of the rule of law as an essential element of coexistence and as a value to be upheld in all circumstances. It is also that both avenues of integration require an independent judiciary for execution.

It should not be forgotten that integration is articulated through law. To be effective, it requires that law be applied by a judiciary free of pressure from other authorities. If these pressures exist or, even worse, are effective, the law emanating from both organisations will not have practical effect. From the EU perspective,[38] its design as a community of law requires that judicial power be governed by a central body (the Court of Justice) and articulated through the national judiciaries that also serve as European judges. The autonomy of the EU legal order and its

[33]*See* ECJ 21 January 2020, Case C-274/14, *Banco de Santander*; ECJ 2 July 2020, Case C-256/19, *S.A.D: Maier und Antsrecher*; ECJ 9 July 2020, Case C-272/19, *VQ* v *Land of Hessen*; ECJ 16 July 2020, Case C-658/18, *Ux*.

[34]*See* e.g. *Minister for Justice and Equality*, *supra* n. 18; ECJ 22 March 2022, Case C-508/19, *OG (Parquet du Lübeck)*; ECJ 27 May 2019, Joined Cases C-508/18 and C-82/19 PPU, *PI (Zwickau)*; ECJ 27 May 2019, Case C-509/18, *Prosecutor General of Lithuania*; ECJ 17 December 2020, Case C-354/20 PPU and 412/20 PPU, *Openbaar Ministerie*; ECJ 22 February 2022, Case C-562/21 PPU to C-563/21 PPU, *Openbaar Ministerie*.

[35]*Achmea*, *supra* n. 19; 20 April 2019, Opinion C-1/17, *CETA*.

[36]*Repubblika*, *supra* n. 24.

[37]Basically, all the Polish cases: *Commission* v *Poland (Independence of Supreme Court)*, *supra* n. 20; *Commission* v *Poland (Independence of Ordinary Courts)*, *supra* n. 20; *A.K. (Independence of the Disciplinary Chamber)*, *supra* n. 21; *Miasto Lowicz*, *supra* n. 22; *A.B. and others (nomination of Supreme Court Judges)*, *supra* n. 23; *Commission* v *Poland (Disciplinary Regime of Judges)*, *supra* n. 26. *See also*, in the case of Romania, *AFJR*, *supra* n. 25.

[38]*See* K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', 38 *Yearbook of European Law* (2019) p. 4 and S. Adam, 'Judicial Independence as a Functional and Constitutional Instrument for Upholding the Rule of Law in the European Union', in P. Craig et al., *Rule of Law in Europe: Perspectives from Practitioners and Academics* (EJTN 2019) p. 35.

application in accordance with the principle of primacy do not arise from the Court of Justice case law. They derive from the involvement of national judges who serve as members of the European judiciary and apply EU law in accordance with the guidelines and principles laid down by case law from Luxembourg: in other words, because the judges are independent of external pressure (primarily from their own states) and are careful not to stray from full compliance with the law. In such a context, the independence of European judges will be particularly relevant with regard to the use of the basic instrument of their relationship with the Court of Justice: the request for preliminary ruling. Without independent courts in member states, this mechanism would also lose its effectiveness. The decision to refer a question for a preliminary ruling is taken by the national judge free from any external pressure, to avoid any chilling effect national legal systems might have on the disposition of judges to refer to the Court. It is a decision that, by definition, cannot depend on the interests or priorities of the other national branches of government, including judicial councils or supreme or constitutional courts.[39] Likewise, the application of EU law cannot be subject in any sense to the pressures that other national authorities may exert on judges. Judicial independence in the constitutional organisation within member states is, therefore, an existential condition of the EU itself, regardless of whether we tie it to Article 19.1 TEU or derive it from the values recognised in Article 2 TEU.

This particular nexus between judicial independence and integration takes place in a similar fashion in the Council of Europe. In the Council of Europe context, no formal embedding of the national judge within the judiciary of the international organisation takes place, but the guarantee of an independent judiciary remains nonetheless essential for integration through rights as one of the prominent goals of the Council of Europe. As is well known, the system for the protection of rights at the Council of Europe, and more specifically in the European Convention of Human Rights system, is founded on the idea of subsidiarity. This principle requires a centralised body for the protection of rights only when the national authorities have proven unable to guarantee the enforcement of a right. The idea of subsidiarity directly appeals to the notion that the European and national levels share responsibility, particularly between the Court and the member states authorities. It is up to the former to establish applicable parameters and standards and up to the latter to enforce them in their territories. Domestic courts themselves play a basic role in the national application of

[39]Unsurprisingly the ECJ has been very clear on this point, especially when judges can be subject to disciplinary proceedings for referring preliminary questions to the ECJ. *See Commission* v *Poland (Disciplinary Regime of Judges)*, *supra* n. 26, para. 222; *Miasto Lowicz*, *supra* n. 22, paras. 57-58 and ECJ 23 November 2021, Case C-564/19, *IS*. It was equally clear when the Romanian Constitutional courts tried to impede the primacy of EU law or the referring of a preliminary question: *see* ECJ 22 February 2022, Case C-430/21, *RS*.

these standards. The national courts, using the specific mechanisms provided by their own legal systems, must implement the European parameters to resolve the cases brought before them. Only independent judges can carry out such a task. If national judges come under pressure in such a way that they are prevented from applying the criteria established by the Court, the whole system falters and ultimately impedes any kind of European integration through the enjoyment of rights.

The weakness of the system for Council of Europe integration compared to that of the EU does not reduce the importance of the fact that it is the absence of pressure on the judiciary that underpins the whole system. If national judges do not apply the jurisprudence coming out of Strasbourg, it will prove useless and integration through the rule of law will be impossible. To apply supranational jurisprudence effectively, judges must be fully protected against any form of external pressure.

A trend can be traced not to treat in the same terms structural or systemic deficiencies and ad hoc problems of judicial independence

Apparently, in the case law of both the European Court of Human Rights and the European Court of Justice, the responses have differed according to the nature of the threat to judicial independence that is faced. Thus, when the threat involved is systemic, the due level of supervision exercised by supranational courts is perceived as higher than in cases of individual or one-off infringements of judicial independence. This is a trend not fully confirmed in all the case law, but which may well explain some of the most important judicial decisions on the subject.

This differentiated treatment in the case law of the European Court of Human Rights is not so clear because of the general unwillingness of the Strasbourg Court to issue sweeping assessments of legal systems, preferring instead a case-by-case analysis. For this very reason in the judgments in *Oleksandr Volkov* v *Ukraine* and *Nunes de Carvalho e Sá* v *Portugal* this double-edged approach was remarkable. The former assessed the system of judicial self-government and the conformity of Ukrainian disciplinary mechanisms within the meaning of Article 6 of the Convention. The Chamber judgment in *Nunes de Carvalho e Sá* followed the same approach. In the Grand Chamber ruling, however, this perspective is overruled by an analysis in which only a punctual violation of Article 6 was declared without any assessment of the compliance of the system as a whole with the Convention, because no systemic problem comparable to the one prosecuted in *Volkov* was found.[40] But a new way to address the question emerges from the way

[40]Expressly in para. 158. This approach triggers sharp criticism from the Portuguese judge in his dissenting opinion.

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Strasbourg is facing the problems in Poland. Apparently, the Court refuses to assess any systemic failure of the Polish legal order, but in a coherent series of judgments the Court has clearly developed the idea of a manifest breach of domestic law that will presumably lead it to conclude that Article 6 has been violated in dozens of cases pending before the Court (*see* below)[41] and, at the same time the Court has issued important interim measures to protect some specific Polish judges that probably would not be justified if a systemic failure in the Polish judicial system were not at stake.[42]

The EU's approach has been much more complex and harder to summarise.[43] It seems to be grounded in the differentiation of several areas of EU law rules related to judicial independence derived from its three main provisions: Article 19(1) TEU, Article 47 Charter and Article 267 TFEU.[44] In an attempt to systematise the case law on the subject, Advocate General Bobek offers a plausible interpretation,[45] even if it is not so clear that the Court has always followed his opinions: The scope of Article 19(1) TEU goes beyond individual situations subject to EU law, as it covers every judge who can apply EU law (in practice, *any* national judge). It requires that the organisation and functioning of the courts accord with the rule of law, and sets a very high threshold for non-compliance

[41]Especially since *Reczkowicz* v *Poland*, *supra* n. 13, in which the ECtHR needed 39 paragraphs to justify a 'manifest' violation of the law (paras. 227-266), but which enables an almost automatic finding of a violation of Art. 6 ECHR in pending cases against Poland and the adoption of interim measures to protect Polish judges from disciplinary measures. See below.

[42]*See* interim measures issued on 8 February and 24 March 2022 (in six pending cases).

[43]AG Tanchev argued in several of his conclusions (e.g. in the first two infringement actions against Poland or in *Miasto Lowicz*, *supra* n. 22) that a clear distinction should be drawn between systemic problems and specific problems of judicial independence, leaving the application of Art. 19(1) TEU only for the former and Art. 47 of the Charter for the latter. However, the ECJ did not seem to follow its recommendations, although it has not expressly ruled on them. AG Tanchev finally abandoned his position in *A.B. and others (nomination of Supreme Court Judges)*, *supra* n. 23, para. 90, but has continued to maintain the desirability of differentiating between systemic and specific problems.

[44]As has been already noted in the text, one of the permanent problems (that could be qualified as an inconsistency) at the EU is the existence of three different provisions with different scopes of application. This has given rise to extensive literature on the subject showing the theoretical difficulties in addressing the problem of judicial independence at the heart of the EU and thus in establishing the necessary internal connections within this triangle. *See* e.g. A. Torres, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence', 27(1) *Maastricht Journal of International and Comparative Law* (2020) p 105; P. Bogdanowicz and M. Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience, ECJ (Grand Chamber) 24 June 2019, Case C 619/18, European Commission v Republic of Poland', 16 *EuConst* (2020) p. 306 esp. at p. 318-320, or N. Canziani, 'Il principio europeo di indipendenza dei giudici: il caso polaco', XL2 *Quaderni Costituzionali* (2020) p. 465.

[45]Conclusions to ECJ 20 May 2021, Cases C-748/19 to C-754/19, *Prokuratura Rejonowa e Minsku Mazowleckim* v *WB and others*.

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with the provision. It should, he argues, be reserved for serious or systemic breaches that cannot be solved within the system itself. The Court's analysis transcends individual cases and includes the institutional and constitutional structure of the national judiciary. Article 47 of the Charter, on the other hand, represents a subjective right limited in scope of application by Article 51. Problems stemming from a structural or systemic feature of the judiciary are only relevant insofar as they affect the domestic judicial process that gave rise to the case. Subsequently, the intensity of supervision by the Court will be more moderate. The scope of Article 267 TFEU concerns all situations in which the interpretation or validity of EU law is questioned. Here, a functional concept of judicial bodies serves to qualify which national bodies can enter into dialogue with the Court of Justice. The analysis therefore focuses on a structural aspect from a general perspective: the status of the body within the institutional framework of the member state. As a result, the intensity of the Court of Justice's control lowers.

This distinction between structural or systemic problems and specific risks should reflect the self-restraint that both courts must exercise to avoid encroaching on the constitutional prerogative of member states. Thus, accepting some presumption of equivalence in favour of national compliance with judicial independence seems reasonable. Such a presumption (*Solange* in reverse) would prevent international courts from making global assessments of national constitutional designs unless a major affront to judicial independence within a given member state can be substantiated.[46]

Traditional scope of judicial independence: subjective and objective

Judicial independence can under no circumstances be considered a judge's privilege. On the contrary, it is an instrument for the achievement of two major constitutional goals: the right to a fair trial; and the division of powers in polities governed by the rule of law. Hence, documents adopted at the Council of Europe often refer to subjective and objective independence in order to distinguish the right enshrined in Article 6 of the Convention (subjective) from the constitutional organisational principle of the division of powers (objective).

[46]On this interesting approach *see* A. Von Bogdandy et al., 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States', 49 *Common Market Law Review* (2012) p. 489 or A. Von Bogdandy and L.D. Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange and the Responsibilities of National Judges', 15 *EuConst* (2019) p. 391.

The subjective dimension: the right to an independent judge

The right to an independent judge enshrined in Article 6 Convention and Article 47.2 Charter has been elaborated without significant discrepancies by the Strasbourg and Luxembourg Courts. The leading case law is elaborated in Strasbourg and subsequently incorporated into EU law by the Court of Justice. The reception of the European Court of Human Rights case law first occurred through a rhetorical acknowledgment of the common constitutional traditions of EU member states without expressly applying it to the cases before it. From the *Wilson* judgment onwards,[47] however, the Court of Justice fully incorporated core criteria formulated by the European Court of Human Rights[48] into its decisions. In both Courts it is a general trend that although a breach of one criterion – if it is very serious and evident – sometimes leads to the conclusion that a judge or a court lacks independence, usually the criteria are assessed in the aggregate to decide whether the right to a fair trial has been respected.[49]

The first of these criteria refers to appointment. Independence as applied to the appointment of judges is understood in dynamic terms and linked to the specific circumstances of the case. It is widely accepted that the selection and appointment of judges be made by other branches of government, most notably the executive.[50] Indeed, this is common practice in many of the member states. What concerns both Courts is not some relationship of dependence 'in origin', because of the mode of appointment, but rather the guarantee of full independence 'in exercise' of the judicial function. In other words, the origin and method of appointment is not as relevant as the absence of external pressure in the subsequent exercise of the judicial function.[51] In this framework, the specific rules concerning the abstention

[47] *Wilson*, *supra* n. 5, although the judgment does not properly distinguish internal independence from impartiality.

[48] *See* as leading cases *Campbell and Fell* v *United Kingdom*, *supra* n. 2, para. 78; *Langborger* v *Sweden*, *supra* n. 2, para. 32 and *Kleyn et al.* v *Netherlands*, *supra* n. 2, para. 190.

[49] *See* Bustos Gisbert, *supra* n. 1, p. 52 ff for the ECtHR and p. 197 ff for the ECJ.

[50] At the ECtHR the idea is clear since *Campbell and Fell v United Kingdom*, *supra* n. 2, para. 67 and 9 November 2006, No. 65411/01, *Sacilor Lormines* v *France*, para. 67. At EU level *see* e.g. ECJ 17 September 1997, Case C-54/96, *Dorsch Consult* or ECJ 16 October 1997, Case C-69/96, *Garofalo and others*. Even so, some evolution might be seen when comparing to ECtHR 3 March 2005, No. 54723/00, *Brudnicka* v *Poland*, were the appointment by the executive was considered a violation of the right to an independent court (even if in this case other circumstances were at stake) or the importance given by the ECJ to the nomination of the members of the judicial council in charge of the appointment of the judges at the disciplinary Chamber in *A.K. (Independence of the Disciplinary Chamber)*, *supra* n. 21, para. 143, even if it kept the orthodoxy of its case law.

[51] *See* e.g. *A.K. (Independence of the Disciplinary Chamber)*, *supra* n. 21, at 133 ff; *Repubblika*, *supra* n. 24, para. 57, but is a basic feature in all ECJ's case law.

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and recusal of the court's members are crucial.[52] However, other factors delimiting subjective independence will also influence the assessment of independence. Therefore, while the manner of appointment is a basic element, in practice it is not definitive for the final outcome of the assessment. In fact, it will often represent a complementary aspect in assessing the appearance of independence and/or impartiality.

The same holds for the second of the criteria to be taken into account: the terms of office and, in particular, irremovability. In European judicial discourse it is considered a basic standard and, as we shall see below, crucial for the status dimension of the principle. From the subjective perspective, however, it is frequently just one of several variables to be assessed jointly.[53] Moreover, this criterion encompasses a number of principles identified by both courts as pertinent. For example, this aspect of judicial independence does not require the office to be held for life, but does require predetermined terms that can only be prematurely terminated in situations expressly established by law.[54] Obviously, the longer the judicial mandate, the more independence is assumed.[55] Hence the distrust of provisory judges where the conditions in which they might become permanent judges are unclear.[56] Likewise, the rules for and practice of assigning and distributing cases among judges are relevant, as they may not sufficiently respect the interest of preserving judicial independence.[57] Finally, the rules for the dismissal and transfer of judges are essential for judicial independence, an issue that will be taken up below.[58]

The third criterion for assessing the subjective side of judicial independence relates to the effective prohibition of external and internal pressures on the judges' decisions. In practice, it is extremely difficult to ascertain or prove the influence of

[52]*See* e.g. *Dorsch Consult*, *supra* n. 50, at 36; *De Coster*, *supra* n. 3, at 19.

[53]As an exception, the ECtHR considered this factor almost exclusively in concluding the right had been violated in 29 April 1988, No. 10328/83, *Belilos* v *Switzerland*, and in 21 July 2009, No. 34197/02, *Luka* v *Romania*.

[54]See ECtHR 22 November 1995, No. 19178/91, *Bryan* v *United Kingdom* or ECJ *De Coster*, *supra* n. 3, at 18 and 20. Recently the free prorogation of judges after early retirement was considered grounds to declare Polish legislation contrary to Art. 19(1) TEU both in *Commission* v *Poland (Independence of Supreme Court)*, *supra* n. 20, and in *Commission* v *Poland (Independence of Ordinary Courts)*, *supra* n. 20. Similarly, the interim nomination of inspectors by the executive in Romania was considered contrary to EU law in *AFJR*, *supra* n. 25, para. 205.

[55]*Le Compte et al.* v *Belgium*, *supra* n. 2; ECtHR 18 May 1999, No. 28972/95, *Ninn-Hansen* v *Denmark*.

[56]ECtHR 30 November 2010, No. 23614/08, *Henryk Urban and Ryszard Urban* v *Poland*.

[57]ECtHR 12 January 2016, No. 57774/13, *Miracle Europa* v *Hungary*, in particular para. 57; ECJ *Commission* v *Poland (Disciplinary Regime of Judges)*, *supra* n. 26, para. 173 ff.

[58]*See* early approaches e.g. ECJ *De Coster*, *supra* n. 3, and recently *Prokuratura Rejonowa e Minsku Mazowleckim* v *WB and others*, *supra* n. 45.

such pressures.[59] Traces of undue pressure therefore also generally comprise a complementary criterion for the assessment of independence. In this framework, safeguards against threats to independence from within the judiciary itself (in particular those overseen by judicial councils) are most effective, as the decision making of the judicial administration may reveal traces of unacceptable pressure on judges.[60] Lax criteria for allocating and reallocating litigation are certainly one of the key elements in this area as well. Once again, such laxity only represents a sufficient *ratio decidendi* for the declaration of lack of independence in flagrant cases[61] and those where systemic flaws are to blame. These involve institutional and organisational designs that allow the executive power to block the execution of judicial decisions or to reopen cases,[62] hierarchical ties to other bodies[63] and, last but not least, the unconventional design of military courts in some member states.[64]

On balance, the crucial criterion for the determination of whether the right to an independent tribunal has been upheld hinges on the appearance of independence. This criterion operates as a fulcrum on which the three previous criteria are weighed simultaneously according to the circumstances of the case. In particular, a test of independence is applied on the basis of the appearances conveyed to the parties or the public.[65] Lack of independence will thus only be found when an external observer accepts as reasonable and objective the argument by a party or

[59]For a general approach to the idea of undue pressure, *see* ECtHR 18 October 2018, No 80018/12, *Thiam* v *France*, para. 77 ff. At the EU level, it has been a relevant element to decide whether national bodies could be considered judicial organs with standing to raise a preliminary reference. *See* e.g. ECJ 4 February 1999, Case C-103/97, *Köllenspreger and Atzwanger* para. 23; ECJ 6 July 2000, Case C-407/98, *Abrahamsson* v *Anderson*, paras. 32 and 36; and ECJ 31 May 2005, Case C-53/03, *Syfait*, para. 31 ff.

[60]*See* ECtHR 10 October 2010, No. 42095/98, *Daktaras* v *Lithuania* and ECtHR 9 October 2008, No. 62936/00, *Moiseyev* v *Russia*.

[61]*See* on pressures related to internal independence e.g. ECtHR 6 October 2011, No. 23465/03, *Agrokompleks* v *Ukraine*; 19 April 2011, No. 33186/08, *Khrykin* v *Russia* and 19 April 2011, No. 33188/08, *Baturlova* v *Russia*. For pressures from outside the judiciary the case of ECtHR 14 January 2020, No. 10926/09, *Rinau* v *Lithuania* is very interesting.

[62].On the topic *see* ECtHR 25 February 1997, No. 22107/93, *Findlay* v *United Kingdom*, para. 78; ECtHR 28 January 1999, No. 28342/95, *Brumarescu* v *Romania*; ECtHR 3 May 2007, No. 7577/02, *Bochan* v *Ukraine* para. 61; and ECtHR 9 June 2015, No. 72493/10, *Draft-Ova A.S.* v *Slovakia*, paras. 58-59.

[63]*See* e.g. *Margarit Panicello*, *supra* n. 29, or *Air Serbia*, *supra* n. 29.

[64]*See* the saga against the United Kingdom initiated in *Findlay* v *United Kingdom*, *supra* n. 62, and ended in ECtHR 16 December 2003, No. 48843/99, *Cooper* v *United Kingdom*, and against Turkey initiated in ECtHR 9 June 1998, No. 22678/93, *Incal* v *Turkey*, and ended in ECtHR 22 June 2004, No. 32580/96, *Ahmet Koç* v *Turkey*.

[65]Paradigmatic for this kind of approach is ECtHR 21 June 2011, No. 8014/07, *Fruni* v *Slovakia*, para. 139 ff or ECJ 11 January 2013, Case C-175/11, *DA*.

the public that the court deciding the case is insufficiently independent (due to an aggregate consideration of its composition, the conditions placed on the judges handling the case and the possible existence of undue external pressure).

This test implies a high degree of casuistry that is heavily conditioned by the circumstances of each case,[66] which together generate high unpredictability as to the final outcome of the cases adjudicated.[67] On the other hand, it allows for great flexibility, given that the designs of the judiciary are very different and depend to a large extent, as noted, on national constitutional traditions that frequently involve non-written rules regarding judicial behaviour and constitutional conventions. Linking the appearance of independence to the circumstances of the case (and with them to those of the particular country) allows for a subtle distinction between consolidated and unconsolidated rule of law. The application of standards will be found more generous in the former than in the latter. Finally, behind this casuistry lies the need to respect the different legal cultures of member states and the varying effectiveness of judicial independence in practice.[68]

The criterion of appearance introduces an objective or institutional element into the definition of the right to an independent judge. The key issue is whether or not the national court possesses public confidence in its administration of justice. It is not solely a question of whether a litigant's right to a fair trial is respected, but also the public's expectation that those charged with administering justice make their decisions solely according to the relevant law. Those who seek justice must *a priori* trust in the independence of the courts. This gives rise to a comprehensive obligation for an adequate national legal framework ensuring independent judicial bodies.[69]

The objective dimension: the independence of the judiciary

The objective aspect of judicial independence requires that all Council of Europe and EU member states be constitutionally and legally organised in accordance with the separation of powers doctrine, and thus that the judiciary represents a power separate from the other branches of government. European integration does not impose any specific model for the division of powers, nor does it adopt a particular constitutional theory. Still, the design of the national judiciary must

[66]Compare the final outcome of the cases at the ECtHR in *Campbell and Fell* v *United Kingdom*, *supra* n. 2, with *Sramek* v *Austria*, *supra* n. 2; or *Sacilor Lormines* v *France*, *supra* n. 50, with 22 June 2004, No. 47221/99, *Pabla Ky* v *Finland*.

[67]Paradigmatic in this sense is the final outcome in ECtHR 18 June 2019, No. 16812/17, *Rustavi 2 Broadcasting Co Ltd* v *Georgia*.

[68]Referring to the Council of Europe *see* A. Nußberger, 'Rule of Law in Europe. Demands and Challenges for the European Judiciary', in Craig et al., *supra* n. 38, p. 82-86.

[69]Adam, *supra* n. 38, p. 20.

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respect certain relevant limits. Three principles group these limits: the principle of alterity, the principle of independent government and the principle of the dual (European and national) nature of the judiciary that gives rise to a non-regression rule.

The *principle of alterity* (otherness) was a determining factor in the case law of the Court of Justicie until 2000, but it is also clearly found in the case law of the European Court of Human Rights. It is understood as meaning that the judicial power must be configured distinct from the other branches of government and from the parties involved in the disputes it is called upon to resolve.[70] The first element is more closely linked to independence than the second, which is related to impartiality. Alterity therefore implies that there must be an organic and, above all, functional separation between the members of the bodies that make up the judiciary and those of the other branches of government. It is permissible, although increasingly rare, for someone serving as a member of a court to serve as a member of another branch of government at the same time. This typically involves the executive but, in some cases, holding a position in parliament has been considered and accepted,[71] as long as the absolute separation of that branch in the exercise of its functions is ensured.[72] Some sceptical presumption regarding the independence of judges who belong to the other branches of government exists, and as a result their independence from pressure or instructions from their colleagues or their superiors in those branches must be satisfactorily established.

For that reason, the criteria linked to the right to an independent (and impartial) judge are utterly important. Undoubtedly, the most relevant element of alterity are rules of abstention and recusal (linked to impartiality), which whether specific or generally provided for judges and magistrates[73] make it possible for judges, on their own initiative or at the request of the parties, to dispel any doubts of dependence that might objectively arise. Equally important is the precise definition of subjective criteria of judicial independence in terms of remuneration,[74] term (the longer the term, the greater the presumed independence),[75] renewal (which can undoubtedly be used to exert pressure), promotion (within the judicial hierarchy),[76] prorogation (which requires the prior establishment of objective and

[70] *See* e.g. *Corbiau*, *supra* n. 3, para. 15.

[71] *See Le Compte et al.* v *Belgium*, *supra* n. 2, for the general principles and *Ninn-Hansen* v *Denmark*, *supra* n. 55, for impeachment tribunals.

[72] *See* e.g. ECJ 30 May 2002, Case C-516/99, *Schmid*, para. 37 ff.

[73] *See* e.g. *Dorsch Consult*, *supra* n. 50, para. 36; *De Coster*, *supra* n. 3, para. 19; or *Köllenspreger and Atzwanger*, *supra* n. 59, para. 22.

[74] *See ASJP*, *supra* n. 17, or ECtHR 26 April 2006, No. 3955/04, *Zubko and others* v *Ukraine*.

[75] *See* e.g. *Campbell and Fell* v *United Kingdom*, *supra* n. 2, *Le Compte et al.* v *Belgium*, *supra* n. 2, and *Ninn-Hansen* v *Denmark*, *supra* n. 55.

[76] *See* ECtHR 9 October 2012, No. 12628/09, *Dzhidzheva-Trendafilova* v *Bulgaria*.

clear criteria and must be subject to appeal in a court),[77] allocation of cases (always subject to objective criteria to avoid any form of external or internal pressure),[78] transfer to other posts (which must follow clear criteria and be properly justified in the administration of justice),[79] civil and criminal liability of judges in their adjudicating role (which must be confined to exceptional cases to avoid any chilling effect on judges)[80] and, above all, those relating to appointments (as already noted above), disciplinary proceedings[81] and dismissals from judicial posts.[82] In this last case, the principle is clear: if the irremovability of a judge is not respected, judicial independence is undermined.

Alterity also requires that judicial decisions be fully and immediately effective. Their execution cannot depend on the will of another branch of government, and the other branches of government must comply with the decisions. Even specific acquiescence or acceptance is improper. In the same way, the principle of alterity precludes organs of other branches from reopening litigation at their discretion. Independence is therefore not limited to the power to judge, but also to the absolute assurance of the finality of the judicial decisions and of their due enforcement by the public authorities in other branches of government.[83]

Independent self-government of the judiciary is another important aspect of the objective side of the principle of independence. It translates the need to have decisions on the organisation and functioning of the judiciary to depend on the will of

[77] *Henryk Urban and Ryszard Urban* v *Poland*, *supra* n. 56, paras. 45-47; *Commission* v *Poland (Independence of Supreme Court)*, *supra* n. 20; *Commission* v *Poland (Independence of Ordinary Courts)*, *supra* n. 20.

[78] *Miracle Europa* v *Hungary*, *supra* n. 57; ECJ *Commission* v *Poland (Disciplinary Regime of Judges)*, *supra* n. 26.

[79] *See* e.g at the ECtHR *Eminagaoglu* v *Turkey*, *supra* n. 12, and ECtHR 9 March 2021, No. 1571/07, *Bilgen* v *Turkey*; ECJ conclusions AG Bobek 15 April 2021, Case C-487/19, *W.Z. and others* and in *Prokuratura Rejonowa e Minsku Mazowleckim* v *WB and others*, *supra* n. 45.

[80] *ASJP*, *supra* n. 17.

[81] The examples here are countless. *See* the leading case at the ECtHR: *Ramos Nunes de Carvalho e Sá* v *Portugal*, *supra* n. 10, and at the ECJ: *A.K. (Independence of the Disciplinary Chamber)*, *supra* n. 21, and *Commission* v *Poland (Disciplinary Regime of Judges)*, *supra* n. 26.

[82] *See* the leading cases referring to dismissals as presidents of the courts: *Oleksandr Volkov* v *Ukraine*, *supra* n. 8; *Baka* v *Hungary*, *supra* n. 9; and ECtHR 25 September 2018, No. 76639/11, *Denisov* v *Ukraine*; *see also* the recent judgments in ECtHR 29 June 2021, No. 26691/18, *Broda and Bojara* v *Poland*, and ECtHR 22 July 2021, No. 11423/19, *Gumenyuk and others* v *Ukraine*. Other important cases are: ECtHR 5 February 2009, No. 22330/05, *Olujic* v *Croatia*, and, referring to prosecutors in anticorruption agencies, ECtHR 5 May 2020, No. 3594/19, *Kövesi* v *Romania*. On the dismissals of judges, *see* e.g. 26 February 2009, No. 29492/05, *Kudeshkina* v *Russia*; 19 October 2010, No. 20999/04, *Özpinar* v *Turkey*. At the ECJ *see* e.g. *Wilson*, *supra* n. 5, at 51 or *Minister for Justice and Equality*, *supra* n. 18, at 63-64.

[83] *Findlay* v *United Kingdom*, *supra* n. 62, para. 78; *Bochan* v *Ukraine*, *supra* n. 62, para. 61; ECJ 29 July 2019, Case C-556/17, *Torubarov*, para. 57.

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bodies other than the legislature and the executive. To this end, parameters are established for the independent bodies set up to adopt these decisions or to advise in a decisive manner the decisions adopted by the other branches of government.

Since the 1990s, both the Council of Europe and the EU have clearly backed a particular model for independent governance of the judiciary: judicial councils. The European Commission endorsed it as a successful institutional mechanism for the institutional independence of the weak judiciaries of the former Soviet bloc countries, though this option has produced well-founded criticism in the academic literature.[84] That said, European constitutionalism does not impose the adoption of judicial councils. Rather, if states choose to adopt them, they must comply with some European requirements. The minimum features are set out in Council of Europe soft law (in particular after 2010) and have been used separately and jointly to assess judicial independence.[85] The performance of the judicial council model recommended has so far been a patchy mix of good and bad[86] and has started to gain some criticism even in some conclusions of Advocates General.[87]

Judicial self-governance goes far beyond what judicial councils contemplate and takes different forms.[88] Other relevant approaches include formulas for judicial appointment commissions, promotion commissions, court presidents and disciplinary panels. The modalities, rationality and effects of judicial self-government now differ so much in Europe that we can accept the broad definition

[84]About both aspects *see* D. Kosař and M. Bobek, *Global Solution, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, Department of European Legal Studies, Research Paper in Law, 07, (2013) p. 3 ff. and D. Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe', 19(7) *German Law Journal* (2019) p. 1567 at p. 1598.

[85]The ECtHR in *Denisov* v *Ukraine*, *supra* n. 82, para. 68, explicitly acknowledges the relevance of the soft law in defining independence within judicial councils since *Oleksandr Volkov* v *Ukraine*, *supra* n. 8 (arguably the leading case in the topic). The ECJ will use similar criteria when assessing the (lack of) independence of the Polish Judicial Council, *see A.K. (Independence of the Disciplinary Chamber)*, *supra* n. 21, at 143-144. On the topic, *see* Bustos Gisbert, *supra* n. 1, p. 171 ff.

[86]*See* the monographic volume 19(7) *German Law Journal* (2019) with a very detailed comparative review of 12 systems of judicial self-government in place in the states and those envisaged for the ECtHR and the ECJ.

[87]*See* Conclusions of AG Hogan in *Repubblika*, *supra* n. 24, para. 57; the same idea can be derived from AG Bobek in ECJ 21 December 2021, Case C-357/19, *Euro Box Promotion and others* and C-547/19 *AFJR (2)* para. 127.

[88]Kosař's recent approach to the subject is interesting. He offers an analysis of judicial self-government not on the basis of the bodies created to manage it, but rather on the basis of the different areas of judicial self-government and the way in which they are institutionally managed. This allows the creation of a conceptual map of the eight dimensions of self-governance: personal, administrative, financial, formative, informational, ethical, digital and regulatory: Kosař, *supra* n. 84, p. 1594-1598.

proposed by Kosař[89] that any institution (involving a judge) with authority over the administration of the courts and/or the judicial profession exercises it. More to the point: judicial governance is exercised by any body with at least one judge whose main function is to oversee the administration of courts, the promotion of judges or to advise the bodies that are to take such decisions. Cases such as *Repubblika* and *Guðmundur Andri Ástráðsson* illustrate how increasingly and crucially important is the involvement of some independent body that provides advice to political decisions-makers on sensitive aspects related to the appointment, promotion and inspection of courts.[90]

The *principle of the dual nature of the judiciary* underlines that all national judges are European judges. This has been particularly clear in the case of the EU since its foundation because the application of its legal order is the responsibility of national courts acting as EU courts.

However, the link between the protection of judicial independence at the national level and the independence of the judiciary as a part of the EU division of powers was not fully enshrined until 2018 in the *ASJP* case. This ground-breaking judgment made it absolutely clear that any domestic court that can apply EU law (which in practice means *any* court) must guarantee the right to an effective remedy, which includes the right to an independent judge. This mandatory requirement derives from Article 19.1 TEU and not from the Charter. Therefore, the internal structure of the national courts must respect the parameters of the rule of law as understood in the EU. This requires respect, by mandate of directly enforceable EU law, for the essential elements that make up judicial independence.

This stance is extremely important. The internal constitutional organisation of states clearly fell outside the scope of European integration. With this ruling (and its further developments), European boundaries have been cast on the freedom of member states to shape their constitutional division of powers. These developments can undoubtedly be seen as one of the results of enshrining the rule of law as one of the EU values in Article 2 TEU. Yet these rulings have made its enforcement in practice and its judicialisation possible.

The definition of the objective dimension of judicial independence from Article 19(1) TEU is linked, in the Court of Justice case law, to Article 267 TFEU and Article 47(2) Charter. This has been a legal innovation in

[89]Kosař, *supra* n. 84, p. 1571-1572.

[90]In both cases, the courts do not question the appointment of judges by a governmental body, even if it is not bound by the independent committee's proposal. However, both courts insist on the relevance of procedural compliance and the duty to give reasons for deviations from the proposal. For the ECtHR, judicial review of the decision must also be ensured, whereas in the case of the ECJ this requirement is less clear. We will return to this issue in the statutory aspect of judicial independence.

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European law for no more than five years and is associated with the essential role of (independent) judges in European integration, which, as we have highlighted, is one of the existential conditions of integration.[91] As we have underlined (above), its most obvious manifestation is over the qualified protection of judges' competence to refer preliminary rulings.

Therefore, the rule of law in the EU would not exist if judicial independence failed to meet the following standards: (1) judges are able to request preliminary rulings; (2) uniformity in the application of EU law is respected; (3) individuals have access to the EU judiciary; (4) there is effective protection of the rights derived from EU law free from external pressure; (5) sufficient mutual trust exists to maintain judicial cooperation.

This development is not yet fully assumed in the Council of Europe even if, as we have pointed out, particular cases in which systemic failures relating to the constitutional design of the judiciary within member states were found. Still, it could also be easily derived from Protocol 15 insofar as the constitutionalisation of the principle of subsidiarity is achieved through the explicit reference to the primary responsibility of states (including their judiciaries) for the enforcement of the rights enshrined in the Convention. In this view national courts become the primary (and 'natural') bodies for the implementation and enforcement of the interpretative criteria established by the European Court of Human Rights, thus becoming European judges that must satisfy European minimum criteria on judiciary governance.

The case law of the Court of Justice has made an interesting development of this idea: the proclamation of the rule of non-regression in judicial independence. The argument to justify this rule is clearly signalled in the *Repubblika* case,[92] where the European Court of Justice was adjudicating on a constitutional amendment that assigned such appointments to the Prime Minister. The new system certainly improved on the old one,[93] but its compatibility with European standards was questioned. The Court recalled that Article 49 TEU specifies that all states must comply with the values of Article 2 TEU before joining the EU. It is thus assumed that *ab initio* EU member states meet certain minimum requirements that qualify its judiciary to act as judicial agents of the EU. These minimum requirements cannot decline after accession. It follows

[91]Here we follow the work of K. Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', 38 *Yearbook of European Law* (2019) p. 3. and 'New Horizons for the Rule of Law within the EU', 21 *German Law Journal* (2020) p. 29.

[92]*Repubblika*, *supra* n. 24.

[93]The new system comprises an independent advisory commission whose recommendations could only be set aside if the Prime Minister states the reasons both in Parliament and in the official publication of the appointments. This system is a clear improvement on the previous situation where no legal boundaries were imposed on the Prime Minister's discretion

(para. 64), that member states: 'are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary'. In short, Article 19(1) TEU 'must be interpreted as precluding national provisions relating the organisation of justice, which are such as to constitute a reduction, in the member state concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence' (para. 65).

The rule of non-regression might overcome the so-called Copenhagen dilemma and deter future backtracking from the shared values affirmed during the accession process. While it is too early to assess the significance and impact of this rule, it may prove to be of great importance as a future benchmark for judging judicial reforms in the member states, as its use in *Commission* v *Poland (Disciplinary Regime)* suggests.[94] This rule implies a narrower margin of manoeuvre for member states to determine the organisation of their judiciary. But in any case, it should be borne in mind that in practice it may not be so easy to assess whether a constitutional or statutory reform can be regarded as a regression.

New scope of judicial independence: the dimension of the status of the judiciary and the birth of the right to independence of European judges

In contrast to other legal systems, it has not been possible in Europe to clearly affirm a judge's right to his or her own independence. Neither the European Court of Human Rights nor the Court of Justice has ever asserted such a right; and in only a handful of opinions of Strasbourg judges has the assertion been made.[95] Perhaps the reason lies in the fact that neither the European Convention nor the Charter establishes a right of access to the public service (such as that contained in Article 23(1.c) of the American Convention of Human Rights or 25(c) of the International Covenant on Civil and Political Rights) to which the specific guarantees of independence for the exercise of the judicial function can be tied. In the Inter-American case this nexus has been established in the case law to develop a genuine right of the judge to his or her independence under

[94]The principle was reiterated in the ECJ in *AFJR*, *supra* n. 25, para. 162 and fully applied in *Commission* v *Poland (Disciplinary Regime of Judges)*, *supra* n. 26, paras. 50 and 51.

[95]*See* in ECtHR *Baka* v *Hungary*, *supra* n. 9, the concurring opinon of judge Sicilianos or the joint concurring opinion by Pinto de Albuquerque and Dejov in that same judgment.

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Article 23 of the American Convention of Human Rights. This jurisprudence has been repeatedly referred to by the Strasbourg Court in its leading cases.[96]

So both European Courts have had to explore, since 2010, a different path to develop not exactly a right to independence of European judges, but rather the jurisdictional guarantee of a status of judicial independence.

The idea of status independence has been recently defined explicitly by the European Court of Human Rights in *Gumenyuk and others* v *Ukraine*:

> the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial Independence and autonomy (. . .) there is no doubt that judges may claim on the basis of the professional guarantees afforded to them, that the principles of independence of the judiciary and the security of tenure of judges should be fully complied with in measures affecting their status or career.[97]

The status dimension thus acts as the 'gateway', to use Advocate General Tanchev's fortuitous expression, which connects and gives coherence to the other two strands of judicial independence. In our opinion, the link between Article 19(1) TEU, Article 267 TFEU and Article 47(2) of the Charter is primarily to be found in this status dimension.

It should be noted that this aspect of judicial independence seeks to strengthen the position of the individual judge not only vis-à-vis other branches of government, but also with regard to the judiciary itself. In this sense, it is a rather modern development due to the newly emerging concentration of authority in the self-governing bodies of the judiciary. These bodies, especially when they take the form of a judicial council, certainly represent a mechanism for objective independence, but they may become (by concentrating key powers over the professional career of judges) serious threats to individual judges. The status dimension could provide a mechanism to prevent strengthened institutional independence from weakening individual independence.

To define this new dimension of independence, the European courts have referred to three lines of reasoning: the institutional guarantee of the right to an independent court *established by law*; the judicial review of any decision related to the status of the judiciary; and the obligation to take into account 'judicial independence' when assessing the set of rights of citizens who are, in addition to citizens, judges.

[96] *See* ECtHR *Baka* v *Hungary*, *supra* n. 9, at paras. 84-85 or *Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 14, para. 144.

[97] *Gumenyuk and others* v *Ukraine*, *supra* n. 82, paras. 52 and 54.

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Independent judge established by law

One of the latest developments of the right to an independent judge has been the use of an additional 'institutional guarantee' (to independence and impartiality) enshrined in Article 6 of the Convention and Article 47(2) of the Charter: the requirement that courts be 'established by law'. In the Grand Chamber judgment *Guðmundur Andri Ástráðsson* v *Iceland*, the European Court of Human Rights, after a fruitful dialogue with the Court of Justice,[98] held that the domestic court was not established by law because the national rules concerning the appointment of one of the judges had been manifestly infringed in a manner that compromised the court's independence. Since December 2020, the test established in this judgment has been consistently applied by both the Courts in a significant number of decisions that suggest perfect symbiosis between the two courts.

This new trend in the case law requires national authorities to respect the rules laid down in domestic parliamentary law[99] that ensure the independence of the courts. Thus, national legal systems must safeguard the independence of judges involved in individual cases, and the monitoring of the proper observance of these rules falls within the jurisdiction of both European Courts.

As the Strasbourg Court expressly states in *Guðmundur*: 'the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the compliance by that tribunal with the particular rules that govern it (. . .) and the composition of the bench in each case' (para. 213). And the word 'independence' (para. 234) characterises both a state of mind and a set of institutional and operational arrangements that 'safeguards against undue influence and/or unfettered discretion of the other State powers, both *at the initial stage of the appointment of a judge and during the exercise of his or her duties*'.

But not every violation of national law referring to the appointment or the exercise of a judge's duties deserves to be monitored by the Court; a certain threshold must be reached. In establishing this threshold a three-step test is applied: (i) whether there was a manifest breach of the domestic law; (ii) whether the breaches

[98]The ECtHR also relied on the ECJ's position established a few months earlier in a Grand Chamber appeal judgment 26 March 2020, Cases C-542/18 RX-II and C-543/18 Rx-II, *Simpson* v *Council* and *HG* v *Commission*. The criteria set out in both decisions are substantially the same, but the ECtHR's analysis is deeper and more detailed. It is noteworthy how the ECJ in *Simpson* v *Council* and *HG* v *Commission* took over the doctrine established by the ECtHR in the earlier judgment of the ECtHR Chamber *Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 14, while the final judgment of the Grand Chamber of the ECtHR also relied on the ECJ's decisions: a shining example of judicial dialogue between Strasbourg and Luxembourg.

[99]It should be taken into account that 'law' here refers to 'parliamentary' legal rules insofar as it is intended to prevent the executive from deciding the basic status of the judiciary. This principle has been clearly established since the Commission's decision in 12 October 1978, No. 7360/76, *Zand* v *Austria*, and is strongly emphasised in *Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 14, para. 214.

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of the domestic law pertained to a fundamental rule of the procedure for appointing judges; (iii) and whether the allegations regarding the right to a 'tribunal established by law' were effectively reviewed and remedied by the domestic courts.

In this way both the European Court of Human Rights[100] and the Court of Justice[101] have secured that manifest breaches of basic domestic rules related to the status of judges that were not effectively reviewed and remedied by domestic courts would be dealt with at European level

Judicial review

More than ten years before *Guðmundur,* the European Court of Human Rights developed a general principle of judicial review of any decision concerning the status of European judges, applying the criteria set out in *Vilho Eskelinen* v *Finland*.[102] Again, in the words of the Court in *Gumenyuk and others* v *Ukraine*: 'Moreover the necessity to have in place procedural safeguards and the possibility of appeal against decisions affecting the career, including the status of a judge is widely acknowledged because what is at stake is public trust in the functioning of the judiciary'.[103] When such review occurs, judicial independence will be the essential criterion of whether decisions have been made in accordance with the law and whether abuse of power in any form has been committed.

[100] *See* ECtHR *Bilgen* v *Turkey* (not for the appointment but for the irremovability of judges); *Xero Flor w Polsce sp z.o.o.* v *Poland*, *supra* n. 15 (lack of independence of the Polish Constitutional Court); *Reczkowicz* v *Poland*, *supra* n. 13 (lack of independence of the Judicial Council and the Disciplinary Chamber of the Polish Supreme Court); ECtHR 8 November 2021, No. 49868/19, *Dolinska-Ficek and Ozimek* v *Poland* (lack of independence of the Extraordinary and Public Affairs Chamber of the Polish Supreme Court) and ECtHR 3 February 2022, No. 2469/20, *Advance Pharma sp z.o.o.* v *Poland* (lack of independence of a panel of the civil chamber of polish Supreme Court composed only by judges nominated on the proposal of the Judiciary Council after its reform). *See also* interim measures adopted by the ECtHR trying to safeguard the enforcement of her previous judgments in March 2022: *Gtowacka* v *Poland* (15928/22), *Wróbel* v *Poland* (6904/22), *Synakievicz* v *Poland* (46453/21), *Niklas-Bibik* v *Poland* (8687/22), *Piekarska-Drazek* v *Poland* (8076/21) and *Hetnarowicz-Sikora* v *Poland* (9988/22).

[101] *See* how the ECJ has applied the same approach (in the 'Simpson' version) also for the Polish disciplinary chamber in *Commission* v *Poland (Disciplinary Regime of Judges)*, *supra* n. 26, just a week before *Reczkowicz*; or in ECJ 6 October 2021, Case C-487/19, *W.Z.*; ECJ 22 February 2022, Case C-562/21 and C563/21 PPU, *Openbaar Ministerire*. It was also considered important in AG Tanchev's conclusions in C-508/19, but the Grand Chamber's inadmissibility decision of 22 March 2022 made any further development impossible.

[102] *Supra* n. 28.

[103] Para. 72, but the idea is clear since the first case at ECtHR of Art. 6 applied to a judge: 27 January 2009, No. 33173/05, *G* v *Finland*, and categorically stated in 23 June 2016, *Baka* v *Hungary*, *supra* n. 9, in which even a constitutional reform decision implying the dismissal as president of the Supreme Court must be open to judicial review.

The exclusion of judicial review in these cases may be acceptable only and if the grounds are explicit but even then, at least when disciplinary sanctions are in play, an effective remedy must be in place, one which may not be strictly judicial, but that covers the essential guarantees of the right to a fair trial.

If no possibility of appeal exists, full compliance with the basic elements of Article 6 of the Convention (through Article 13) can be directly demanded of the judicial councils deciding the case.[104] If the national legal order provides for judicial review of the decisions of its council (or of the body entrusted with that competence), the council does not have to comply with those requirements, but the appeal procedure must allow the reviewing court to fully assess the facts and observance of the law, not just procedural technicalities.[105]

The cornerstone of statutory independence is therefore found in the guarantees for compliance with Article 6 of the Convention (and Articles 47 and 48 Charter) [106] or provision of judicial review in accordance with EU law whenever decisions that affect judges' careers are made.[107] Judicial supervision thus becomes entrenched as regards the exercise of administrative powers over judges, especially those involving disciplinary proceedings.[108] Statutory independence may also, as mentioned, embrace other aspects such as appointment, promotion, confirmation in office, early termination, assignment and reassignment of cases, etc.[109] In any

[104] *See* e.g ECtHR 9 July 2013, No. 51160/06, *Di Giovanni* v *Italy*. This explains why the requirements on disciplinary proceedings against judges have been recently applied for non-judicial members of judicial councils in ECtHR 20 July 2021, No. 79089/13, *Loquifer* v *Belgium*.

[105] *See* e.g. ECtHR 15 September 2015, No. 43800/12, *Tsanova-Gecheva* v *Bulgaria*.

[106] That implies that the body in charge of making the decision or having a decisive role in it must be independent enough to fulfil the fair trial requirements, be it a judicial council or another body such as an independent commission.

[107] This principle stems clearly from the ECtHR case law but it is not as radically stated at the ECJ where in some cases the absence of judicial review of decisions made by political bodies have not been considered a violation of judicial independence in the case of appointments or in the case of temporal services. *See* the criticism of the apparent incoherence in imposing judicial review for dismissals and disciplinary proceedings but not for appointments in Bogdanowicz and Taborowski, *supra* n. 44, p. 325. However, the latest judgments by the ECJ suggest a full endorsement of the principle of judicial review to any relevant aspect of the judges career: *see* ECJ 6 October 2021, Case C-487/19, *W.Z.* and *Prokuratura Rejonowa e Minsku Mazowleckim* v *WB and others*, *supra* n. 45.

[108] *See* the leading case in the ECtHR, *Ramos Nunes de Carvalho e Sá* v *Portugal*, *supra* n. 10, and at the ECJ in the Polish saga on disciplinary proceedings and its twin development at Strasbourg in *Reczkowicz* v *Poland*, *supra* n. 13.

[109] For a recent example *see* ECtHR 29 June 2021, *Broda y Bojara* v *Poland*. This type of analysis can be found at the ECJ: *see*, e.g. ECJ 9 July 2020, Case C-272/19, *VQ* v *Land Hessen*, para. 52 ff. concluding that the body in charge of the appointment of judges in *Hessen* was sufficiently independent, or a similar approach in *Repubblika*, *supra* n. 24, when defining the independence requirements included in the appointments commission in Malta, para. 67.

case, such oversight must be carried out by an 'independent and impartial tribunal' which excludes both 'captured' judicial councils and specialised chambers or inspectorates created *ex profeso* without proper safeguards against external or internal pressures.[110]

In this framework, the reasons for the different degree of European supervision are obvious, depending on whether the deficiencies detected are systemic and structural or whether they are individual instances. The risk to judicial independence is very different in each of those two situations. In the case of one-off problems, the risk is only for the individual judge concerned and, perhaps, for the litigant in a specific dispute. In the event of systemic problems, it is no longer only the individual judge's independence that is jeopardised, but that of all members of the judiciary. In the first case the objective dimension of the principle is not involved, and in the second case it is clearly undermined.

Judge's substantive rights from the perspective of judicial independence

On the judges' substantive rights which have been called on to strengthen judicial independence, three rights stand out: the freedom of expression; the right not to be arbitrarily detained; and freedom of association. These rights are at the core of judicial independence.

Freedom of expression[111] is not only key because it ensures the right of the judge to express his or her opinion on matters of general interest and thus to contribute to informed public opinion. It is also central because it safeguards the right of judges and magistrates to intervene in the public debate when their independence is threatened by other powers, in particular by legislative or constitutional reforms.[112] In these cases, freedom of expression may even become a duty to express an opinion: a legal duty in the case of judges and magistrates who occupy relevant positions in judicial self-government and a deontological duty in the case of other judges and magistrates.[113] Thus, any sanction on judges for expressing their views on matters of public interest related to the judiciary will be strictly

[110]Again at the ECJ the Polish saga in disciplinary proceedings is relevant, but it will also include other issues, such as the rules on inspection of judges in Romania in *AFJR*, *supra* n. 25.

[111]The leading case again is *Baka* v *Hungary*, *supra* n. 9, but there are other important cases. *See* e.g. ECtHR 29 October 1999, No. 28396/95, *Wille* v *Liechtenstein*; ECtHR 8 February 2001, No. 47936/99, *Pitkevich* v *Russia*; *Kudeshkina* v *Russia*, *supra* n. 82. *See also* recently ECtHR 1 March 2022, No 16695/19, *Kozan* v *Turkey*.

[112]On the relevance of increasing the democratic legitimacy of the judiciary in rule of law backsliding through the involvement of judges in public debate, *see* M. Gersdorf and M. Pilich, 'Judges and Representatives of the People: a Polish Perspective', 16 *EuConst* (2020) p. 345.

[113]*Baka* v *Hungary*, *supra* n. 9, para. 168 or, for public prosecutors, *see Kövesi* v *Romania*, *supra* n. 82.

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assessed by European courts who will only tolerate such sanctions when public confidence in the judiciary has been unduly undermined. Moreover, once a link between sanctioning a judge and the exercise of freedom of expression has been established, the national authority imposing the sanction must bear the burden of proof that no causal relation exists between these two events.[114]

The second essential right, as the unfortunate Turkish experience shows, is the prohibition on arbitrary detention of judges,[115] because it is one of the first rights that the executive power violates when it wishes to free itself from judicial control. Not only is detention effective in freeing the executive from control in the short term (by eliminating any defence of the judge pending his immediate removal) but it has an extremely effective chilling effect. Although European constitutional law does not prescribe the specific rules concerning the detention of judges, it does impose a particular duty of compliance with the national rules in force.

Freedom of association is another key element in guaranteeing judicial independence.[116] The role of national and international judicial associations in upholding independence can hardly be exaggerated, to the point that the European Court of Human Rights has labelled them as the 'watchdog' of democracy and rule of law under certain circumstances.[117] States therefore have a slim margin of discretion to limit it to the point that associative activities of the judges may be used as a relevant argument to justify interim measures by the Strasbourg Court to protect their rights.[118] Even in the Masonic lodges case,[119] any restriction of the right had to be provided for with extraordinary clarity in the law. The relevance of judicial associations in this area is reflected through the active role they have played, and still play, in the defense of judicial independence in some member states. Some of the leading (and some still pending) cases have been brought before the European courts by judges' professional associations.

Property and privacy rights seem less relevant, although they have been invoked when pertinent. Adequate remuneration of judges and magistrates, through the right to property, has proved relevant with respect to pension payments or salary reductions and, to a lesser extent, has appeared in some decisions on forced early retirement (although in these cases non-discrimination on grounds

[114]For a recent summary on the criteria laid down by the ECtHR on the topic *see Eminagaoglu* v *Turkey*, *supra* n. 12, para. 133 ff.

[115]*Alpasarlan Altan* v *Turkey*, *supra* n. 11, and ECtHR 17 March 2020, No. 46448/17, *Baş* v *Turkey*.

[116]*See*, recently, *Eminagaoglu* v *Turkey*, *supra* n. 12.

[117]*Eminagaoglu* v *Turkey*, *supra* n. 12, para. 134.

[118]See ECtHR interim measures adopted on 24 March 2022.

[119]See ECtHR 2 August 2001, No. 37119/97, *N.F.* v *Italy*; 17 February 2004, No. 39748/98, *Maestri* v *Italy*. These excessive protections might be also behind the outcome in *Di Giovanni* v *Italy*, *supra* n. 104.

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of age has been a stronger argument).[120] The right to privacy, given its expansive nature, has been used with caution. Therefore, the impact on the right must be of sufficient intensity as to establish interference.[121] However, very meaningfully, the dismissal of a judge is always considered to affect privacy.[122] Hence, any disciplinary decision leading to the removal of a judge will be assessed not only from the perspective of the right to a fair trial but also from the perspective of its necessity in a democratic society. The assessment will take into account the effect on judicial independence, which of course severely constrains the scope of states to remove a judge from office.

Final remarks

It is important to underline that the three strands of the principle of judicial independence track back to three different ideas. While not interchangeable, they are certainly complementary. It is worth stressing that the guarantee of objective independence (i.e. the imperviousness of the judiciary vis-à-vis other branches of government) does not *per se* imply the individual independence of judges. Independent judges may exist within institutional structures that are not independent according to the standards established by European jurisprudence. It is also possible that designs of the judiciary that incorporate radical separation from the other branches of government fail to ensure truly independent judges. Even very sophisticated models of institutional independence can operate in practice such that the independence of individual judges is undermined by internal dependency bonds within the judiciary.[123]

Even though these three aspects are distinct, the guarantee of judicial independence demands an adequate, coherent and simultaneous approach to their configuration in law and practice, insofar as they are deeply interconnected. Any significant change in the understanding of the principle must thus be echoed in its three aspects. The changes in the substance and significance of the concept of independence stemming the Court of Justice's judgment in the *ASJP* case reflect this. The reasoning behind *ASJP* quickly widened to apply to the national division of powers, the bodies that may request preliminary rulings, those that

[120] *Zubko and others* v *Ukraine*, *supra* n. 74.

[121] See the leading case, *Denisov* v *Ukraine*, *supra* n. 82.

[122] *See* e.g. *Özpinar* v *Turkey*, *supra* n. 82. The Court has recently found that prolonged suspension from office during disciplinary proceedings raises a question under Art. 8 of the ECHR in *Gumenyuk and others* v *Ukraine*, *supra* n. 82.

[123] For a description of the different models of judicial self-government in practice that shatters commonly held beliefs, *see* the monographic issue of *German Law Journal* 19(7) (2019).

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decide cases of EU law, ones demanding surrender of persons under European Arrest Warrants, and finally to the content of the right to an independent judge.

In other words: an internal link of compatibility, not one of absolute identity, runs through these aspects.[124] Judicial independence cannot be legally configured without simultaneously taking into account these three elements to avoid incompatible normative mandates. In this framework, the notion of judiciary status can play the role of a bridge that can bind all dimensions of judicial independence together. In other words, if the judge's right to his or her independence is sufficiently guaranteed, any change in the objective and the subjective dimension would be acceptable to the European courts.

In considering this internal link of compatibility we should take into account that judicial independence is ensured also in constitutional conventions and not only in expressly positivised norms such as constitutions or legislation. This explains the persistence in the 'old' democracies of mechanisms and institutions that do not apparently meet the parameters set out at European level, and yet do not raise any doubts about the independence of judges and courts. The abstract control of independence is therefore very difficult and would often require a more complex and detailed examination of the specific legal and factual circumstances of time and place to be carried out properly.[125]

Therefore, casuistry in this area will remain unavoidable in the future.

[124]The problem clearly manifests itself at the EU level insofar as three provisions come into play, Art. 19.1 TEU, Art. 267 TFEU and Art. 47 of the Charter. This leads to conceptual problems which are evident in the different positions on the content of judicial independence in the EU which can be summarised when comparing the claim for conceptual identity (but not of scope and purpose) made by AG Bobek in his conclusions in *Prokuratura Rejonowa e Minsku Mazowleckim* v *WB and others*, *supra* n. 45, para. 161 ff.), with the position of the ECJ, for whom, in the definition of Art. 19. 1 TEU, Art. 47 must be duly taken into account (*Repubblika*, *supra* n. 24, para. 57), while AG Tanchev has maintained the existence of a 'constitutional gateway' between the three precepts (Conclusions 20 June 2019, C-192/18, *Commission* v *Poland (Independence of Ordinary Courts)*, *supra* n. 20, para. 97).

[125]AG Bobek describes three scenarios in reviewing compliance with judicial independence: that of 'paper assessment only', that of 'paper combined' or 'paper as applied' and that unfortunate situation in which the analysis must be referred to 'practice only' or to 'paper is worthless': *AFJR*, *supra* n. 25, paras. 241-243.

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