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EUROPEAN POLICY ANALYSIS

The European Court of Human Rights and Rule of Law Backsliding

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Summary

The present European Policy Analysis examines the case law of the European Court of Human Rights (ECtHR) on judicial independence. This case law mainly concerns Poland. The analysis discusses the extent to which these judgments help in solving rule of law problems in Poland and other European Union (EU) Member States.

The analysis finds that this case law can interact in a number of productive ways with the rule of law work of the EU. An ECtHR judgment can be used by national judges as part of the basis for requesting a preliminary ruling from the European Court of Justice (ECJ) or invoked by the European Commission to initiate infringement proceedings, or as evidence that an infringement has occurred. ECtHR case law also serves to legitimize ECJ intervention. It can be used by the ECJ to back up its factual and legal conclusions in different ways.

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The opinions expressed in the publication are those of the author.

1. Introduction

Considerable attention has been devoted in recent years to the issue of "rule of law backsliding", which can be defined as the process through which elected public authorities deliberately implement governmental blueprints that aim to systematically weaken, annihilate or capture internal checks on power, with the purpose of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party (Scheppele and Pech, 2017).

A central feature of this is the weakening of the independence of the judiciary. The threat posed by rule of law backsliding is great: democracy does not work properly without the rule of law, and nor does the EU internal market, which is based on the principles of non-discrimination and mutual recognition,[1] which in turn are based on mutual trust. A public administration must have legal support for any measure restricting the freedom of action of individuals and companies, and must act within the law (the principle of legality). Underpinning these principles are independent courts, the transparency generated by public access to documents and a free investigative media. When these institutions are undermined, there is a risk that all activities pursued by the state, from defence to trade to environmental measures, will be corrupted.

> "The threat posed by rule of law backsliding is great: democracy does not work properly without the rule of law[...]"

Judicial independence is often seen from the perspective of the constitutional principle of the separation of powers, according to which there must be a degree of separation between the three branches of government: the legislature, the executive and the judiciary. The judiciary must be protected from undue interference from the other two branches, particularly the executive branch. However, judicial independence also has an "internal" dimension, meaning that judges are to be protected against undue pressure from within the judiciary itself.[2]

Judicial independence can thus be seen as an instrumental value, not as a good in itself (Bell, 2001, Bobek, 2008, cf. Macdonald and Kong, 2012). It promotes judicial impartiality, as well as strengthening public trust in the legal system and thus in the state itself.

Non-lawyers often confuse the two European courts: the European Court of Justice (ECJ), which sits in Luxembourg and interprets and applies EU law, and the European Court of Human Rights (ECtHR), which sits in Strasbourg and interprets and applies the European Convention on Human Rights (ECHR), the creation of another international organization, the Council of Europe (CoE). There is undoubtedly a lot of overlap between the two courts. In particular, as regards the present report, both nowadays have a lot to say on the subject of judicial independence. The ECJ case law on judicial independence has been extensively discussed and analysed (e.g. Pech and Kochenov, 2021). EU law scholars have paid less notice to the recent (since 2021) case law of the ECtHR. The present report will examine this case law, which, for reasons explained below, so far mainly concerns Poland.

When national mechanisms for upholding the rule of law crumble, to what extent can the ECHR help? The ECHR is meant to be a "floor" rather than a "ceiling". It sets out a minimum standard of rights protection (Article 53) and is supposed to be complementary to national mechanisms. Procedurally, this status is reinforced

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[1] That is, the idea that, in the absence of harmonized rules, a product approved in one EU state can be sold freely in another EU state, regardless of whether or not it complies with the technical national rules of that other state.

[2] "Judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court". *Parlov-Tkalčić v. Croatia*, No. 24810/06, 22 December 2009, § 86.

by the requirement that national remedies must be exhausted before recourse is allowed to the ECtHR. The ECtHR frequently emphasizes the subsidiarity principle, that is, that states have the primary responsibility for securing the Convention rights, and that states consequently need to provide effective remedies for Convention violations at the national level. Nonetheless, the ECtHR also insists that its task is to determine in each concrete case whether the respondent state fulfils the minimum standards of the Convention, applying the traditional international law principle (which is also a principle of EU law) that national law, even national constitutional law, does not justify non-compliance with international obligations.[3] Moreover, the ECtHR has made it clear that a corollary of the rule on the exhaustion of domestic remedies is that the ECtHR expects it to be possible for a complainant to be able to raise the substance of a Convention issue at the national level.

This analysis covers all the judgments delivered so far (up to 1 January 2023), going through the relevant cases chronologically, and follows this with a more general analysis. The focus for the concluding general analysis and the conclusion is: to what extent can these judgments help in solving the rule of law problems in Poland and other EU states?

2. A tribunal established by law

2.1 Changing approaches

Article 6(1) of the ECHR provides that everyone is entitled to a fair trial within a reasonable time before an "independent and impartial tribunal established by law". Every year, some 20% of the cases before the ECtHR concern one or other aspect of Article 6, reflecting the central position of this right in the Convention. The ECtHR has tended to take a holistic approach to determining whether an applicant has received a fair trial, so that a defect in one respect can be counter-balanced by a safeguard in another. The Court has used four criteria in relation to the independence of a tribunal: (i) the manner of appointment of its members; (ii) the duration of their term of office; (iii) the existence of guarantees against outside pressures; and (iv) whether the body presents an "appearance of independence".[4]

The independence requirement is closely related to the impartiality requirement, which refers to the objectivity of the court vis-à-vis the parties. If a party is not assured that a judge will be impartial, there will be no incentive to let a court settle a dispute. This impartiality also applies when the state is one of the parties in the dispute, which is the case for criminal law and administrative law (including tax law, public procurement, and so on).

In its more recent case law, the Court has diverged from the holistic approach sketched out above in which it weighs the above four factors against one another. Instead, it has regarded the need for a tribunal to be "established by law" as an obligatory minimum requirement; in other words, if a tribunal is not established according to law, then this in itself could suffice to constitute a breach of Article 6 (Aire Centre, 2021).

2.2 The background to the *Guðmundur Andri Ástráðsson* case

The central case is this respect is the Grand Chamber (GC) judgment in *Guðmundur Andri Ástráðsson v. Iceland*.[5] The basic facts were as follows. Appointments were made to the newly established Court of Appeal in Iceland, but the responsible minister changed four of the people recommended by an independent evaluation committee and replaced them with four other people, including A.E. The minister's proposal was eventually confirmed by the parliament, voting on party lines. Two of the people removed from the list then brought civil proceedings, which resulted in judgments being given by the Supreme Court. The Supreme Court found that the minister had breached the domestic rules for judicial appointments, and awarded the two applicants non-pecuniary damages.

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[3] See Article 26, Vienna Convention on the Law of Treaties, 1969; for EU law, see, among many authorities, *Melloni*, Case C-399/11, EU:C:2013:107.

[4] *Campbell and Fell v. UK*, 28 June 1984, A/80, § 78.

[5] [GC], No. 26374/18, 1 December 2020. Certain particularly important cases are decided by the ECtHR in a 17-judge Grand Chamber, which can sit either as an appeal body, or as a first instance court if an ordinary 7-judge chamber "relinquishes" the case to it.

The case before the ECtHR resulted from the fact that the Court of Appeal, sitting in a composition that included Judge A.E., had confirmed the conviction of Guðmundur Andri Ástráðsson for traffic offences. He had admitted the offences but had appealed for a reduction of his sentence. Before the Court of Appeal, he argued that he was entitled to a trial before a panel that did not include A.E. or any other irregularly appointed judge. He appealed on this point to the Supreme Court, which decided that, despite the irregularities in her appointment, A.E. was now a judge and bound by the law to perform her duties impartially, and that there was no sufficient reason to doubt that the applicant had not enjoyed a fair trial.

The case before the ECtHR went first to a chamber, which found by five votes to two that Article 6(1) had been "flagrantly" breached. The Icelandic government appealed the chamber's judgment. The GC began by stating that a "tribunal" must be composed of judges selected on the basis of merit – that is, judges who fulfilled the requirements of technical competence and moral integrity. The higher a tribunal in the judicial hierarchy, the more demanding the applicable selection criteria (§§ 220–222).

The purpose of the "established" requirement was to protect the judiciary against unlawful external influence, particularly from the executive but also from the legislature or from within the judiciary itself. The comparative material available to the Court showed, in fact, that, whereas all states recognized the principle that courts must be "established by law", the meaning given to this principle, and what it covered, varied from state to state. Only half of the group of European states regarded the underlying process of appointing judges to be part of the concept of a court "established by law" (§ 151): they saw it instead as an issue going to "independence" (see further below). Notwithstanding this, the Court considered that appointment necessarily constituted an inherent element of the concept, and that it called for "strict scrutiny". Breaches of the law regulating the judicial appointment process might render the participation of the relevant judge in the examination of a case "irregular" (§§ 226–227).

As regards "by law", the Court clarified that this third component entailed relevant domestic law on judicial appointments being couched in unequivocal terms, to the extent possible, so as not to allow arbitrary interference in the appointment process (§§ 229–230).

> "In particular, the Court considered that 'independence' means the necessary personal and institutional independence that is required for impartial decision-making, and that independence is thus a prerequisite for impartiality."

There was an overlap between the "by law" requirement and other parts of Article 6(1). In particular, the Court considered that "independence" means the necessary personal and institutional independence that is required for impartial decision-making, and that independence is thus a prerequisite for impartiality. In the Court's view, independence characterizes both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving appointment and selection procedures – which must provide safeguards against undue influence and/or the 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 (§ 234). The second element of independence is a necessary, but not a sufficient, guarantee of the first: a person might still be corrupt, or corruptible, notwithstanding the fact that they have been appointed through impeccable procedures.

2.3 The three-fold test

The Court noted that its task was to enquire whether the alleged irregularity in a given case was of such gravity as to undermine the aforementioned fundamental principles and to compromise the independence of the court in question (§§ 231–234). To do this, the Court stated that it would apply three criteria, cumulatively (§ 243). The breach of the domestic law must usually be *manifest*, in the sense that the breach must be objectively and genuinely identifiable (§§ 244–245). Secondly, the breach must concern the ability of the judiciary to perform its duties

free of undue interference, and not be a breach of a purely technical nature (§ 246). Thirdly, the review conducted by the national courts, if any, of the legal effects of the breach must be carried out on the basis of the relevant Convention case law (§§ 248 and 250). The Court concluded on the facts that all three criteria were fulfilled.

The remaining issue, as far as the majority of the Court's judges was concerned, was the general effect of the above defects. The Icelandic Supreme Court had found, simply put, that, while the people passed over in the appointment process had a claim in damages, nothing else need be done. The Court disagreed: the defects affected the rights of the general public too (§ 283). It accepted that states had a margin of appreciation[6] in how they solved problems like these if they emerged (§ 243), and that "the passage of a certain period of time after an allegedly irregular judicial appointment process may in principle tip the balance in favour of legal certainty". However, it pointed out that this was not relevant in the present case, as the applicant had requested the withdrawal of A.E. only one month after she had begun serving, and the final judgment of the Supreme Court in his case was rendered less than four months later. It therefore dismissed Iceland's arguments that there was a lack of "proximity" between the irregular appointment of A.E. and Guðmundur Andri Ástráðsson's trial for traffic offences (§ 284).

In fact, these problems were relatively easy for Iceland to solve. The minister had already resigned after the chamber's judgment, and the Icelandic government had "re-advertised" the "disputed" four positions at the Court of Appeal. After a new process had been followed, which had been duly prepared by the evaluation committee and which was otherwise correct, four new appointments were made, including that of A.E.

By way of comment, the consequences of the Court's approach are that, when the criteria are satisfied, the validity of *all* judgments that have been delivered by a judicial grouping including an irregularly appointed judge can be questioned *by a party to the case in question*. This does not automatically mean that an exceptional remedy – reopening the case – must be available for all such judgments later on, and perhaps many years later on.[7] Normally, final judgments (after the time for appeal has expired) are regarded as *res judicata* – unalterable. This principle is part of the principle of legal certainty, itself a fundamental element of the rule of law.

> "[...] the validity of *all* judgments that have been delivered by a judicial grouping including an irregularly appointed judge can be questioned *by a party to the case in question*."

Another issue is that the three-fold test takes as its starting point the national rules on appointment. The three-fold test is focused on ensuring compliance with *existing* rules. Therein lies the limitation in the value of the test as far as rule of law backsliding is concerned. The Court's focus on *upholding* compliance with the laws on judicial appointment presupposes that these are *good* laws in the first place. Simply put, regression in this regard will often be easier to identify than the fact that national laws, institutions and the judicial culture are unsatisfactory in the first place. Moreover, if you – legally – change the rules, as Hungary, for example, did, then you make it more difficult for the Court to find a violation.

3. Some background regarding the attacks on judicial independence in Poland

The implications of the *Guðmundur Andri Ástráðsson* case were very obvious for Poland, in particular. The Polish government, and the (then) Polish ombudsman, Adam Bodnar, had intervened in the case. Some background is useful, although it is not necessary to recount in detail the measures which were taken in Poland by the Law and Justice (PiS) party and its political allies attacking judicial independence.

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[6] This is a central concept in ECtHR case law. It basically means that states have a degree of discretion when it comes to how exactly they fulfil their obligations under the Convention.

[7] Moreover, as the result of a parallel development, Iceland has created a court of reopening for criminal cases.

Elections to the presidency and the parliament took place in 2015. The PiS candidate for president won and took office in August. PiS, together with its political allies, also won a majority in the parliamentary elections on 25 October, although the majority was not sufficient for them to change the Constitution.

PiS began by amalgamating the post of prosecutor general with that of minister of justice, thus taking closer control over the prosecutorial authority and the police. It then targeted the Constitutional Tribunal (CT), which was seen as an obstacle to its political reform programme, and took control over the (previously) judge-dominated National Council of the Judiciary (NCJ), which fulfils the functions of appointing, promoting and disciplining judges. It proceeded to take various measures to bring under its control the system of the ordinary and administrative courts, inter alia by dismissing judges from managerial positions and establishing two special chambers in the Supreme Court with hand-picked judges to hear disciplinary cases against judges and extraordinary appeals in various public law matters (including complaints regarding referenda and elections). The existing Supreme Court judges were barred from being appointed to these special chambers.

As regards the CT, in October 2015 before the new parliament (Sejm) had its first sitting, the old Sejm filled three existing vacancies among the judges on the CT. It also attempted to appoint, prematurely, two more judges to the CT, the posts in question becoming vacant later in the year in December. However, the new president refused to receive the oaths of office of any of these five appointees. The new Sejm instead amended the Act governing the composition of the CT, and voted to appoint five new judges, that is, it purported to annul the previous votes of the Sejm. The CT ruled on 3 December that the three judges who were filling the existing vacancies in November had been lawfully appointed, and that the other two vacancies fell to be filled by the new Sejm. However, the evening before the CT delivered its judgment, the president swore in four of the judges purportedly appointed by the new Sejm, including judge M.M., with the fifth being sworn in on 9 December.

The CT refused, over a long period, to let the three irregularly appointed people commence work as judges. It also delivered various rulings that the amending Acts adopted by the new Sejm were unconstitutional. The Sejm nonetheless adopted further amendments to the laws governing the CT, undermining its work and facilitating the "capture" of the CT by the judges appointed by the new Sejm. This was an extended process. It resembled, in a way, repeated hacking into a computer system. Points of vulnerability were identified and then exploited. As soon as the mandate of the then president of the CT expired on 19 December 2016, the post of "acting president" was created, bypassing the existing vice-president of the CT. J.P., one of the five new judges (though not an "irregular" judge) was appointed acting president by the President of Poland, and she proceeded to exercise extensive control over the composition and work of the CT (Sadurski, 2019). In a new judgment, delivered on 24 October 2017, a panel of the CT chaired by judge M.M. and including another irregularly appointed judge, H.C., by four votes to one, basically reversed its previous case law on the unconstitutionality of the amendments and the appointment procedure.

As regards the NCJ, this body of judicial self-governance was introduced into the Polish Constitution in 1989. Under Article 187(1) of the Constitution, it has twenty-five members, of whom seventeen are judges, including the two presidents of the apex courts. From 2001 until 2017, a statute provided that the fifteen other judge members were to be elected by the relevant assemblies of judges at different levels and from different types of court. On application by the prosecutor-general/minister of justice, the new ("captured") CT issued a judgment on 20 June 2017 holding that the provisions regulating the procedure for electing members of the NCJ were unconstitutional.[8]

On 8 December 2017, the PiS-dominated government amended this statute, providing that henceforth these fifteen judges were to be elected by the Sejm for a collective term. The existing judge members were dismissed, and new members rapidly appointed. The procedure by which these judges were endorsed by the Sejm was not transparent, but most of the new members had links of various types to the PiS.

[8] This judgment largely ignored a previous judgment of the CT, delivered in 2007, finding that the process of election by assemblies of judges was constitutional. See the discussion of the *Reczkowicz* case, below.

4. The Polish Constitutional Tribunal

Judgment in the first case raising issues concerning rule of law backsliding in Poland to reach the ECtHR, *Xero Flor w Polsce sp. z o.o v. Poland*.[9] came four and a half years after PiS had taken power. The applicant company was one of Poland's leading producers of turf. It had suffered damage to its turf caused by deer and wild boar over several years. Compensation for such damage was provided for under a ministerial ordinance, issued under the Hunting Act. The company sued the state because it did not consider that it had received sufficient compensation. It argued that the compensation provisions discriminated against producers of perennial crops, as opposed to those growing annual crops, and that the provisions were unconstitutional as they were provided by subordinate legislation. It requested the trial court to refer three questions to the CT for a preliminary ruling. It also, later, lodged a constitutional complaint directly with the CT. The ordinary Polish courts dismissed the applicant company's arguments, including those on unconstitutionality. On 5 July 2017, a panel of the CT, including judge M.M., by three votes to two discontinued the proceedings before the CT.

Before the ECtHR, the government objected to the admissibility of the complaint by arguing that the CT was not a "tribunal" within the meaning of Article 6(1) as it did not "determine" a "dispute" over a "civil right or obligation". The ECtHR considered, on the basis of its well-established case law, that a constitutional court could be a "tribunal" within the meaning of Article 6(1). Admittedly, a constitutional complaint in Poland can only be lodged against a law and not against a judicial or administrative decision. Moreover, the effect of a CT judgment or preliminary ruling is limited: a CT judgment or ruling does not automatically quash an administrative or judicial decision taken under a law found to be unconstitutional. However, the ECtHR considered that the outcome of proceedings before the CT was still directly decisive to an applicant's civil rights, in that a successful applicant could then file a request to *reopen* prior administrative or judicial proceedings (under Article 190(4) of the Constitution). In a situation in which the CT has found legislation to be unconstitutional, other Polish courts would be obliged to disregard the legislation.

By way of commentary here, one can say that the Court's reasoning on this particular point can be criticized as not being fully supported by previous case law; this was the view of the Polish judge, Wojtyczek, in his partly dissenting opinion. The Court has usually shown considerable deference to national courts when determining whether an arguable right exists at national law.[10] Here, one can note that the right to a judicial remedy is wider under EU law (Article 47 of the Charter of Fundamental Rights of the European Union). Moreover, it should be noted that a constitutional court can have several different grounds for jurisdiction: Article 6 is relevant to cases from individuals and companies who wish to make a direct challenge to the constitutionality of a law (in legal systems where this is allowed)[11] and to certain types of referrals from ordinary courts, but it is not relevant to cases initiated by so-called "privileged" litigants (parliamentary minorities, ombudsmen, etc.) (Szwed, 2021).

In any event, the ECtHR proceeded to apply the criteria from the *Guðmundur Andri Ástráðsson* case. It noted that European states had a variety of different methods for appointing judges. It was permissible for the executive or the legislature to appoint judges, "provided that appointees are free from influence or pressure when carrying out their adjudicatory role" (§ 252).[12] The main issue was whether the breach of the domestic law was manifest.

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[9] No. 4907/18, 7 May 2021.

[10] See, e.g. *Roche v. UK*, No. 32555/96, ECHR 2005-X, at § 120.

[11] This is often called an *actio popularis*, meaning a right of any member of a legal community to take legal action to vindicate a public interest, without the need to show that they are individually affected by the administrative decision.

[12] The Court had previously found that appointment of judges by the executive is not a problem, if this is simply a formal culmination of the relevant decision-making process, *Thiam v. France*, No. 80018/12, 18 October 2018. Moreover, the Court has accepted that the principle of the separation of powers can be applied differently in different states, *Kleyn and others v. The Netherlands* [GC], Nos 39651/98, 39343/98, 46664/99 et al., 6 May 2003.

As regards this, the ECtHR considered that the Sejm's purported election of the three "December" judges in 2015 (explained above) was in violation of Article 194(1) of the Constitution (§ 268). In doing so, it relied heavily on the earlier findings of the CT itself. It also found, again relying on the findings of the CT, that by refusing to receive the oath of the three "October" judges, the President had violated domestic law (§§ 269–270). The government had relied upon the later judgment of 24 October 2017, delivered by a panel of the "captured" CT. However, the Court noted that this had "entirely disregarded" the earlier judgment of 3 December 2015 and had also "contradicted" the judgment of 11 August 2016, concluding that the judgment "could not cure the fundamental defects" in the election of the three "December" judges (§ 272). It also noted that two irregularly appointed judges had participated in the panel judgment of 24 October 2017, and that therefore that judgment "carries little, if any weight" (§ 273).

Having decided the question of whether the national rules had been manifestly disregarded, the other parts of the three-fold test were dealt with relatively easily. The rules in question were clearly designed to protect judicial independence, and the government had conceded that there was no judicial mechanism available for the applicant company to challenge the alleged defects in the election procedure.

The Polish government's reaction to *Xero Flor* was swift. Instead of appealing to the GC, the Minister of Justice/Prosecutor General brought a motion before the CT for a declaratory judgment. On 24 November 2021, the CT ruled the ECHR to be incompatible with the Polish Constitution to the extent that the term "court" used in Article 6 includes the CT and insofar as the ECHR confers competence on the ECtHR to review the legality of the election of judges to the CT (Ploszka, 2022).

5. Taking control over managerial positions in ordinary courts

On 12 July 2017, a law was passed amending the Polish Law on the organization of the ordinary courts. It allowed the Minister of Justice, over a period of six months, freely to dismiss the heads and deputy heads of courts. There was no obligation for the Minister to communicate the reasons for his decisions to those concerned, no right to a hearing or to submit written observations, and no appeal against a removal decision of the Minister. The ECtHR considered this law in *Broda and Bojara v. Poland*.[13]

The applicants were vice-presidents of a regional court who had been dismissed. Before the Court they argued that this dismissal violated Article 6(1). The Court considered that the compatibility of the legislative provision in question with the rule of law was "doubtful" (§ 146), and that in any event the measure was not surrounded by any of the necessary safeguards of procedural fairness. Referring, inter alia, to the opinions of the CoE advisory body on constitutional matters (the Venice Commission), the European Charter on the Status of Judges, and the Committee of Ministers Recommendation CM/Rec(2010)12, the Court stressed that judges had to enjoy protection against arbitrary action by the executive. Only a review of the legality of such decisions by an independent judicial body would be capable of making judicial independence effective (§ 147).

By way of commentary, this case means that judges must be protected not simply against dismissal as such, but also against dismissal from their managerial functions. The case does not in itself lay down the criteria for dismissal (and by extension, for suspension, promotion and disciplinary measures generally), but it indicates that there must *be* such criteria, that these should be in statutory form, and that an appeal to a judicial body must lie against any such measures.

[13] Nos. 26691/18 and 27367/18, 29 June 2021.

6. The NCJ and the disciplinary chamber of the Supreme Court

The ECtHR considered the measures taken by PiS against the Supreme Court and the NCJ in *Reczkowicz v. Poland*.[14] The applicant was a barrister who was the subject of a disciplinary order, suspending her from practising for three years. She appealed the decision before the Polish courts, her case being ultimately dismissed in 2019 by the newly established Disciplinary Chamber of the Supreme Court. Before the Court she argued that her case had not been heard by an "independent and impartial tribunal established by law". The NCJ, after PiS had taken control over it, had proposed the judges for the Disciplinary Chamber to the President.

As regards the first part of the three-fold test from the *Guðmundur Andri Ástráðsson* case, whether there had been a manifest breach of domestic law, the applicant (together with the intervenors) and the government had radically different views. The Court began by noting that the law changing how the fifteen judges in the NCJ were chosen should be examined within the context of the ruling party's programme of changes to the judicial system (§ 235). The official motivation given was that the old rules had supposedly discriminated against judges sitting in lower courts, an argument accepted by the CT. The Court considered that this motivation "could prima facie be considered legitimate" (§ 237). However, the Court noted that the CT "did not engage substantively" with the legal arguments that were contained in its earlier ruling from 2007 and that had been universally accepted for ten years. The Court was "unable to detect any attempt [by the CT] to explain … why and how the new election model would better serve the interests of the judiciary and equal opportunities or whether, and if so how, it would impact upon the NCJ's primary constitutional obligation of safeguarding the independence of courts and judges … [moreover] no consideration appears to have been given to the Convention case-law or the fundamental Convention principles of the rule of law, separation of powers and independence of the judiciary" (§ 239).

The Court also pointed out that no international body agreed with the CT.[15] In particular, the Court referred to the criteria set out by the ECJ in its preliminary ruling in C585/18, (*A. K. and others v. Sąd Najwyższy)*,[16] which had dealt with a similar issue. The Polish Supreme Court, sitting in a formation of 59 judges, had applied the ECJ criteria and adopted an "interpretative resolution" in January 2020, coming to the conclusion that the NCJ lacked the necessary independence from the legislative and executive powers and that consequently any judicial panel containing judges appointed by the new NCJ would not give an effective judicial remedy. The "captured" CT responded first by attempting to stop the Supreme Court from adopting its resolution: it issued a decision, also in January, purporting to suspend the Supreme Court's power to make interpretative resolutions regarding the NCJ. Thereafter, on 20 April 2020, it adopted a judgment finding that the Supreme Court had no competence to question procedures for appointing judges.

The Court noted that the Supreme Court's conclusions were "explained in extensive reasoning [and] reached after a thorough, meticulous assessment of all the elements relevant to an 'independent and impartial tribunal established by law'" (§ 257). The government had argued that the CT had subsequently negated ("removed") the "doubt" occasioned by this interpretative resolution in its judgment of 20 April 2020. The Court was careful not to usurp the CT's role as ultimate interpreter of the Polish Constitution. However, it stated that the CT's "judgment appears to focus mainly on protecting the President's constitutional prerogative to appoint judges and the status quo of the current NCJ, leaving aside the issues which were crucial in the Supreme Court's assessment, such as an inherent lack of independence of the NCJ … while formally relying

[14] No.43447/19, 22 July 2021 § 238.
[15] Referring to the CoE parliamentary assembly (PACE), OSCE/ODIHR, the Venice Commission, the CoE Consultative Council of European Judges, the UN Special Rapporteur on Independence of Judges and Lawyers, the CoE Commissioner for Human Rights, the CoE anti-corruption body, Greco and the Extraordinary General Assembly of the European Network of Councils for the Judiciary.
[16] EU:C:2019:982.

on the constitutional principles of the separation of powers and the independence of the judiciary, [it] refrained from any meaningful analysis of the Supreme Court's resolution" (§ 261).

It was less circumspect as regards the CT's conclusion that the new method of selecting NCJ members was compatible with the ECHR. The Court stated that it "sees *no conceivable basis* in its case-law for such a conclusion" (ibid, my emphasis). It stated, moreover, that the CT's attempt (in January 2020) to suspend the Supreme Court's power to make interpretative resolutions regarding the NCJ was "unprecedented" and "an *affront* to the rule of law and independence of the judiciary" (§ 263, my emphasis). It noted, finally, that the bench of the CT that had delivered all four of the contested rulings included M.M., who it had previously found (in *Xero Flor*) to have been irregularly appointed. It concluded that the procedure for the appointment of the Disciplinary Chamber was in "manifest breach" of domestic law (§ 264), and that these breaches concerned a fundamental rule designed to maintain judicial independence (§ 276). The government made no argument that there was a procedure whereby the applicant could challenge the alleged defects, so the third criterion was also fulfilled.

By way of commentary, one can say that the principle of subsidiarity shows how important it is to have some "allies" left at the national level when one apex court, in this case the CT, has been captured. The Court looks at national law as part of the context of the case, and tends to defer to national courts' interpretations of this. It is, in principle, free to come to its own conclusion about whether or not a national court has given proper weight to ECHR factors in its reasoning, but it is on much stronger ground if it can refer to, and rely upon, the reasoning of another national apex court. The Polish Supreme Court fulfilled this function.

7. The Extraordinary Review Chamber

In *Dolińska-Ficek and Ozimek v. Poland*[17] the applicants were judges who had applied for vacant judicial posts in other courts but who had not been recommended for those posts by the NCJ. Their complaints against the decisions of the NCJ was heard by the "Chamber of Extraordinary Review and Public Affairs" of the Supreme Court. The Court found that this chamber had not been an "independent and impartial tribunal established by law", basically on the same grounds as they had given in *Reczkowicz* – that the procedure for appointment to the chamber was fatally tainted.

The Court's judgment makes it clear that not only was the chamber not an "independent and impartial tribunal established by law" but that its conduct "must *per se* be considered to challenge the letter and spirit of the rule of law" (§ 336). The Court also, in this case, indicated for the first time that rapid *general* remedial measures must be taken[18] to remove the structural fault at the heart of the case (and the other Polish cases), namely, the fact that the NCJ is no longer a body of judicial self-governance but is dominantly composed of appointees from the legislative and executive branches.

8. Tainted judges on the Supreme Court and the exhaustion of domestic remedies

In *Advance Pharma Sp. z o.o. v. Poland*[19] the applicant company complained that its case was determined, in the final instance, by a panel of three judges in the civil chamber of the Polish Supreme Court who had been irregularly appointed (that is, they had been appointed by the President on the recommendation of the "tainted" NCJ). There is no need to dwell in detail on this case. The main issue was, once again, the absence of a tribunal established by law, and the Court decided this issue in the same way. However, another issue, raised as a preliminary objection by the government, was whether the applicant company should have exhausted domestic remedies by making a constitutional complaint. Thus, unlike

[17] Nos. 49868/19 and 57511/19, 8 November 2021.
[18] In its judgment, in addition to awarding "just satisfaction" (monetary compensation), the Court may choose to indicate what specific measures the state should take to provide remedies for the present victims, as well as setting out what general measures should be taken to avoid this problem emerging again in the future.
[19] No. 1469/20, 3 February 2022.

in *Reczkowicz*, the government argued that there *was* a procedure whereby the applicant could challenge alleged defects. The Court repeated the same arguments as it had made in *Reczkowicz* as to why the CT's judgments on the issue were arbitrary, before reaching the conclusion that it "does not see sufficiently realistic prospects of success for a constitutional complaint" (§ 319). It added, as regards a constitutional complaint, that "the effectiveness of that remedy must be seen in conjunction with the *general context* in which the Constitutional Court has operated since the end of 2015" (ibid, my emphasis), noting that the CT had gone so far as to try to block the implementation of the *Xero Flor* judgment by its ruling that this judgment violated the Polish Constitution.

Thus, the Court's case law has evolved: the focus is no longer simply on tainted judges. The CT as a whole has been undermined. It is no longer seen as providing a remedy which must be exhausted before complaining to Strasbourg.[20]

9. More on the NCJ

In *Grzęda v. Poland*[21] the GC considered an application from a judge of the Polish Supreme Administrative Court who had been elected in 2016 to serve a four-year term on the NCJ. His term of office was prematurely ended by the 2017 Act (above). Again, this judgment, voluminous though it is, adds relatively little to the findings in *Reczkowicz*. There are, nonetheless, two significant points which are clarified in the judgment.[22]

As with *Xero Flor*, an issue arose as to whether Article 6(1) was applicable. The state argued that the NCJ exercised public power and that therefore there was no "genuine and serious dispute" over a "civil right" under domestic law to serve a full term as a judicial member of the NCJ. According to the Court's well-established case law,[23] a right is not "civil" if two conditions are fulfilled. First, the national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the state's interest. The Court considered that it could be left open whether the first condition was met (§ 294). As regards the second condition, the Court stated that the applicant's exclusion from access to a court was not justified on objective grounds in the state's interest.

The second significant issue was whether the concept of judicial independence extended beyond a judge's adjudicating role even to ancillary functions, such as membership of a judicial council. The Court considered that it did (§ 303). Accordingly, the Court considered that similar procedural safeguards to those available in cases of the dismissal or removal of judges should be available where, as in the present case, a judicial member of the NCJ had been removed from his position.

Again, the reaction of the Polish government was to request a new judgment from the CT, which duly declared again that Article 6(1) of the ECHR is incompatible with the Polish Constitution to the following extent. First, because it includes, under the phrase "civil rights and obligations", a judge's subjective right to hold a managerial position within the structure of the common courts in the Polish legal system. Secondly, in the context of assessing whether the requirement for a "tribunal established by law" has been met, because: (a) it permits the ECtHR and/or national courts to overlook the provisions of the Constitution and statutes as well as the judgments of the CT; (b) it makes it possible for the ECtHR and/or national courts, by interpreting the Convention, to independently create norms pertaining to the procedure for appointing national court judges; and (c) it authorizes the ECtHR and/or national courts to assess the conformity to the Constitution and the ECHR of statutes concerning the

[20] Cf. the ECtHR's approach (so far) to the Hungarian Constitutional Court, noted below.
[21] No. 43572/18, [GC] 15 March 2022.
[22] Rizcallah and David (2022). There was also a procedural point, in that Poland opposed the chamber's relinquishment of the case to the GC. This issue is no longer important, because the possibility that a respondent state can object to relinquishment under Article 30 has since been removed by Protocol 15 to the ECHR, which has now entered into force.
[23] *Vilho Eskelinen and others v. Finland* [GC], No. 63235/00, 19 April 2007.

organizational structure of the judicial system, the jurisdiction of the courts, and the Act specifying the organizational structure, scope of activity, modus operandi, and mode of electing members of the NCJ.

10. Judges' freedom of expression

Żurek v. Poland[24] concerned a judge who was also a spokesperson for the NCJ. The case concerned his removal from the NCJ before his term had ended, and his complaint that there had been no legal remedy to contest his removal. This part of the case, concerning Article 6(1), need not be dwelt on, because it repeats the findings in *Grzęda*. Mr Żurek was an outspoken critic of the measures taken by the Polish government, and the case also concerned his allegation that there was a campaign to silence him. The ECtHR considered that the accumulation of measures taken against Mr Żurek – inter alia, his dismissal as the spokesperson of a regional court, the initiation of an audit of his financial declarations and the launching of an official inspection of his judicial work – had been aimed at intimidating him because of the views that he had expressed in defence of the rule of law and judicial independence. It noted (§ 227) that "no other plausible motive for the impugned measures has been advanced or can be discerned", and found a violation of Article 10 (freedom of expression).

11. Judges' private lives and ulterior motives for restricting rights

Juszczyszyn v. Poland[25] concerned a judge, seconded to a regional court, who, in the light of the ECJ preliminary ruling in *A.K. and Others*, joined cases C-585/18, C-624/18 and C-625/18) (above), decided to verify whether a first instance judge, who had been appointed by the President of the Republic upon the recommendation of the "new" NCJ, complied with the requirement of independence. He issued an order directing the Head of the Chancellery of the Sejm to produce copies of the endorsement lists for judicial candidates to the new NCJ, which at the time were not publicly available. This led to his secondment being terminated by the Minister of Justice. Disciplinary proceedings were initiated against him and, while these were being investigated, he was suspended from working as a judge. The disciplinary case was heard by the Disciplinary Chamber. This initially ruled that the suspension was unjustified. However, it reversed this at second instance, finding that Juszczyszyn's actions had been an obvious and gross violation of the law on disciplinary offences, and that the exceptionally bad example this set for other judges, the undermining of the competences of the President of the Republic, and the threat of chaos if the practice of every judge encroaching on the President's prerogatives were to be accepted had fully justified the need to suspend him from his judicial duties, and that the 40% salary reduction imposed on him had been acceptable.

Before the ECtHR, the first issue was the lack of a remedy before a tribunal established by law. This issue need not be examined, because it repeats the ECtHR's earlier findings regarding the Disciplinary Chamber. However, an issue also arose under Article 8, the right to private life. The ECtHR has set a high threshold before a disciplinary sanction, imposed for professional reasons, can be seen as encroaching on a person's private life. However, in the present case, the ECtHR considered that the statements made expressed a clearly negative opinion about Mr Juszczyszyn's judicial competence, professionalism and integrity, thus affecting his professional reputation. Bearing in mind, also, the length of time the disciplinary measures had lasted (over two years), the ECtHR considered that Article 8 was applicable. The sanction was not appealable before a "tribunal established by law" (the Disciplinary Chamber not satisfying these requirements). This would, in itself, have been sufficient to find a violation of the requirement that any limitations on private life be "in accordance with the law". However, the ECtHR went on to examine the "quality of law" requirement, in particular the foreseeability of the law in question. The ECtHR noted that the sanction was imposed because of the content of a judicial decision Juszczyszyn took, rather than of, for example, administrative inefficiency, such as gross delay in handling cases. In the view of the ECtHR, the imposition of disciplinary liability in connection with the giving of a judicial decision

[24] No. 39650/18, 16 June 2022.
[25] No. 35599/20, 6 October 2022.

must be seen as an exceptional measure and be subject to restrictive interpretation (§ 276). The ECtHR in this respect also attached "significant weight" to the findings of the ECJ in *Commission v. Poland (Disciplinary regime for judges)*.[26] It concluded on this ground too that the interference with Juszczyszyn's private life was not in accordance with the law.

There is a further aspect of the case that deserves treatment. The ECHR, Article 18, forbids *détournement de pouvoir*, where the state employs a permissible restriction on a right for a purpose for which it was not intended or to achieve an impermissible purpose. This article can only be invoked together with a Convention right. The Court has previously set very – in the view of some, unrealistically – high standards before this provision becomes applicable, ruling that it must be shown that the "predominant purpose" was ulterior or impermissible (Finnerty, 2022). In the Juszczyszyn case the ECtHR took into account the general context of the Polish government's measures, the ECJ case law and the "manifestly unreasonable" interpretation of the applicable law that the Disciplinary Chamber had used. It found that the predominant motive of the authorities had been to demonstrate that a challenge to the status of judges appointed with the participation of the recomposed NCJ would expose any judge making the challenge to sanctions. It therefore found a violation of Article 18 in conjunction with Article 8.

12. Analysis

What general conclusions can be drawn from these cases? The first point to make is that the case law has so far mainly been about Poland, but it has clear implications for several other states. The Polish government has drawn considerable attention to itself because its measures have been so blatant and its attitude so uncompromising, but the situation of the rule of law in Hungary is probably worse. The independence of the whole court system in Hungary is in considerable doubt. Hungary is no longer seen by the European parliament as a full democracy. The EU Commission's rule of law report in fact indicates that judicial independence is a problem in several states, such as Croatia, which has very low ratings of public trust in judges. The procedures for appointing judges in Spain have been heavily criticized. The Venice Commission[27] criticized the considerable power exercised by the executive over judicial appointments in Malta (reforms have since been made). The Venice Commission has also been critical of the lack of independence of prosecutors and judges in Romania and Bulgaria. For these two countries in particular, one can note that, before a country can have rule of law backsliding, it needs to have achieved a reasonable level of respect for the rule of law from which it then "slides back".

> "The experiences of Hungary and Poland show that it is very difficult for courts in a state to defend themselves against a sustained attack from their own government."

The experiences of Hungary and Poland show that it is very difficult for courts in a state to defend themselves against a sustained attack from their own government. It is not for nothing that Alexander Hamilton called the courts the "least dangerous branch" of government, in that they tend to operate only with a veto over the other branches of government, and lack power over both the military and economic resources of the state (Bickel, 1986). Courts and judicial councils cannot be entrenched deeply enough to be protected against any attack, at least if one wants to maintain the main principle of governance for an EU state, namely democracy.

One might think that strengthening the constitutional rules on judicial independence is the answer, but if the problem is, in essence, a failure of political culture then this cannot be simply corrected in this way. Moreover, it is not possible to put every rule into the constitution: it becomes too unwieldy. Some rules have to be on a lower constitutional level (statute, ordinance) and, as the experience of the Polish CT shows, a court which is partly regulated by statute has

[26] C-791/19, EU:C:2021:596.
[27] Cameron (2021), Turkut (2022).

too many vulnerabilities to allow it to hold out for any length of time. Even if every important rule is in the constitution, this is no guarantee of eternal protection for the rule of law. A party which wins a supermajority can do what it chooses. The Hungarian Fidesz party had a supermajority in the parliament and could, and did, change the Hungarian Constitution whenever the Constitutional Court attempted to stop unconstitutional reforms.

Nonetheless, assuming that an authoritarian government does not obtain a sufficient majority to change the constitution, there is some value in putting the most fundamental rules on the criteria for choosing judges, court organization and judicial independence in the constitution. This will mean that any changes that might be made by means of ordinances and statutes can be attacked as being unconstitutional. It will, at the very least, make taking control over all ordinary and administrative courts in a state a more time-consuming process. Having said this, an authoritarian government does not need "total" control, simply *enough* control to scare judges into subservience, and the longer it is in power, the more easily it is able to do this (as well as multiplying the damage which has to be repaired, if and when a less authoritarian government regains power). In this respect, the competences exercised by chief judges in many states, particularly in central and eastern Europe, create a problem of a lack of "internal independence" of junior judges.[28] If a less authoritarian government ever obtains power in Poland, it is likely that there will be decisions taken by chief judges appointed by the PiS-led government that are open to attack because the judges have favoured other PiS-friendly judges in different ways rather than basing their decisions on the person's professional qualifications and objective merit.

Still, there are even more vulnerabilities in a system in which the constitutional review functions are concentrated in a single court. A constitutional court on the Austrian model is designed to have exclusive jurisdiction, or at least priority, over constitutional issues, which usually includes issues of fundamental rights. Putting all one's eggs in one basket has several advantages as regards specialist knowledge and in the context of a transition to democracy (where the loyalty of the general courts to the transition can be doubted), but it has obvious disadvantages too. The judges of a constitutional court will usually sit for limited periods, and there is often a special procedure for appointing them. As the Polish cases show, once an authoritarian government has taken control over the membership of a specialist constitutional court, this can be used to legitimate other power grabs. The constitutional court can "take away" rights issues from the ordinary courts, and decide these in ways which suit the government, and it can be used to "defend" the constitution from "attacks" from Strasbourg and Luxembourg. By contrast, the obligations which flow from the incorporated ECHR and from EU membership are meant to be enforced by all courts. This decentralized enforcement is a strength.

> "Largely because of the domestic remedies rule, the ECtHR is not a quick mechanism for dealing with rule of law backsliding."

Largely because of the domestic remedies rule, the ECtHR is not a quick mechanism for dealing with rule of law backsliding. The European Commission and the ECJ have been criticized for not acting sooner as regards Hungary (e.g. Scheppele and Pech, 2017). The same criticism can be directed against the ECtHR. It took five years before the judgment in the *Baka* case,[29] and, as already mentioned, four and a half years for a judgment in the first Polish case, *Xero Flor*. It is a reactive system. In this respect, it is no different from the protection afforded to an individual by the national courts. These must normally wait for an irregular measure to be taken, and then wait for a suitable litigant to bring the irregularity up in court proceedings. However, five years is a long time for an authoritarian government to consolidate its power. In Hungary, this period was more than

[28] See, e.g., the measures taken against Judge Juszczyszyn (above). For a general discussion of the concept and the problems, see Bobek (2008), Joost Sillen (2019).
[29] *Baka v. Hungary* [GC], No. 20261/12, 23 June 2016.

sufficient for the Orbán government to take over the Hungarian Constitutional Court and other administrative control bodies (ombudsman, data protection authorities, etc.), as well as to "chill" the ordinary and administrative court systems (and the press and public media). If an authoritarian government (relatively) quickly takes over the apex courts, then this gives them the possibility to stop, slow down, or otherwise influence the "pre-process" to Strasbourg.

As shown by *Advance Pharma*, it is possible for the ECtHR to find that a domestic remedy is not effective and need not be exhausted, but the Strasbourg court is naturally reluctant to find that a national judicial remedy has been undermined (quite apart from the fact that this will exponentially increase its own case load). The Court still regards the *actio popularis* before the Hungarian Constitutional Court as a remedy which has to be exhausted.[30]

Moreover, a court, any court, approaches a general problem (in this case, executive aggrandizement)[31] through the lens of the case at hand. It cannot go outside the framework of the case and lay down rules which it thinks would be a good idea. The ECtHR is no different, seeing structural weaknesses and vulnerabilities through a human rights lens (Kosař and Šipulová, 2018). Although this European policy analysis has been about judicial independence, executive aggrandizement is not simply about taking over control over courts, but covers a variety of other measures, such as control over quasi-independent administrative agencies (arm's length executive bodies), control over ombudsmen, data protection boards and other supervisory bodies intended to be independent, control over prosecutors and police,[32] control over security and intelligence agencies, control over state-controlled media (radio, TV etc.), the introduction of vague criminal provisions restricting media reporting,[33] and onerous administrative regulations regarding privately owned independent media. Checks and balances in all these areas can be weakened, a process which can be easier when the safeguards and restraints have been in the political or legal culture rather than in explicit rules. Before the ECtHR can do anything about these issues, suitable cases have to arise.

"Checks and balances in all these areas can be weakened, a process which can be easier when the safeguards and restraints have been in the political or legal culture rather than in explicit rules."

The realization that the reaction as regards Hungary was gravely inadequate at least meant that the EU Commission, and the ECtHR, were better prepared when similar developments began in Poland. The situation in Poland was different because the Polish courts were better able to fight back. The main reason for this is that the PiS government did not, and still has not, secured a sufficient majority to change the Constitution. Consequently, it had to exercise power by means of government ordinances and by virtue of its dominance in the legislature, by changing statutes. Thus, the constitutionality of many of its measures could be, and were, questioned by the Polish courts. Furthermore, the intervention of the ECJ has empowered, indeed obliged, the Polish courts to act to preserve their judicial independence, relying upon EU law.

The Court has now decided that all current and future applications concerning complaints about various aspects of the reform of the judicial system in Poland should be given priority. The pending applications deal with many of the same issues, and can be dealt with under the "repetitive"

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[30] See, e.g. *Mendrei v. Hungary*, No. 54927/15, 19 June 2018 and *Szalontay v. Hungary*, No. 71327/13, 12 March 2019. See further Karsai (2019).

[31] This is one form or variant of "democratic backsliding" or "rule of law backsliding", involving the concentration of power in the executive branch, and/or the weakening or elimination of checks and balances restraining this branch. See, e.g., Bermeo (2016).

[32] One major difficulty here is that there is direct executive control over the police in almost all European states, and over prosecutors in many states (see however *Kövesi v. Romania*, No. 3594/19, 5 May 2020 § 116).

[33] See e.g. *ATV ZRT v. Hungary*, No. 61178/14, 28 April 2020.

procedure,[34] which is faster. Nonetheless, a judgment is supposed to be the product of a measured and balanced procedure, and this means that slowness tends to be built into the system. Internal independence issues, and more cases concerning freedom of expression of judges, are likely to arise in these pending cases, as PiS appointed court presidents are exercising control over the composition of judicial panels and judges are being disciplined for such matters as criticizing the NCJ.

What can be done to try to get the Polish government to comply with these judgments? The Polish government has reportedly claimed that it has complied with EU law – at least, those parts it has not rejected as contrary to the Polish Constitution.[35] Some changes have admittedly been made. The Disciplinary Chamber has been replaced by a new "Chamber of Professional Liability". However, it seems very unlikely that the present Polish government will make more than superficial changes or genuinely comply with the ECtHR judgments. If it is to do so, it must be persuaded by means of economic carrots and sticks. This is why the Council's decision in June 2022 to approve the Polish government's Recovery and Resilience Plan is regarded in some circles as a big mistake. Four European judges' associations have lodged an annulment action with the General Court seeking the annulment of the Council's decision.[36]

The weakness of the ECtHR is undoubtedly a disappointment to some, but it was never supposed to be very powerful. There are no police that the ECtHR can order to Warsaw to arrest the government. The ECtHR cannot govern Poland by judgments. The ECtHR essentially works on "naming and shaming". The primary means of avoiding or minimizing the problems with recalcitrant national governments, or apex/constitutional courts, is "dialogue". From the perspective of enabling a rational dialogue, ECtHR judgments are "better" than ECJ judgments. Judgments with separate and dissenting opinions allow a more open and dynamic evolution of rights thinking. Moreover, judgments which do not have to build in widely differing views can be more principled and less of a compromise (Fredman et al., 2000). The most obvious form of dialogue is through the referral of a chamber judgment to the Grand Chamber. As shown by the *Grzęda* case, the Polish government has actively tried to prevent this. Another form of dialogue is through the ratification of Protocol 16, which provides for a right for the apex national courts to refer interpretative questions to the ECtHR, something like the EU preliminary reference procedure. Of the EU states which are often classed as experiencing rule of law problems, only Romania has ratified this protocol. It has happened that national courts have engaged in "dialogue" with the ECtHR by noting that there are problems with applying an ECtHR judgment, or even by explicitly stating that they can only apply a judgment to a limited extent.[37] However, it takes two to have a dialogue. The reaction of the Polish government, and the captured CT, shows that there is no real prospect of a *genuine* dialogue.

> "The ECtHR essentially works on 'naming and shaming'."

The Polish government has not only not done what is required to comply with the ECtHR's judgments. It has also used the CT to try to exclude parts of the ECHR from the Polish legal order, and has threatened Polish judges who continue to apply these parts, in open contradiction to its obligations under the ECHR. The extent of this "rebellion" in fact goes far beyond what the Russian Constitutional Court did before Russia was expelled from the Council of Europe.[38] In normal circumstances, one could argue that this level of

[34] This is a simplified procedure applied by the ECtHR for cases that are largely similar to previous cases and involve no significant new issues.
[35] At the discussion which occurred at the General Affairs Council, 18 October 2022, see Eurocrim 3/2022, p. 169.
[36] T-532/22, *Association of European Administrative Judges v. Council.*
[37] See e.g. the position of the UK Supreme Court in *R. v. Horncastle and Others* [2009] UKSC 14.
[38] The Russian Constitutional Court was prepared, at least to some extent, to try to reconcile – apparently – conflicting demands made by the ECtHR and the wording of the Russian Constitution. However, when these demands were found to be irreconcilable, it would apply the Constitution. For an analysis, see Cameron (2019).

open defiance should result in proceedings to expel Poland from the Council of Europe. At the very least, one could say that the legal conditions for triggering the mechanism in Article 7(2) of the Treaty on European Union are satisfied. However, Hungary is likely to block this. Besides, with the Russian war of aggression against Ukraine, the circumstances are far from normal.

The Court will not usually take up a case from an applicant complaining that a state has failed to implement an earlier judgment properly.[39] The task of "following-up" the implementation of ECtHR judgments is largely for the CoE Committee of Ministers, a political body which, like the EU Council, is not known for its willingness to take strong steps against a state. There is a procedure by which the Court can rule that a judgment has not been implemented, under Article 46(4) of the ECHR, but this has rarely been used so far. Nor, unlike the position for EU law, is a finding of non-implementation backed by financial penalties.

At some point, however, the ECtHR can no longer give an authoritarian government "the benefit of the doubt". In analysing the arguments of the Polish government, the ECtHR has been aided by critical reports from other international bodies, in particular the Venice Commission (Cameron, 2021). As shown by the *Advance Pharma* case, the ECtHR is already prepared to take into account the "general context" of the PiS "reforms" – that these are systematic, and are aimed at creating a judiciary which is respectful, even subservient, to the government. A development can also be seen from *Xero Flor*, where the ECtHR was still focused on the irregularly appointed judges. In *Advance Pharma*, the ECtHR considered that the CT as a whole has been captured, and that it no longer provides an effective independent remedy. One can say that the ECtHR's case law shows a "domino effect": the CT became "tainted", therefore its legitimization of the new NCJ was tainted, and the new NCJ appointment procedures were also tainted.

> "A judgment from the ECtHR can obtain more power by virtue of the fact that the ECHR is incorporated into national law."

However, the ECHR enforcement system, weak though it is, should not be seen in isolation. A judgment from the ECtHR can obtain more power by virtue of the fact that the ECHR is incorporated into national law. It is public law to be applied by the national courts (at least, those national courts which have not been taken over). The case law of the ECtHR, although slow to develop, has given those Polish judges who are still able to resist a further series of strong legal arguments on which to question the PiS measures. It is now very clear from the ECtHR case law what constitutes a violation of judicial independence. It is also fairly clear what the Polish state must do to remove these continuing violations of the ECHR. It must restore the status quo ante for the composition and powers of the NCJ and abolish the new special chambers. More problematic is the question of what to do about the (now many) new judges, as well as judges appointed to managerial positions since 2017. These appointments are all tainted by "irregularity" and so, arguably, all of these posts should be readvertised,[40] giving a reconstituted NCJ the decisive role in the appointment process. Present incumbants could be permitted to apply along with other applicants.

This is unlikely to happen unless and until a non-PiS dominated government comes to power. In the meantime, the effect of ECJ and ECtHR case law

[39] Although it may decide that the victim can bring a new application. See *Vgt Verein gegen Tierfabriken v. Switzerland (no. 2)*, No. 32772/02, 30 June 2009 and *Moreira Ferreira v. Portugal (no. 2)* [GC], No. 19867/12, ECHR 2017.

[40] An important question here is whether one should draw a distinction between the position of Supreme Court judges and "ordinary" judges on the basis that the former have a more overt constitutional role. As mentioned, the ECtHR has stated that the higher a tribunal in the judicial hierarchy, the more demanding the applicable selection criteria (*Guðmundur Andri Ástráðsson* §§ 220–222). On the other hand, one can argue that *all* courts must be trusted to apply EU law faithfully and that irregularity at first level courts (where the public meets judges most) is at least as damaging for public confidence in the judiciary as is irregularity at high level courts.

is to de-legitimize the position of irregular judges. This national effect is what the Polish government seeks to minimize by deterring the ordinary Polish courts from giving effect to ECtHR judgments on Article 6, using the "sovereignty-defending" judgments of the "captured" CT and threats of disciplinary measures against judges, but these "sovereignty-defending" judgments cannot keep out EU law, and Article 6 is also a part of EU law.

13. Conclusion

To return to the question posed in the introduction, in what ways can this case law interact with the rule of law work of the EU? An ECtHR judgment can be used by national judges as part of the basis for requesting a preliminary ruling from the ECJ. For example, the ECtHR considers that, where national law in an EU state is in violation of EU law, national measures taken in pursuance of this law lack a legal basis: they are not "in accordance with the law" (ECHR Articles 8–11).[41]

Most obviously, ECtHR judgments can be invoked by the EU Commission to initiate infringement proceedings, or as evidence that an infringement has occurred. These judgments can serve as a basis for economic pressure on Poland under the rule of law mechanism and the conditionality mechanism.

ECtHR case law also serves to legitimize ECJ intervention. ECtHR judgments can be used by the ECJ to back up its factual and legal conclusions in different ways. As Weiler has put it, a right expresses a community standard, and different political communities have different standards. His proposed solution is that, in the more controversial area of ECJ review, that is, review which has the (indirect) effect of making a Member State's legislation in violation of Charter rights inapplicable, the ECJ should only apply the minimum ECHR standard (Weiler, 2009). The Polish government may be abusing the sovereignty argument, but it obviously has a core of validity. It is clear that there are quite different national conceptions in Europe of what judicial independence means (Bell, 2001). Thus, it is very important that the ECJ is not open to the attack that it is imposing an alien "Brussels/Luxembourg" conception on Warsaw, or Budapest, or anywhere else. Of course, the "imposition" argument is not very strong, because what is really being said, by both the ECJ and the ECtHR, is that the Polish system is not *satisfactory*, leaving it to Poland to restore the status quo ante, or devise a satisfactory new system. Nonetheless, the fact that the ECtHR is saying the same thing means that the ECJ can honestly say that it is not imposing its own ideas, but simply helping to uphold an agreed European community standard.

[41] See, e.g. *Big Brother Watch and others v. UK*, [GC] Nos. 58170/13, 62322/14 and 24960/15, 25 May 2021.

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