Justice Under Pressure:
Strategic Litigation of Judicial Independence in Europe

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Final Mapping Report

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Table of Contents

1. Introduction: Judicial Independence in Law and Practice

1.1. Overview

Judicial independence is a cornerstone rule of law principle and a fundamental requirement for the effective protection of human rights and the fair administration of justice for all persons. It is essential to enabling the judiciary to fulfil its role in ensuring the protection of the human rights and fundamental freedoms.[1] Yet, across the globe, attacks on judicial independence are undermining the rule of law and human rights, and the European Union (EU) is no exception.

Today, there is a well-developed body of international and EU standards and jurisprudence, which underscore that ensuring judicial independence is a binding legal obligation on States, and which spell out its essential elements and benchmarks.[2] While addressing questions around judicial independence through the courts is, unsurprisingly, a complex endeavour, there is also an inspiring and rapidly expanding array of practice of strategic litigation. Advocates, civil society actors, lawyers, judges and others are resorting to the courts as part of a strategy to defend judicial independence across Europe and beyond. Together, this body of law and practice provide tools that can be invoked strategically to better protect judicial independence and strengthen the rule of law in Europe and around the world.

This report maps existing standards and experiences of strategic litigation on judicial independence and accountability in Europe, highlighting obstacles, strategies and good practices that can be gleaned from such litigation.

Section 1 of the report provides an introductory overview of the concept of judicial independence and its erosion in the EU over the past decade. Section 2 identifies legal standards and mechanisms that provide tools and avenues to address challenges to judicial independence. Section 3 provides an overview of the experiences of advocates seeking to litigate in this field to date, with examples from a growing body of practice. Reflecting on this experience, Section 4 explores the real impact of litigation to date, highlights some of the many challenges that impede effective strategic litigation in this field and seeks to identify strategic approaches that may help overcome such challenges and ensure impactful outcomes. The report ends in Section 5 with conclusions and recommendations for strengthening and enhancing future litigation and advocacy to safeguard and secure judicial independence in the EU and beyond. Throughout the report case study boxes written by partners – often the lawyers involved in the litigation – provide insights into cases that have been brought, their impact and the reasons for such impact.

This report is the culmination of a series of events held within two years as part of the "Rule Of Law for Lawyers (ROLL)" project,[3] led by the International Commission of Jurists

[1] Bangalore Principles of Judicial Conduct, adopted by the United Nations Economic and Social Council (ECOSOC) Res. 2006/23, July 2006, Principle 1; European Commission for Democracy through Law (Venice Commission), Report on the independence of the judicial system part I: The independence of judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para. 6; International Commission of Jurists (ICJ), *Practitioners Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, 2007; ICJ, *Practitioners Guide No. 13: Judicial Accountability*, 2016; ICJ, *ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*; ICJ, *Legal Commentary to the ICJ Geneva Declaration*, Human Rights and Rule of Law Series: No. 3, 2011; ICJ, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019.

[2] See Section 3. 1. below.

[3] The project was carried out January 2023-January 2025 with the support of the European Commission.

(ICJ) in close cooperation with Helen Duffy from Human Rights in Practice and in collaboration with national partner organizations: aditus (Malta), Forum for Human Rights (Czechia and Slovakia), and Free Courts (Poland), supported by the Romanian Institute for Human Rights.[4] The ICJ and its partners organized three transnational workshops and five mentoring or exchange sessions with lawyers and judges across the EU to facilitate experience-exchange and foster the effective use of strategic litigation to promote independent and effective judicial systems.[5] The report was also informed by research conducted into the state of the rule of law and judicial independence in Europe, including interviews with experts from eight target countries – Poland, Hungary, Romania, Bulgaria, Slovakia, the Czech Republic, Malta and Spain.[6] While challenges and strategies are deeply context specific, participants to the events made clear the cross-cutting nature of many obstacles arising in the EU today, as well as some positive experiences and lessons learned. They underscored the need to develop capacity, share learning and ensure mutual support, and to enable more creative and strategic approaches, in order to harness the power of domestic and international courts and enable advocates to meet the many challenges that arise.

While focused on the independence of the judiciary, the report may be relevant to challenges to the independence of the prosecution service, individual prosecutors and other legal professionals and human rights defenders. The complementary roles of diverse justice actors are interconnected, and attacks on the independence of the prosecution and the legal profession more broadly often have a direct effect on the judiciary's ability to fulfil its crucial mandate.[7]

1.2. Nature and significance of judicial independence

Judicial independence and accountability are a universal and central component of the rule of law and linked to the principle of separation of powers in governance.

To effectively protect human rights and the rule of law, States must secure the independence, impartiality, quality, effectiveness and accountability of their justice systems.[8] This reflects the essential role that judiciaries play within the State, as a check on the power of the political branches of government and other powerful actors, such as business enterprises. It is no coincidence that one of the first steps of autocratic regimes

[4] For an overview of the ROLL project, see project description at International Commission of Jurists (ICJ), Rule of Law for Lawyers (ROLL) project.
[5] The three workshops overall gathered 86 participants, consisting of experts and practitioners from eight EU Member States (Poland, Hungary, Romania, Bulgaria, Slovakia, the Czech Republic, Malta and Spain). See further ICJ, EU: Protecting Judicial Independence: Lawyers' strategic litigation workshop, 2023; ICJ, EU: Lawyers Exploring Strategic Human Rights Litigation on Judicial Independence, 15 June 2023; ICJ, EU: Lawyers strategizing ways forward against threats to judicial independence across the EU, 22 March 2024 (accessed 28 November 2024).
[6] Additional research has been conducted by Unmekh Padmabhushan, legal intern at Human Rights in Practice.
[7] The recognition of the importance of prosecutorial independence is reflected for instance in the increased attention of numerous regional and international bodies on the issue and the development of various guidelines on the topic. See e.g. UN's Guidelines on the Role of Prosecutors (1990), UNODC's The Status and Role of Prosecutors (2014), the Special Rapporteur on the Independence of Judges and Prosecutors (2012), and the Council of Europe's Recommendation Rec(2000)19 of the Committee of Ministers (2000).
[8] See e.g. ICJ, *Practitioners Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, 2007, pp 3-5; ICJ, *ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*, Principle 1; European Commission, 2024 Rule of Law Report, Communication, p. 10; Venice Commission, Rule of Law Checklist, March 2016, CDL-AD(2016)007, p. 13; European Commission, The 2024 EU Justice Scoreboard, June 2024, COM(2024) 950, p. 44.

seeking to assume unfettered power has often been to undermine, and eventually capture, the judiciary.[9]

An independent judiciary is one that is free from undue pressure, influence or manipulation – both external and internal, in both law and practice.[10] Judicial independence should be formally enshrined in law – in the constitution or "at the highest possible legal level" backed up by detailed rules in legislation – and be actionable by those affected, including judges whose independence is threatened or attacked. The duty of States to guarantee judicial independence requires procedural and institutional safeguards, and the possibility to challenge a judicial decision that impugns judicial independence before a judicial council or another independent authority.[11]

International standards emphasize that independence requires suitable frameworks, criteria and procedures for the appointment and removal of judges, guarantees of security of tenure, conditions governing promotion, transfer, suspension and cessation of their functions, and measures to ensure independence from political interference by the executive or legislature, or indeed from encroachment into judicial independence within the judiciary itself.[12] It also involves processes of accountability, including appropriate grounds and procedures for disciplinary measures. Not only must judges be independent of undue influence, but they must also appear to be impartial to a reasonable observer to protect public confidence in justice systems.[13]

As clarified further in Section 2. 2, undermining judicial independence may also result in violations of human rights of the affected judges, and breaches of the binding positive obligations of States to take measures to prevent and protect against the erosion of judicial independence. The section therefore provides an overview of some of the universal and regional international standards that establish benchmarks for judicial independence, and which stand in sharp contrast to evolving practices across the EU.

1.3. Erosion of judicial independence in practice across the EU

Backsliding on judicial independence in Europe, specifically since the 2010s, is manifest throughout the region. Reports by regional and global intergovernmental bodies and independent expert groups have documented the erosion of the state of the rule of law and judicial independence. Concerns have been voiced by many entities, within the

[9] Hans Petter Graver, 'On Judges When the Rule of Law is Under Attack' (2024) Oñati Socio-Legal Series, forthcoming: *Judges Under Stress*, DOI: <https://doi.org/10.35295/osls.iisl.192>, p. 4.
[10] Bangalore Principles of Judicial Conduct, adopted by the United Nations Economic and Social Council (ECOSOC) Res. 2006/23, July 2006, Principle 1; Venice Commission, Rule of Law Checklist, March 2016, CDL-AD(2016)007, p. 20; European Commission, The 2024 EU Justice Scoreboard, June 2024, COM(2024) 950, p. 44.
[11] Venice Commission, Rule of Law Checklist, March 2016, CDL-AD(2016)007, p. 20, 22; United Nations, Basic Principles on the Independence of the Judiciary, 6 September 1985, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 1; Human Rights Committee, General Comment no. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19; ICJ, *Practitioners Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, 2007, pp 17-25.
[12] Human Rights Committee, General Comment no. 32, para. 19. See also checklists for judicial independence provided in Venice Commission, Rule of Law Checklist, March 2016, CDL-AD(2016)007, p. 20, 22.
[13] See e.g. *Campbell and Fell v. the United Kingdom*, ECtHR, application nos 7819/77 and 7878/77, Judgement of 28 June 2014, para. 78; Human Rights Committee, General Comment no. 32, para. 21; ICJ, *Practitioners Guide No. 13: Judicial Accountability*, 2016.

European Union,[14] the Council of Europe[15] and UN, and by civil society organizations (CSOs) and other relevant stakeholders.[16]

These reports complement the international, regional, EU and national level litigation explored in this report, wherein courts and bodies have grappled with and expressed deep concern about the erosion of judicial independence in EU Member States. In addition to findings of serious violations by the **European Court of Human Rights (ECtHR**) and UN Treaty Bodies, are cases including EU infringement proceedings (ex-article 258 TFEU) before the **Court of Justice of the EU (CJEU)**, and actions against Poland and Hungary initiated under article 7 of the Treaty on European Union (TEU)[17]. Although there have been pockets of progress, and some States have taken measures to strengthen judicial independence and to remedy problems,[18] serious challenges remain across the EU and in many countries the situation continues to worsen.[19]

The erosion of judicial independence is a global phenomenon taking many forms. As the ICJ explained in its Tunis Declaration of 2019:[20]

> *"11. The independence, impartiality and accountability of the judiciary, as well as the independence of lawyers and prosecutors, are fundamental to the Rule of Law and legal protection of human rights, yet all are facing heightened challenge from governments and other powerful actors in many countries across all regions of the world.*
>
> *12. These include laws, policies and practices aimed at: limiting or otherwise undermining the jurisdiction of ordinary courts, including by substituting military or other forms of tribunals that provide deficient independence and fair trial guarantees; undermining the security of tenure of judges; removal or discipline of judges on unjustified grounds or through non-independent or otherwise unfair procedures; directly or indirectly interfering with a judge's decision-making in individual cases, including through legislation imposing mandatory minimum sentences; processes of appointments or promotions of judges that are politicized or otherwise fail to value individual independence; failure of other branches of government to enforce court orders and judgments; depriving judiciaries, legal aid programmes, or prosecution services, of necessary financial and human resources; undermining bar associations or other institutions that protect the independence of the legal profession; unduly interfering with the work*

[14] Over the years the European Union, especially through the Commission, has developed and strengthened the so-called 'Rule of Law toolbox' which includes, among others, the Rule of Law report since 2020, the Annual Rule of Law Dialogue, the regulation for the protection of the EU budget. See: European Commission, 'Annual Rule of Law Cycle' (accessed 20 November 2024); European Commission, 'Rule of law conditionality regulation' (accessed 20 November 2024).

[15] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, 2010. See also Venice Commission, 'Opinion on the cardinal acts on the judiciary that were amended following the adoption of opinion cdl-ad(2012)001 on Hungary', adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), paras. 37 and 52. Secretary General of the Council of Europe, 'State of democracy, human rights, and the rule of law: Report of the Secretary General of the Council of Europe, 2023, p. 8 (accessed 20 November 2024); European Commission, 'Rule of Law Report Country Chapter on the rule of law situation in Poland', 2023, p. 45 (accessed 20 November 2024). European Commission, 'Rule of Law Report Country Chapter on the rule of law situation in Hungary', 2023 (accessed 20 November 2024).

[16] See Section 2 on standards and mechanisms on judicial independence.

[17] Treaty on European Union (TEU) (Consolidated version), C 326/13.

[18] See e.g. 2024 Rule of Law Report, Communication, p. 11-16.

[19] See e.g. Civil Liberties Union for Europe, Liberties Rule of Law Report 2024, p. 7-8; Commissioner Didier Reynders, 'Rule of Law Report 2024: with the 5th edition, the EU is better equipped to face rule of law challenges' (press release), 24 July 2024. For specific examples see: European Commission, 'Rule of Law Report Country Chapter on the rule of law situation in Slovakia', 2024, pp. 4 and 7 (accessed 20 November 2024).

[20] ICJ, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019.

> *of individual independent lawyers, including by sanctioning lawyers for fulfilling their professional duties in cases perceived to be against the government's interests, identifying lawyers with their clients or their clients' causes as a result of discharging their functions, or denying people access to independent lawyers of their choosing; interfering with the independence and objectivity of prosecutors; criticism of the judiciary, legal profession, or prosecution services by members of the executive or legislative branches of government, intended to bring one or more of them into disrepute and thereby undermine public confidence; and otherwise weakening guarantees of judicial independence.*
>
> *13. Political influence or control of the judiciary, other forms of intimidation or interference by governments or other powerful actors, and the corruption of judges, lawyers or prosecutors, as well as lack of independence of individual judges within a judicial hierarchy, manipulation of assignment of cases, and similar issues of internal independence, have often resulted in the judiciary itself being unable or unwilling to fulfil its role as an independent check on the arbitrary use of power by the executive and legislative branches of government, as an impartial arbiter of disputes between private persons, and as a guarantor of the fair administration of justice and fair trial rights*."

Attacks on judicial independence take many forms, both direct and indirect, and arise from many sources. They include direct threats and reprisals against judges, arbitrary dismissals or unfounded disciplinary sanctions or even criminalization. Often, such measures begin as subtle legal, policy or institutional changes that may have popular appeal, or appear facially innocuous, yet indirectly impede judicial independence. For example, 'reforming' the administration of justice, putting in place measures in the name of accountability, anti-corruption, judicial ethics or integrity, narrowing the judicial role in the name of democratic decision-making, or reconfiguring judicial oversight bodies, can all mask efforts to undermine judicial independence.[21]

The ROLL project consultations surfaced a myriad of examples of these threats to judicial independence in the focus countries. Notorious examples include what has been described as "overall chaos and legal instability" following wide-ranging judicial reforms and appointments of sometimes unqualified judges through illegitimate procedures in Poland.[22] Despite many CJEU and ECtHR judgements, and political transition and commitments to re-establish the rule of law, many of these problems remain unaddressed, illustrating the importance of avoiding – and the complexity of undoing – damage to judicial independence. The politicization of judicial bodies can affect the entire judiciary or certain courts. For example, in Poland[23] and Hungary,[24] the Constitutional Court was targeted as a first step to broader changes. Under the banner of 'reform', judicial tenures were shortened, the retirement age of judges was lowered, and large numbers of independent judges were ousted from their posts, paving the way for what was described as the 'packing' of courts with government-friendly or unqualified judges.[25]

The interference with or 'weaponization' of judicial councils has arisen in several States. The political takeover of the Polish National Council of the Judiciary (NCJ) led to extensive litigation. However, threats to and concerns about the independence of judicial councils

[21] See Section 3 below; ICJ, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019.
[22] Expert interview, Poland, 3 March 2023; European Commission, 2022 Rule of Law Report, Country chapter Poland.
[23] ROLL Workshop I, 13-14 June 2023, Brussels.
[24] ROLL Workshop I, 13-14 June 2023, Brussels.
[25] In Hungary, the retirement age was changed from 70 to 62, forcing many judges into retirement. Although some were later allowed to return as judges, their earlier leadership positions in the courts were not restored. Expert interview, Hungary, 31 March 2023; ROLL Workshop I, 13-14 June 2023, Brussels.

are much more widespread, as evident in concerns raised in Hungary,[26] Slovakia,[27] and Spain.[28] Changes undermining the independence of these bodies, that play critical roles in appointing, removing, and often more broadly organizing and supporting the judiciary, have often been the precursors to subsequent improper judicial appointments. This pattern is epitomized by the appointment of what have been referred to as 'neo-judges' in Poland appointed which followed the 'reform' of the Council.[29] In Spain, there are serious problems with the independence of the judicial council, the renewal of which has been paralyzed for several years, as highlighted by the Council of Europe's Group of States against Corruption (GRECO)[30] and UN experts.[31] Similarly, in Slovakia, the independence of the judicial council has become increasingly compromised, following constitutional amendments allowing the removal of council members, and the subsequent dismissal of the Chair and several members before the end of their terms.[32]

The increased lack of transparency and political influence on the appointment of judges and court presidencies, including of high-level courts, has emerged in Bulgaria,[33] Hungary,[34] Spain[35] and Malta.[36] At times many issues that may appear minor can carry serious consequences, such as pressures or attacks on the security of tenure and certain

[26] "There was a serious smear campaign against two judges of the NJC – 450 articles published against them calling them traitors, etc., because of their meeting with the US Ambassador. This was clearly done for chilling effect to discourage other judges to speak up". Expert interview, Hungary, 27 March 2023. See also Jennifer Rankin and Flora Garamvolgyi, "Hungarian judges face media 'smears' after meeting US ambassador", *The Guardian,* 9 November 2022.
[27] Contribution from the European Association of Judges for the 2022 Rule of Law Report, pp. 2, 11; Contribution from the European Network of National Human Rights Institutions (Slovak National Centre for Human Rights) for the 2022 Rule of Law Report, p. 465-466; Contribution from the Association of Judges for the 2022 Rule of Law Report, p. 2.
[28] European Commission, 2023 Rule of Law Report Country Chapter on the rule of law situation in Spain, 5 July 2023, SWD(2023) 809 final; Hay Derecho, 2023 Rule of Law Report Targeted stakeholder consultation, 2023.
[29] *Commission v. Poland*, CJEU, C-791/19, Judgment of 15 July 2021, para. 108; *W.Ż.*, CJEU, C-487/19, Judgement of 6 October 2021, paragraph 150; *Grzęda v. Poland*, ECtHR, application no. 43572/18, Judgement of 15 March 2022; *Advance Pharma sp. z o.o v. Poland*, ECtHR, application no. 1469/20; *Dolińska-Ficek and Ozimekf v. Poland*, ECtHR, applications nos 49868/19 and 57511/19, Judgment of 8 November 2021.
[30] In the 2021 report, GRECO recommended that Spain evaluate the legislative framework governing the Judicial Council (GCJ) and its effects on the real and perceived independence of the body; its report of 2022 noted the lack of progress in implementing the recommendation.
[31] The UN Special Rapporteur on the independence of judges and lawyers in a 2024 report criticized the failure to appoint members of the General Council of the Judiciary (GCJ) in Spain, causing delays in the appointment of judges across the country, and noted that impartiality is closely linked to the free and independent functioning of the GCJ, see UN Human Rights, Spain: UN expert concerned about five-year delay in appointing General Council of the Judiciary, press release, 19 January 2024.
[32] See e.g. European Commission, 2024 Rule of Law Report Country Chapter on the rule of law situation in Slovakia, 27 July 2024, SWD(2024) 825 final; Peter Čuroš, "Fast-Tack Democratic Backsliding in Slovakia", *Verfassungsblog*, 6 September 2024 (accessed 2 December 2024).
[33] Expert interview, Bulgaria, 16 February 2023.
[34] See e.g. Joint contribution from Amnesty International Hungary and eight other CSOs for the 2022 Rule of Law Report, p. 7 on judicial secondments; ROLL Workshop I, 13-14 June 2023, Brussels.
[35] Expert interview, Spain, 10 March 2023; Greco report, 2022 Addendum to the Second Compliance Report, Spain, p. 4.
[36] Articles 91 and 96 of the Constitution of Malta; aditus and Daphne Caruana Galizia foundation, Report to the 2023 Rule of Law Report, January 2023; European Commission, 2021 Rule of Law Report Country Chapter on the Situation in Malta, p. 4-5.

labour rights of judges, as seen in Bulgaria,[37] Hungary[38] and Poland.[39] Direct attacks on judicial independence frequently involve abusive disciplinary proceedings, often linked to the independence of bodies tasked with safeguarding the integrity of the judiciary. Such instances have occurred in Bulgaria,[40] Poland,[41] Romania,[42] Slovakia,[43] Hungary,[44] and Malta.[45]

Judicial accountability is both a complement to and a necessity for the effective operation of an independent judiciary and of the rule of law. It is especially critical to ensure accountability in cases of corruption, involvement of judges in human rights violations and serious criminal acts.[46] However, there is also a risk that the conduct of the judiciary fulfilling their judicial functions may be subject to abusive criminalization in the name of judicial accountability. The trend towards expansive criminalization, and the adoption of vague offences, has led to judges and prosecutors in many countries being accused of vague criminal charges, including related to terrorism, corruption or indeed criminalizing 'judicial error'.[47] While cases of high-profile corruption within the judiciary remain an area of concern (for instance in Malta[48] and Slovakia[49]), this must not justify the resort to criminal prosecution to erode judicial independence in the name of accountability. For instance, the existence of the broad crime of "judicial malfeasance" (*prevaricación*) in Spain,[50] and its use in the arbitrary prosecution of a judge based on his judicial interpretation has authoritatively been found to be in breach of international law, but remains unremedied.[51] In Slovakia, a new criminal offence of "bending the law" provides another recent example.[52] More broadly, the pattern of critical and at times vitriolic public

[37] The lack of official competitions for merit-based promotions and the extensive use of secondments among judges. Expert interview, Bulgaria, 16 February 2023.
[38] The President of the National Judicial Office has far-reaching powers over the careers of judges, including promotions, assignments and decisions about judicial tenure. See e.g. Joint contribution from Amnesty International Hungary and eight other CSOs for the 2022 Rule of Law Report, p. 4; Contribution from the European Association of Judges for the 2022 Rule of Law Report, p. 5; Venice Commission Opinion CDL-AD(2021)036, para. 59. See also Joint contribution from Amnesty International Hungary and eight other CSOs for the 2022 Rule of Law Report, p. 7 on judicial secondments.
[39] After the reform of the NCJ in Poland, the judicial community lost the power to influence on promotion and recruitment of judges. Moreover, candidacies for the promotion of critical judges were ignored and judicially reviewed. See Venice Commission, Joint Urgent Opinion with the Directorate General of Human Rights endorsed by written procedure, replacing the 123th plenary session, 22 June 2020.
[40] Concerns regarding the Inspectorate of the Supreme Judicial Council, Expert interview, Bulgaria, 16 February 2023.
[41] See e.g. *Grzęda v. Poland*, ECtHR, application no. 43572/18, GC, Judgement of 15 March 2022.
[42] European Commission, Rule of Law Report Country Chapter on the rule of law situation in Romania, 2022, recommendations; ICJ et al., ROLL Baseline Report, p. 33-35; Expert interview, Romania, 9 March 2023.
[43] Expert interview, Slovakia, 17 March 2023.
[44] ROLL Workshop I, 13-14 June 2023, Brussels.
[45] Article 101B of the Constitution of Malta. European Commission, 2021 Rule of Law Report Country Chapter on the Rule of Law Situation in Malta, 20 July 2021, SWD(2021) 720 final.
[46] ICJ, *Practitioners Guide No. 13: Judicial Accountability*, 2016.
[47] ROLL Workshop III, 21-22 March 2024, Prague.
[48] Expert interview, Malta, 21 March 2023.
[49] ROLL Workshop III, 21-22 March 2024, Prague; Peter Čuroš, "Mária Kolíková is leaving", *Verfassungsblog*, 28 September 2022.
[50] *Garzón v. Spain*, UNHRC, communication no. No. 2844/2016, UN Doc. CCPR/C/132/D/2844/2016, 23 May 2023.
[51] *Garzón v Spain*, UNHCR (2023), *ibid*.
[52] In Slovakia, a new criminal offense called "bending of law" was introduced, allowing the prosecution of judges for allegedly arbitrary application of the law. See e.g. Consultative Council of European Judges (CCJE), Opinion of the CCJE Bureau following a request by the CCJE member in respect of Slovakia as regards the reform of the judiciary in Slovakia, CCJE-BU(2020)3, 9 December 2020, pp. 2 and 6.

attacks by politicians undermines judicial authority and threatens the independence of the judiciary in several target States, such as Hungary,[53] Slovakia and Spain.[54]

Domestic laws, rules of procedure, or judicial doctrine may pose obstacles to the invocation of international law and standards by judges whose judicial independence and individual rights are attacked. The developments in Hungary,[55] Poland,[56]and Romania[57] are testimony to an increasing trend that questions the primacy of EU law or the legitimacy of the ECtHR, in favour of the supremacy of national courts over these regional bodies. Such approaches hinder the implementation of the judgements of the CJEU and ECtHR and may prevent judges from having access to an effective remedy and reparation for the rights violations suffered.

Incidents of judicial interference must not be viewed in isolation. A measure directed at one outspoken judge, for example, can, through the chilling effect on the entire judiciary, have a profound effect on judicial independence and public confidence. An unwarranted dismissal, a severe salary reduction, improper punishment or public vilification of a judge sends a message to the broader judiciary and may influence other judges to avoid addressing sensitive and contentious issues and comply with political pressures out of fear of such punishments in the future. Actions targeting individual judges therefore often ripple through the judiciary, compromising its independence as a whole.[58]

This chilling effect on judicial independence has been recognized in many cases explored in this report. These include *Żurek v. Poland*, where the ECtHR cited the observation of the Council of Europe Commissioner for Human Rights that the disciplinary actions against an outspoken judge in Poland "are likely to have a chilling effect on other judges and prosecutors who wish to participate in the public debate […] on issues related to the administration of justice and the judiciary."[59] Similarly, in *Baka v. Hungary*, the ECtHR

[53] "There was a serious smear campaign against two judges of the NJC – 450 articles published against them calling them traitors, etc., because of their meeting with the US Ambassador. This was clearly done for chilling effect to discourage other judges to speak up". Expert interview, Hungary, 27 March 2023; Jennifer Rankin and Flora Garamvolgyi, "Hungarian judges face media 'smears' after meeting US ambassador", *The Guardian,* 9 November 2022.

[54] ICJ et al., ROLL Baseline Report, p. 47; Contribution from Civic Platform for the Judicial Independence for the 2022 Rule of Law Report, p. 16; Contribution from the Judges and Magistrates' Association 'Francisco de Vitoria' and the Independent Judicial Forum for the 2022 Rule of Law Report, p. 14; Contribution from the Professional Association of the Magistracy for the 2022 Rule of Law Report, p. 3; Associations of Judges 2021, Press Release of 21 November 2021 on the statements of politicians on judicial resolutions.

[55] Domestic rules of procedure allowing the Kúria to declare requests for preliminary references from the CJEU unlawful, despite the CJEU's finding that this is in violation of EU law, and court insistence that its decision stands. Kúria (2021), Statement regarding the judgment delivered by the Court of Justice of the EU in case C- 564/19; Procedural rules, Bt.III.838/2019/11; Judgment of the CJEU, of 23 November 2021, IS, C-564/19, ECLI:EU:C:2021:949, paras. 74-75. See also European Association of Judges, Contribution to the 2022 Rule of Law Report, p. 20 and 22, arguing that this could dissuade Hungarian courts from referring questions for a preliminary ruling to the Court of Justice.

[56] See e.g. the ruling of 14 July 2021 in case P 7/20, where the Constitutional Tribunal considered that article 4(3) second subparagraph TEU read in connection with article 279 TFEU are unconstitutional to the extent that they oblige Poland to abide by interim measures orders issued by the Court of Justice that affect the organization and functioning of Polish courts and the procedure before such courts. 2021 Rule of Law Report, Chapter on the rule of law situation in Poland, p. 7. Polish experts interviewed within the ROLL project expressed for instance: „The Constitutional Tribunal doesn't basically exist anymore" and "The Constitutional Tribunal has been turned into the third Chamber of the Parliament."

[57] See Romanian Constitutional Court, Decision No 390 of 8 June 2021 regarding the exception of unconstitutionality of the provisions of articles 881 - 889 of Law No 304/2004 on judicial organization, and of the Government Emergency Ordinance No 90/2018 on measures to operationalize the Section for the investigation of offences in the Judiciary, published in Official Gazette no. 612 of 22 June 2021.

[58] See e.g. *Żurek v. Poland,* ECtHR, application No. 39650/18, Judgement of 16 June 2022, para. 107, 227; *Baka v. Hungary,* ECtHR, application No. 20261/12, Judgement of 23 June, 2016, para. 167, 227.

[59] *Żurek v. Poland,* ECtHR, application No. 39650/18, Judgement of 16 June 2022, para. 107, 227.

noted that an unwarranted judicial sanction affects all judges and "works to the detriment of society as a whole".[60]

These and other judicial independence problems across EU Member States are highlighted in examples of important strategic litigation cases throughout the report. One such case is *Grzęda v. Poland*, before the ECtHR, illustrating a common way of undermining the independence of the judiciary, by interfering with the National Judicial Council.

***Grzęda v. Poland*, European Court of Human Rights (ECtHR)[61]**
articles 6 and 13 ECHR

Background of the case
Judge Jan Grzęda was elected to the Polish National Council of the Judiciary (NCJ) in 2016, for a term of office of four years.[62] In December 2017, the Polish Parliament passed a law that prematurely terminated the terms of office of the NCJ elected members, including Judge Grzęda. The government justified the legislative change by citing the implementation of the Polish Constitutional Court ruling of June 20, 2017 (K 5/17). The Court had determined that the existing individual term of office for members of the NCJ was inconsistent with the Polish Constitution and found that such a term should be of a joint nature. As a result, the new law introduced a completely different model for the election of judges to the NCJ, such that members would not be elected by other judges, but by the Parliament (Sejm). [63]

Litigation before the ECtHR
Judge Grzęda filed a complaint with the ECtHR in September 2018 challenging the judicial reform and shortening of his four-year term in the NCJ. Relying on articles 6(1) (right to a fair trial) and 13 (right to an effective remedy), the applicant complained of having been denied access to a court, as there had been no possibility of challenging the termination of his membership of the NCJ, and of a lack of an effective remedy in that regard.

In February 2021, the ECtHR decided that, despite the Polish government's objections, the complaint would be heard by the Grand Chamber. Several organizations submitted written comments under article 36(2) of the Convention and Rule 44(3) (the European Network of Councils for the Judiciary, Amnesty International jointly with the International Commission of Jurists, the Helsinki Foundation for Human Rights (Poland), the Commissioner for Human Rights of the Republic of Poland and the Polish Judges' Association Iustitia.) The interest of these organizations demonstrated the importance of the litigated issues.

Judgment of the ECtHR
In the judgment of March 15th, 2022, the Grand Chamber held, by 16 votes to 1, that there had been a violation of article 6(1) (right to a fair trial) of the ECHR. The Court found in particular that the lack of judicial review had breached Judge Grzęda's right to access to a court. It held that the successive judicial reforms, including that of the NCJ, which had affected Judge Grzęda, had been aimed at weakening judicial independence, exposing judges to interference by the executive and legislature.

Impact of the litigation
The Court stressed that the systematic judicial reform in Poland was aimed at weakening judicial independence and rule of law. As a result of the changes, the influence of the executive and legislative branches on the functioning of the judiciary has significantly

[60] *Baka v. Hungary,* ECtHR, application No. 20261/12, Judgement of 23 June, 2016, para. 107, 227.
[61] *Grzęda v. Poland*, ECtHR, application no. 43572/18, GC, Judgement of 15 March 2022.
[62] Article 187(3) of the Constitution of Poland.
[63] ECtHR, Information Note on the Court's case-law 260, *Grzęda v. Poland*, March 2022.

increased. Today, it is evident that the *Grzęda v. Poland* judgment is and will be of particular importance for the discussion and shaping new standards and regulations in Poland in the course of restoring the rule of law.

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2. Standards and Mechanisms on Judicial Independence

2.1. International Standards and Mechanisms

Many international human rights treaties of relevance to judicial independence related claims, are applicable within Europe. These include, at the European regional level, the European Convention on Human Rights (ECHR), the European Social Charter and the EU Charter of Fundamental Rights (EU Charter). At the universal level, all nine principal human rights treaties and their substantive Optional Protocols, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child, engage the question of judicial independence. This is because all provide for the right to effective remedies, including judicial remedies, and some directly engage the right to a fair trial in criminal or civil matters.

These treaties are supervised and administered by institutions and mechanisms that promote and protect the rule of law and judicial independence – including courts and treaty bodies that provide jurisprudence and commentary on the interpretation of their respective conventions.

This section provides an overview of regional and universal standards on judicial independence that define and clarify the legal obligations of States, in particular in the focus countries, and of related mechanisms. These standards and mechanisms provide tools for strategic litigation, complementing judicial independence safeguards in national legal and constitutional frameworks.[64]

2.1.1. Council of Europe

The Council of Europe (CoE) comprises 46 Member States, including all EU Member States. All CoE Member States are parties to the **European Convention on Human Rights (ECHR)**,[65] and the **European Court of Human Rights (ECtHR or the Court)** oversees its implementation by issuing judgements which are binding on CoE Member States. An important feature of the ECtHR is its ability to receive complaints from any individual, or exceptionally NGOs, who have suffered significant harm as a result of rights violations of the ECHR within the jurisdiction of CoE Member States,[66] provided that national 'domestic' remedies have been exhausted. The ECtHR has developed a rich jurisprudence on rule of

[64] For example, the Polish Constitution of 1997 in its article 178 also protects judicial independence, or the Spanish Organic Law 6/1985 of 1 July, of the judiciary in its article 1 states that justice is administered by judges and magistrates which are independent and solely subject to the Constitution and the rule of law..

[65] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950 [hereafter ECHR].

[66] Article 34 ECHR states that "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto" after having exhausted domestic remedies and complied with the time limit. However, the ECtHR recognizes NGO standing when there is a direct and sufficient link between the harm complained of and the individual rights of its members (*Verein Klimaseniorinnen Schweiz and others v. Switzerland*, ECtHR, application no. 53600/20, Judgement of 9 April 2024, paras. 618-619).

law matters, including the independence of the judiciary, access to justice and accountability for human rights violations.[67] It can also order urgent interim measures[68] to prevent irreparable harm before a case can be heard fully on its merits, although the Court has tended to take a narrow view limiting exercise of this power to exceptional circumstances such as where life or limb is in immediate peril.

Following a judgment, the **Committee of Ministers (CoM) of the CoE** supervises its implementation. This is an enforcement mechanism[69] with which persons whose rights have been violated, litigators, and NGOs increasingly engage, as they seek to ensure implementation of the judgements. Implementation may pose complex problems, particularly when systemic change is required for an effective remedy rather than simpler forms of reparation, as discussed in Section 4 on Challenges. Nonetheless, the binding nature of ECtHR judgments, and the enforcement role of the CoM, make the ECHR one of the most effective rule of law instruments.

Several expert and advisory bodies of the CoE also work closely on the rule of law and judicial independence in different capacities. While not courts or quasi-judicial bodies, they play complementary roles, bolstering standards and the oversight of judicial independence. They may also support or intervene in litigation or collaborate to enhance its effectiveness or implementation (see Section 4).

The European Commission for Democracy through Law **(Venice Commission**), one of the leading CoE advisory bodies on constitutional matters, issues authoritative opinions and advises Member States to help bring legal and institutional structures in line with CoE and international human rights and rule of law standards.[70] The Venice Commission has, for example, issued critical opinions on Member States' legislation related to the administration of justice, providing evidence of rule of law backsliding.[71] The Commission has developed the broader Rule of Law checklist,[72] an operational tool for assessing the level of rule of law compliance in any State, based on six criteria, including '*Access to justice before independent and impartial courts'*.[73] According to the detailed standards set down by the Venice Commission, reflecting international law, this requires constitutional protections for judges, limited interference with judicial appointments and impeachment, the independence of a judicial supervisory body, and sufficient financial autonomy for the judiciary.

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[67] See e.g. ECtHR, Key Theme - Article 6 (civil) Protection of the judiciary, summarizing some of the court's case law on the protection of the judiciary.
[68] The ECtHR ordered interim measures in the cases of *Synakiewicz v. Poland*, ECtHR, application no. 46453/2; Niklas-*Bibik v. Poland,* ECtHR, application no. 8687/22; *Piekarska Drążek v. Poland*, ECtHR, application no. 8076/22. See also 'Interim Measure in Cases Concerning Transfers of Polish Judges', ECHR 379 (2022) (accessed 23 November 2024).
[69] See e.g. Council of Europe Department for the Execution of Judgments of the European Court of Human Rights, *Supervisory role of the Committee of Ministers under Article 46 of the European Convention on Human Rights in respect of developments subsequent to a judgment of the European Court of Human Rights*, CM/Inf/DH(2022)9, 4 March 2022.
[70] See e.g. Venice Commission, Report on the rule of law, adopted by the Venice Commission at its 86th plenary session, Venice, 25-26 March 2011; Venice Commission, Report on judicial appointments, adopted by the Venice Commission at its 70th Plenary Session, Venice, 16-17 March 2007.
[71] See for example Venice Commission, 'Georgia - Follow-up opinion on previous opinions concerning the Organic Law on Common Courts, adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023); Venice Commission, 'Romania - Urgent Opinion on three Laws concerning the justice system' issued on 18 November 2022, pursuant to article 14a of the Venice Commission's Rules of Procedure, adopted by the Venice Commission at its 133rd Plenary Session, Venice, 16-17 December 2022.
[72] Venice Commission, Rule of Law Checklist, adopted at its 106th Plenary Session, Venice, 11-12 March 2016.
[73] *Legality*:*Legal certainty Prohibition of arbitrariness Respect for human rights Non-discrimination and equality before the law*

The **Consultative Council of European Judges (CCJE)** contributes to the implementation of the Framework Global Action Plan for Judges in Europe,[74] adopted by the Committee of Ministers to strengthen the role of judges in Member States. It also serves an advisory function on general questions regarding independence, impartiality and competence of judges. To fulfil this role the CCJE prepares opinions for the Committee of Ministers or other CoE bodies upon request.[75]

The **European Commission for the Efficiency of Justice (CEPEJ)**, in turn, is charged with enhancing the efficiency and functioning of justice in the Member States. Its methods of work include analyzing judicial systems, identifying obstacles, evaluating and defining ways to improve, and providing assistance at the request of CoE Member States.[76]

The **Commissioner for Human Rights of the CoE** supports Member States in the implementation of CoE human rights standards.[77] In this role, the Commissioner has commented on judicial independence[78] and issued specific reports on the situation in selected CoE Member States.[79] The Commissioner can also intervene as a third party in proceedings, and has frequently done so before the ECtHR.[80] In the 2024 1st Quarterly Activity Report[81] the Commissioner warned that the situation of judicial independence in certain States poses existential risks to the rule of law.

The CoE's **Parliamentary Assembly (PACE)**, a representative body consisting of parliamentarians from the Council's Member States, has also addressed rule of law issues, including the independence of the judiciary. For example, its 2017 Resolution on 'New threats to the rule of law in Council of Europe Member States' remains pertinent.[82]

2.1.2. European Union

The rule of law and judicial independence are expressed in the law of the European Union (EU) as fundamental values upon which the EU is built.[83] These principles are embedded

[74] Consultative Council of European Judges, Framework Global Action Plan for Judges in Europe, Strasbourg, 12 February 2001.
[75] See CCJE opinions and Magna Carta of Judges, available on the dedicated website of the Council of Europe.
[76] Council of Europe, About the European Commission for the efficiency of justice (CEPEJ),(accessed 23 July 2024).
[77] Article 3.a., Council of Europe, Commissioner for Human Rights, Resolution (99) 50, adopted by the Committee of Ministers on 7 May 1999 at its 104th Session.
[78] Council of Europe, Commissioner for Human Rights, 'The independence of judges and the judiciary under threat' (accessed 23 November 2024).
[79] See e.g. Council of Europe, Commissioner for Human Rights, 'Report on the visit to Hungary from 4 to 8 February 2019 by Dunja Mijatović'.
[80] See e.g. Council of Europe, Commissioner for Human Rights, 'Third Party Intervention under article 36, paragraph 3, of the European Convention on Human Rights, application no. 17764/22, *C.O.C.G. and Others v. Lithuania*'.
[81] Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, '1st Quarterly Activity Report 2024 (1 January to 28 March)', presented to the Committee of Ministers and the Parliamentary Assembly.
[82] Parliamentary Assembly of the Council of Europe, New threats to the rule of law in Council of Europe Member States: selected examples, Resolution 2188 (2017).
[83] Article 19 Treaty on European Union (Consolidated version), Official journal C 326/13 [hereinafter TEU] gives concrete expression to the value of the rule of law as affirmed in article 2 TEU and assigns the responsibility for ensuring the full application of EU law and judicial protection of the rights of individuals under that law to both national courts and tribunals as well as to the CJEU. Article 19(1) TEU provides that "*The Court of Justice of the European Union (…) shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*."

in the founding **Treaties of the EU**[84] and in the **EU Charter of Fundamental Rights**,[85] which recognizes the independence of the judiciary as a pre-requisite for the effective protection of human rights and protects the right to an effective remedy and a fair trial by an independent and impartial tribunal in article 47.[86] Under these provisions, as interpreted by the **Court of Justice of the European Union (CJEU),** Member States may not change the organization of their justice system in a way that lowers the level of protection for the rule of law, an obligation reflecting the principle of non-regression of rule of law.[87]

The EU Treaties establish a framework for standard setting and ensuring oversight of judicial independence and important judicial independence litigation to uphold those standards has taken place before the CJEU. Access to this court, however, is, as a general rule, not available for individuals, unlike the ECtHR where victims have a right to bring claims of violations by CoE member states, or most UN Treaty Bodies which are available while providing that States have accepted such jurisdiction under the pertinent provisions of the respective UN treaties.[88] Instead, most cases reach the CJEU through the **preliminary ruling** procedure, whereby the CJEU answers questions on the interpretation and application of EU law emerging in domestic proceedings.[89] Litigants may therefore attempt to have their case brought before the CJEU by formulating their case so as to invoke questions or EU law and requesting the national court dealing with it to refer it to the CJEU for a preliminary ruling. The CJEU also deals with **infringement proceedings**, which can be initiated by the European Commission[90] or another Member State, if it considers that a Member State has failed to fulfil an obligation under the Treaties.[91] The CJEU can also issue **interim measures** to prevent irreparable harm to the independence of the judiciary or other crucial institutions or systems in a rule of law crisis.[92] Generally, interim measures are granted when three requirements are met: (i) the action in the main proceedings appears to be of reasonable substance, (ii) there is a risk of serious and irreparable harm, and (iii) the interim measure balances the interests of the parties and the public.[93]

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[84] See e.g. article 2 TEU, which provides "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*"

[85] Charter of Fundamental Rights of the European Union (2007/C 303/01), C 303/1, 14 December 2007.

[86] See EU Charter Preamble, states "*This Charter reaffirms (…) the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights*." See also 2024 Rule of Law Report, Communication, p. 1.

[87] *Repubblika*, CJEU, C-896/19, judgement of 20 April 2021, para. 65.

[88] Article 263 TFEU states that the CJEU may review legislative acts of the European institutions upon request of member states, the European Parliament, the Council or the Commission, the Court of Auditors or the Central Back. While individuals and legal can also institute proceedings against an act, the act has to be of direct and individual concern to the applicant, or if not, it should not entail implementing measures which are of direct and individual concern to them. NGOs do not generally have direct access to the CJEU unless they can prove they are directly and individually affected by a measure (Case C-25/62, *Plaumann & Co. v. Commission of the European Economic Community*, Judgment of the Court of 15 July 1963, [1963] ECR 95, reiterated over the years). Treaty on the Functioning of the European Union (Consolidated version), Official journal C 326 [hereinafter TFEU].

[89] Article 19 TEU, and article 267 TFEU.

[90] The European Commission is the EU institution tasked with ensuring the application of the EU's Treaties, and of measures adopted by the institutions. It oversees the application of Union law under the control of the CJEU and executes the budget and manages programmes, exercising coordinating, executive and management functions of the EU. Article 17 TEU.

[91] Article 258 TFEU.

[92] Article 279 TFEU.

[93] See e.g. CJEU, 'Press Release No 204/18: Luxembourg, 17 December 2018, Order of the Court in Case C-619/18 R, *Commission v. Poland*', 2018, OJ C 204/18.

When a Member State persistently breaches the EU's 'founding values', the **procedure under article 7 of the Treaty on the European Union (TEU)** provides for an important accountability measure that can be invoked by EU institutions to ensure that rule of law and human rights are respected.[94] The article 7 procedure was initiated by the Commission against Poland in December 2017 and the by the European Parliament against Hungary in September 2018.[95] In May 2024, the Commission announced the closure of the procedure against Poland, following a change in government and the adoption of plans for remedying the rule of law issues in the country.[96]

Since January 2021, the **Conditionality Regulation**[97] provides for the possibility of suspension of payments or financial corrections to EU Member States in cases of breaches of the rule of law principles, which affect or seriously risk affecting the sound financial management of the EU budget. In the context of the rule of law crisis in Hungary, in December 2022, the European Council decided to apply the mechanism on the recommendation of the European Commission, suspending around 6,3 billion EUR in payments to Hungary.[98] As Hungary has only partial taken required remedial action to date, the suspension remains in place.[99] EU funding to Hungary has also been suspended under the Recovery and Resilience Fund.[100] Overall, the funding that remains locked for Hungary under different EU funds amounts to around 21 billion EUR (as of December 2023).[101]

Since 2020, the **European Commission** has also issued a yearly **Rule of Law Report**, which, since 2022, includes recommendations to Member States.[102] Civil society organisations are invited to contribute to these reports by making submissions to the Commission highlighting concerns about compliance with the rule of law in specific EU Member States.[103] The rule of law dialogue, discussing the rule of law situation in Member States based on the Commission's Rule of Law report, is regularly conducted in the General Affairs Council.[104]

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[94] Provided for in Article 2 TEU.

[95] European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 2017/0360 (NLE), 20 December 2017; European Parliament, European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union (2017/2131(INL)).

[96] European Commission, "Commission intends to close Article 7(1) TEU procedure for Poland", 6 May 2024.

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

[98] European Council, Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary; Council of the EU, "Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary", Press release of 12 December 2022.

[99] The conditions for the unfreezing of this funding include taking remedial measures to prevent the risk of misappropriation and embezzlement of the funds through corruption and improper procurement in the country, *ibid*.

[100] European Commission, Commission Decision C(2023)8999 final of 13 December 2023.

[101] European Commission, "Commission considers that Hungary's judicial reform addressed deficiencies in judicial independence, but maintains measures on budget conditionality", press release, 13 December 2023. Another instrument that has encouraged reforms relevant to the rule of law and human rights is the horizontal enabling condition under the Common Provisions Regulation (Charter HEC), under which Member States are required to put in place effective mechanisms to ensure compliance with the EU Charter at all stages when implementing EU programmes. This includes compliance with the Charter right to an effective remedy and fair trial by an independent and impartial tribunal. 2024 Rule of Law Report, Communication, p. 6-7.

[102] See European Commission, 2024 Rule of Law Report, 24 July 2024; European Commission, 2023 Rule of Law Report, 5 July 2023.

[103] European Commission, 2024 Rule of Law Report - targeted stakeholder consultation, 24 July 2024.

[104] For further detail on EU work on the rule of law see e.g. 2024 Rule of Law Report, Communication, p. 2-9.

2.1.3. United Nations

The United Nations framework embodies many standards relevant to rule of law and judicial independence. The UN Human Rights Council has set out its conception of the contents of the rule of law in its 2012 Resolution 19/36 on "Human Rights, Democracy, and Rule of Law" (see box below).[1] While the protection of all internationally recognized human rights is integral to the rule of law, there are certain human rights obligations that are especially critical for the implementation the rule of law in a more directly operational sense, particularly those related to the fair administration of justice. Legally binding human rights treaties at universal level contain obligations for States to guarantee a range of rights, including the right to a competent, independent and impartial tribunal established by law and the right to effective remedies, including judicial remedies by an independent tribunal.

The UN Human Rights Council Resolution on the rule of law

The UN Human Rights Council has set out its conception of the contents of the rule of law in its 2012 Resolution 19/36 on "Human Rights, Democracy, and Rule of Law".[1] The Resolution establishes benchmark standards for the work of the Council, including at periodic forums on the rule of law, democracy and human rights. Among the efforts that States are called upon to make to strengthen the rule of law are:

> *(a) Upholding the separation of powers by taking appropriate constitutional, legislative, judicial and other institutional measures;*
> *(b) Upholding the independence and the integrity of the judiciary;*
> *(c) Ensuring that a sufficient degree of legal certainty and predictability is provided in the application of the law, in order to avoid any arbitrariness;*
> *(d) Taking active and consistent measures aimed at increasing awareness among the population of their human rights and of their possibilities of resorting to remedies, as established by law and international human rights instruments and mechanisms, when their rights are infringed;*
> *(e) Engaging with civil society organizations and institutions and enabling them to participate in the public debate on decisions that would contribute to the promotion and protection of human rights and the rule of law and of any other relevant decisions;*
> *(f) Ensuring increased public access to information in a manner that can be understood by people and groups in society regarding the exercise of their rights;*
> *(g) Taking active measures to provide equal access to persons with disabilities through means such as the identification and elimination of obstacles and barriers to accessibility, in order to ensure their full participation in all aspects of the democratic processes;*
> *(h) Taking appropriate measures and steps to amend electoral laws in order to enable people to vote and participate in elections, without unreasonable restrictions;*
> *(i) Establishing or strengthening national human rights institutions, in compliance with the Paris Principles;*
> *(j) Guaranteeing that no individual or public or private institution is above the law, by ensuring that:*
> *(i) The principles of equal protection before the courts and under the law are respected within their legal systems and applied without discrimination to all persons within their jurisdiction;*
> *(ii) Impunity is not tolerated for violations of human rights law and international humanitarian law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through domestic mechanisms or, where appropriate, international*

mechanisms, in accordance with international human rights obligations and the commitments of States;
(iii) All Government agents, irrespective of their positions, are promptly held fully accountable, consistent with applicable domestic law and international obligations, for any violation of the law that they commit;
(iv) The administration of justice is free from any form of discrimination;
(v) Comprehensive anti-corruption strategies and measures are adequately developed and applied in order to maintain the independence and impartiality of the judiciary, and to ensure the moral integrity and accountability of the members of the judiciary, legislative and executive powers;
(vi) The military remains accountable to relevant national civilian authorities;
(vii) Military courts or special tribunals are independent, competent and impartial, and that such courts or tribunals apply established procedures of due process of law and guarantees of a fair trial, in accordance with domestic law, international human rights obligations and international humanitarian law;
(k) Respecting equal protection under the law, by:
(i) Ensuring the right to life, liberty and security of person without discrimination, fully guaranteeing the right of everyone to recognition as a person before the law;
(ii) Ensuring that everyone has equal access to information regarding their rights and equal access to justice, including through non-judicial measures;
(iii) Taking active measures to improve the access to justice for all, including minorities, whose full exercise of human rights is impeded by, inter alia, the lack of information and/or resources and any discriminatory or arbitrary measures;
(iv) Incorporating the principle of equality of men and women under the law;
(v) Guaranteeing the right to a fair trial and to a due process of law without discrimination, including the right to be presumed innocent until proven guilty according to law, and the right of everyone convicted of a crime to have their conviction and sentence reviewed by a higher tribunal according to law;
(vi) Promoting continuously the independence, impartiality and integrity of the judiciary;
(vii) Guaranteeing to victims of human rights violations the right to effective remedies, including reparations, as subject to determination by competent authorities and consistent with international obligations;
(viii) Encouraging the continuous training of public servants, military personnel, parliamentary experts, lawyers, judges at all levels and the staff of the courts, as appropriate to their area of responsibility, on international human rights obligations and commitments, in particular with respect to legal aspects and procedures relating to equality under the law;
(ix) Supporting inclusive and democratic approaches in the elaboration and revision of fundamental laws and regulations that underpin democracy and the rule of law, human rights and fundamental freedoms;

The primary overarching universal standards regarding judicial independence specifically are contained in the **UN Basic Principles on the Independence of the Judiciary**.[105] These Principles provide that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[106] The Basic Principles address the main elements of judicial independence, including: the freedom of expression and association of judges; judicial capacity, qualifications, and training; appointment procedures; conditions of service and training,

[105] United Nations, Basic Principles on the Independence of the Judiciary, 6 September 1985, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[106] Basic Principles on the Independence of the Judiciary, Principle 1.

professional secrecy and immunity; and discipline, suspension, and removal, all of which are linked to the protection of judicial independence.

The Basic Principles are complemented and further developed by other instruments, such as the **Bangalore Principles of Judicial Conduct**,[107] adopted in 2006. These Principles articulate "fundamental values" for the rule of law including independence, impartiality, integrity, propriety, equality, competence and diligence. They also provide guidance on the applicability of these values and their implementation. The Bangalore Principles are widely regarded as the leading universal instrument addressing judicial accountability, and should be read together with the accompanying Commentary[108] and the Measures for Effective Implementation of the Bangalore Principles,[109] elaborated by the Judicial Integrity Group, under the UN Office of Drugs and Crime (UNODC). Regarding judicial accountability, it is also critical to note the UN Convention against Corruption, article 11(1) of which requires States to strengthen integrity and prevent corruption among the judiciary, bearing in mind the importance of judicial independence.[110]

UN human rights treaties are supervised by Treaty Bodies, which may engage with the question of judicial independence, the right to a fair trial, and other key rule of law precepts, and play a quasi-judicial role alongside other overlapping or complementary functions. For instance, the **UN Human Rights Committee**, the supervisory body for the ICCPR, addresses the State obligation to respect and ensure judicial independence through its three main competencies. These are: 1) the monitoring and evaluation of the compliance of State Parties with all provisions the ICCPR through the State reporting and review function; 2) producing statements of authoritative interpretation of the ICCPR in consolidated form through General Comments that address specific provisions or themes of the ICCPR; and 3) adopting Decisions and Views in response to individual petitions alleging violations of the ICCPR. The latter function is applicable to States that have ratified the Optional Protocol to the ICCPR.[111] Most of the other UN Human Rights Treaties have similar competency to adjudicate individual communications (complaints), either through optional protocols or by optional provisions in the main treaties themselves.[112]

Multiple General Comments (GC) elaborate on the nature and scope of State obligations pertaining to particular rights and treaty provisions, providing detailed normative tools to address challenges to judicial independence. These include, for instance, the Human Rights Committee's GC 32 elaborating on article 14 of the ICCPR which addresses fair trial rights. The Committee here makes clear that the "requirement of competence, independence and impartiality of a tribunal […] is an absolute right that is not subject to any exception"[113]

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[107] Bangalore Principles of Judicial Conduct, adopted by the United Nations Economic and Social Council (ECOSOC) Res. 2006/23, July 2006.
[108] The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct, March 2007.
[109] The Judicial Integrity Group, Measures for Effective Implementation of the Bangalore Principles, 21-22 January 2010.
[110] Specifically it states: "Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary."
[111] In regard to states that are parties to the first Optional Protocol to the ICCPR. Optional Protocol to the International Covenant on Civil and Political Rights, 17 September 1966, General Assembly resolution 2200A (XXI). See e.g. the *Garzón* case;
[112] For an overview, see e.g. UN Human Rights, Individual Communications: Human Rights Treaty Bodies (accessed 9 December 2024).
[113] UNHRC, General Comment 32, paras. 19 and 25. Para. 19 additionally provides that: "The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the

and that it "entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive" in the judicial function. It also establishes that "decisions regarding removal or sanction [of judges] must be made wholly independently of the executive".[114]

Many other GCs and the jurisprudence of the UNHRC in individual complaints concerning judicial independence provide a fairly elaborate set of international standards benchmarking what is required of States.[115] While the individual complaints mechanism is only accessible for victims of violations of the ICCPR and where State Parties have ratified Optional Protocol 1 allowing for such complaints, a number of important judicial independence cases have been brought before the UNHRC using the mechanism.[116] While UN Treaty Bodies may not offer the same enforcement mechanisms as courts, they do also have a follow-up mechanism,[117] and can prove a useful alternative or complement to regional judicial venues.

In addition to UN Treaties, 'Charter-based mechanisms', established under the auspices of the **Human Rights Council (UNHRC)**, also address rule of law issues, including individual petitions. Key among these are the Special Procedures, consisting of independent experts tasked to address specific human rights themes or the situation of human rights in individual countries, and the Universal Periodic Review, by which States at the Council assess the human rights performance of every country on regular and periodic basis. These mechanisms contribute significantly to standard-setting. The UN Human Rights Council has also adopted multiple resolutions on rule of law issues, including 19/36 on Human Rights, Democracy and Rule of Law and its successor resolutions; resolutions on the independence of judges and lawyers;[118] and on the administration of justice.[119]

Among the Special Procedures mandates is the **Special Rapporteur on the independence of judges and lawyers** (the Special Rapporteur) who promotes and protects the independence of the judiciary. However, all Special Procedures have mandates which either closely intertwine with judicial independence or are dependent on judicial independence, given its fundamental role in the implementation of all human

judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation**.** In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."

[114] UNHRC, General Comment 32, §25. Other GCs address particular rights at stake in the case, e.g. GC 35.

[115] See e.g. UNHRC, General Comment no. 35, UN Doc. CCPR/C/GC/35, 16 December 2014; UNHCR, General Comment no. 34, UN Doc. CCPR/C/GC/34, 12 September 2011; *Garzón v. Spain*, UNHRC, communication no. 2844/2016, UN Doc. CCPR/C/132/D/2844/2016, 23 May 2023.

[116] See e.g. *Garzón v. Spain*, UNHRC, communication no. 2844/2016, UN Doc. CCPR/C/132/D/2844/2016, 23 May 2023; *Mikhail Ivanovich Pastukhov v. Belarus*, UN Doc. CCPR/C/78/D/814/1998 (2003).

[117] See e.g. International Service for Human Rights, ISHR Academy, Treaty Bodies, 1.10 Follow-up - What do the Treaty Bodies do? (accessed 27 November 2024).

[118] UNHRC, Resolution 29/6. Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc. A/HRC/RES/29/6, 21 July 2015; UNHRC, Resolution 44/9 Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc. A/HRC/RES/44/9, 16 July 2020.

[119] UNHRC, Resolution 24/12. Human rights in the administration of justice, including juvenile justice, UN Doc. A/HRC/RES/24/12, 8 October 2013. The UNHRC has also adopted a number of other relevant resolutions related to for instance the rule of law, arbitrary detention, democracy and human rights. See e.g. UNHCR, Resolution 50/15. Freedom of opinion and expression, UN Doc. A/HRC/RES/50/15, 8 July 2022; UNHRC, Resolution 44/12. Freedom of opinion and expression, UN Doc. A/HRC/RES/44/12, 24 July 2020; UNHRC, Resolution 15/21. The rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/RES/15/21, 6 October 2010.

rights, the right to an effective remedy or judicial review of legislation with human rights implications.[120]

The Special Rapporteur on the independence of the judges and lawyers has played multiple roles of importance. Those include interpretation of the legal and conceptual framework and elements surrounding judicial independence and the role of legal professionals, commentary on legal and policy developments and recommendations to individual States, which may provide sources of evidence or support for litigation initiatives.[121] The Special Rapporteur's overarching or detailed thematic reports often contribute to benchmarking international standards on specific underexplored issues or the state of play globally on these issues.[122] Any stakeholders, including civil society actors and affected judges, may also provide information on a particular situation, including communications that are tantamount to complaints. While the Special Rapporteur does not perform an adjudicative function, they may engage with the concerned State on the matter, and offer their own views. In turn, these reports are often taken into account by human rights mechanisms when deciding cases concerning judicial independence. For instance, the ECtHR referred to the 2019 Special Rapporteur report[123] when ruling that the right to freedom of expression of judges may become a duty to speak up in defence of the rule of law and judicial independence, when these are threatened.[124] Special Procedures mandates increasingly seek to enhance their impact by issuing joint statements and reports.

2.2. The interface between judicial independence and human rights

Judicial independence in the fair administration of justice is essential to protect human rights. In turn, human rights protection is indispensable to ensuring judicial independence. Judicial independence and the rule of law are complementary and mutually reinforcing, as are the rule of law as a whole and human rights. Where judicial independence is undermined or otherwise not secured, human rights cannot be protected. Interference with judicial independence adversely affects the rights of all those who come into contact with the justice system or are dependent upon access to justice to give effect to the full range of civil, political, economic, social and cultural rights.

Judges, like all other persons, must be guaranteed the protection of the full range of human rights without discrimination. There are often pressures on the enjoyment of several rights in particular when it comes to the judiciary. In practice, the rights to a fair trial, liberty, respect for private life, and freedom of expression, association and assembly, the right to public and political participation, have been particularly prevalent in judicial independence litigation. This is, perhaps, due to these rights being particularly prone to unjustifiable restrictions or violations, or due to them being the most straight-forward to litigate.[125]

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[120] Consider for instance the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the rights to freedom of peaceful assembly and of association.
[121] The comments on legislation and policy are available at Office of the High Commissioner for Human Rights (OHCHR), 'Special Procedures: Comments on Legislation and Policy' (accessed 23 November 2024).
[122] See e.g. Margaret Satterthwaite, Reimagining justice: confronting contemporary challenges to the independence of judges and lawyers, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/53/31, 10 July 2023; Diego García-Sayán, Judicial independence in the context of the 2030 Agenda for Sustainable Development, Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/77/160, 13 July 2022.
[123] Human Rights Council, 'Independence of Judges and Lawyers: Report of the Special Rapporteur on the Independence of Judges and Lawyers', A/HRC/41/48, 29 April 2019 (accessed 23 November 2024).
[124] *Zurek v. Poland*, ECtHR, application no. 39650/18, Judgment of 10 October 2022, para. 222.
[125] See e.g. United Nations, Basic Principles on the Independence of the Judiciary, 6 September 1985, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 8.

Human rights, with certain exceptions, are however not absolute, and some rights are subject to derogation or restrictions. For example, the ICCPR and the ECHR both contain limitation clauses allowing for narrowly tailored **restrictions** on a number of rights, such as freedom of movement, freedoms of expression, association or peaceful assembly. However, such restrictions are only permissible where they are clearly and precisely provided for by law (principle of **legality**); where **necessary** for one of the enumerated legitimate aims enumerated in the treaties, including "respect of the rights or reputations of others" and "the protection of national security, public order, or public health or morals (principles of necessity and legitimacy); and only where the limiting measure pursued is the least restrictive measure (principle of **proportionality**)".[126] The ECHR specifically lists "the authority and impartiality of the judiciary" as an interest justifying restrictions to the freedom of expression,[127] while the Bangalore Principles contain the proposition that protecting the dignity and integrity of judicial office and the impartiality of the judiciary can justify certain restrictions.[128]

The principle that restrictions of rights may only pursue defined legitimate motives and not ulterior motives is particularly important where seemingly permissible measures are used to undermine judicial independence.[129] The ECtHR has, for instance, found a violation of article 18 ECHR, prohibiting the use of restrictions for purposes other than those provided in the convention; the Court found that a judge had been suspended, not due to a violation of judicial ethics as claimed by the authorities, but based on the ulterior motive of punishing him for verifying the lawfulness of judicial appointments.[130]

Judicial accountability is itself a dimension of the rule of law, ensuring that judges do not misuse or abuse their authority. At the same time, strict scrutiny of measures that may impair judicial independence is required given its fundamental importance. As noted above, restrictions on rights must pursue a legitimate aim, be clearly provided for in law, be necessary and proportionate, be non-discriminatory and be accompanied by procedural safeguards.

Judicial independence litigation in EU Member States has revolved around alleged violations of one or several of the following rights of judges:

2.2.1. Fair trial rights and the right to an effective remedy

Access to an independent and impartial tribunal is a fundamental aspect of the right to a fair trial, the right to an effective remedy, and access to justice (articles 6 and 13 ECtHR, article 47 EU Charter (read in conjunction with article 2 TEU), articles 2(3) and 14 ICCPR). The right to a fair trial before an independent and impartial tribunal is an absolute right, not subject to exception, and a core non-derogable right applicable at all times and recognized as customary international law.[131] This right ensures that judges must decide

[126] See e.g. articles 19(3), 21, 22(2) ICCPR. See also General Comments 34 and 37 of the Human Rights Committee, which spell out the conditions for restrictions in greater detail. Similar language can also be found in the ECHR, see e.g. articles 8(2) and 10(2). In addition, a special limitation regime applies during times of declared public emergency where necessary and proportionate derogations may be permissible, see article 15 ECHR, article 4 ICCPR; ICJ, *ICJ Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis*; ICJ, *Legal Commentary to the ICJ Geneva Declaration*, Human Rights and Rule of Law Series: No. 3, 2011; American Association for the ICJ, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1984.

[127] Article 10(2) ECHR.

[128] See e.g. UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct (the Bangalore Principles), UN Doc. E/RES/2006/23, 2006, Value 2.4 and 3.

[129] See article 18 ECHR, articles 52 and 54 EU Charter, article 5 ICCPR.

[130] *Juszczyszyn v. Poland,* ECtHR, application no. 35599/20, Judgement of 6 October 2022, para. 338.

[131] Human Rights Committee, General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 19.

cases fairly, independently and impartially, without fear or favour, to protect the rights of all persons under the jurisdiction of a State, including judges themselves.

States have an obligation under human rights law not only to refrain from interfering with judicial independence but to protect and promote it. In order to fulfil this obligation, States must put in place legal, institutional, policy and practical measures that safeguard the protection of this core rule of law element. The Special Rapporteur on the independence of judges and lawyers has emphasized the obligation to 'adopt all appropriate measures' to ensure institutional independence and impartial decision-making by judges.[132] This includes establishing clear **procedures** for appointing, remunerating, promoting, suspending, dismissing or disciplining judges, as well as creating legal and institutional frameworks that guarantee judicial independence.

The discharge of this obligation will generally require the establishment of appropriate, independent national institutions, such as independent judicial councils, containing at least a majority of judges.[133] They certainly include safeguards against the arbitrary sanctioning of judges; the principle of irremovability, which the Venice Commission has expressed should be incorporated in national constitutions;[134] the requirement that authorities involved in disciplinary proceedings be independent; and clear standards defining which conduct can lead to the removal of a judge or a change in their status.[135] Many courts, bodies and standards stress the importance of independence from the executive and legislative branches in terms of the body's appointment procedures, 'safeguards' and 'appearance' of independence.[136] Likewise, in the resolution of alleged attacks on their own rights, it is imperative that judges have access to an independent and impartial tribunal and stringent due process safeguards – which unsurprisingly are often compromised in situations where judicial independence is undermined.

Many other forms of interference with judicial independence have been raised in particular cases discussed in the next section. For example, considerations such as the adequate remuneration of judges may also be relevant to maintaining the dignity of the profession, while ensuring budgetary autonomy to reduce the possibilities of undue external influence.[137]

2.2.2. Right to respect for the right to privacy and private and family life

The right to privacy and respect for private life (article 8 ECHR, article 7 EU Charter, articles 1.1 and 17 ICCPR) is a broad right that encompasses the development of one's professional life, career, reputation and relations with others.[138] It protects against unjustifiable attacks on honour, reputation, health and well-being, and requires States to adopt "adequate legislation" and other measures to ensure that individuals are "effectively

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[132] See e.g. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/38/38, 2 May 2018 (2018 report).

[133] Human Rights Committee General Comment 32; *Ibid* (application 017/2021), Judgment (22 Sept 2022), §97 on the obligation to establish appropriate national institutions and to guarantee the independence of the courts. Special rapporteur report on judicial councils. ADD REF HD

[134] *Ibid.*

[135] Venice Commission, 'European Standards on the Independence of the Judiciary: A Systematic Overview', Study No. 494/2008, CDL-JD(2008)002, 3 October 2008, pg. 5.

[136] *Volkov v. Ukraine*, ECtHR, application No 21722/11, Judgment of 9 January 2013, paras. 72-77, 79, 81 and 84. Para. 103 notes that to establish whether a tribunal is "independent" regard must be had to manner of appointment of members, safeguards against external pressure and appearance of independence.

[137] *Ibid*, p. 6.

[138] *Taliadorou and Stylianou v. Cyprus*, ECtHR, applications nos. 39627/05 and 39631/05, Judgment of 16 October 2008, para. 53. *See also, Sidabras and Dziautas v. Lithuania*, ECtHR, applications nos. 55480/00 and 859330/00, Judgment of 27 July 2004, para. 48.

able to protect [themselves] against any unlawful attacks that do occur and to have an effective remedy against those responsible".[139]

In accordance with the legal framework, certain restrictions on the career and personal development of judges may be permissible (or indeed required), but only if they meet the criteria of being provided for in clear law, pursuing a 'legitimate aim' of protecting judicial institutions, and are necessary and proportionate to that aim and applied with appropriate safeguards. Assessing such restrictions requires an evaluation of all relevant facts, including the nature, and duration of the measures, the reasons justifying them, whether steps could and should have been taken to mitigate their impact on the judges' rights, and whether the restrictions were in all the circumstances proportionate.[140] As the ECtHR makes clear, the dismissal of a judge for corruption following a fair trial may be a justifiable restriction, whereas restrictive measures based on vague or unsubstantiated accusations of impropriety and 'inappropriate attitudes' would not be sufficiently clear and would therefore result in a violation.[141]

Where there has been an interference with the right to respect for private life of judges, courts have pointed to factors to be taken into account in determining whether a violation has taken place, including the degree of interference with the right, its duration and impact.[142] These determinations must however be made in light of the particular facts of each case.

2.2.3. Freedom of expression

Judges have the right to freedom of expression(article 10 ECHR, article 11 EU Charter, article 19 ICCPR), both within the judicial process and outside it. Indeed, the ECtHR and other bodies have underscored the critical importance of the capacity of judges to exercise the right to freedom of expression, in particular to comment on issues related to the administration of justice. Speaking up in response to attacks against judicial independence may not only be a right but also a duty of judges.[143] Free expression is also linked to the need for judges to interact with society, inspire confidence in the administration of justice and enhance understanding of the context of their decision-making. The legitimate exercise of the rights of judges, including to offer analysis, including criticism, on matters affecting the independence and functioning of the justice system, must be strictly protected, as it is essential to the functioning of a justice system that protects all persons.[144]

The right to freedom of expression, like the right to private life, may be subject to narrow limitations. As noted above, the ECHR specifically includes "the authority and impartiality

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[139] UNHRC General Comment 16, §11. See also *Komarovski v. Turkmenistan*, HRC, communication no. 1450/2006, U.N. Doc. CCPR/C/93/D/1450/2006, 24 July 2008, §3.8 and 7.7.
[140] *Ibid*, *paras.* 228-237.
[141] *Özpınar v. Turkey,* ECtHR, Application No. 20999/04, Judgment of 19 October 2010, para. 48.
[142] See e.g. in *Juszczyszyn v. Poland,* ECtHR application no. 35599/20, para.222: the impact on the judge's reputation of his suspension from the Polish judicial council, amid accusations of misconduct and criminality, was sufficient to violate article 8. Various factors were cited in support including: (i) the unsubstantiated nature of the allegations of misconduct and criminality (ii) allegations 'couched in virulent terms' and which 'related to the core of his judicial integrity and his professional reputation', and (iii) the fact that suspension 'deprived him of the opportunity to continue his judicial work and to live in the professional environment where he could pursue his goals of professional and personal development,' and (iv) length of suspension (2 years 3 months and 18 days). In all the circumstances, the measures affected the dismissed judge's private life to a 'very significant degree' in violation of article 8. In *Xhoxhaj v. Albania factors* included loss of remuneration, consequences for the applicant's 'inner circle', well-being and family, and the social stigmatization. See also *Erményi v. Hungary*, ECtHR, *application no.* 22254/14*, Judgement of 22 November 2016,* para. 30; see also *Gumenyuk and Others v. Ukraine,* ECtHR, application. 11423/19, Judgement of 22 July 2021.
[143] *Baka v. Hungary*, ECtHR, application no. 20261/12), Judgement of 23 June 2016), paras. 162-167.
[144] *Zurek v. Poland*, ECtHR, application no. 39650/18, Judgment of 10 October 2022, para. 224. See also *Baka v. Hungary,* ECtHR, application no. 20261/12, Judgement of 23 June 2016, para. 165.

of the judiciary" as a legitimate ground for restricting freedom of expression,[145] consistent with broader international standards.[146] While the requirement that judges be independent and impartial undoubtedly leaves scope for appropriate limits on judges' freedom of expression, those limitations must be clearly and precisely prescribed by law, pursue the legitimate aims identified above, be non-discriminatory and constitute necessary and proportionate interferences with their rights.[147] Blanket restrictions on the ability of judges to exercise their right to free expression are likely to be a violation of human rights.

Unjustified interferences with a judge's ability to communicate, for instance by writing to public officials, delivering speeches, or issuing public statements, have all been found to violate this right.[148] Moreover, the ECtHR has noted that the 'chilling effect' on other judges is one of the numerous factors to be considered when weighing the proportionality of sanctions or punitive measures imposed.[149]

2.2.4. Freedom of association

Like other persons, judges have the right to freedom of association (article 11 ECHR, article 12 EU Charter, article 22 ICCPR), including the right to join associations of judges or associations of a similar nature, for example to advance or protect their professional interests and judicial independence.[150] The Council of Europe's Committee of Ministers has recommended that a judge's freedom of association should be limited only to the extent required to maintain their independence and impartiality. The law must spell out the requirements in a way that satisfies the test of legality, clarity and foreseeability, so that the individual could reasonably conclude whether their actions would violate the restrictions placed by law upon their role as a judge. Moreover, the judiciary itself should play a role in the establishment of the restrictions to ensure that they are in line with the principles of judicial independence.[151]

The ECtHR's consideration of this issue has mainly focused on the lack of a legal basis of the restrictions on the right of judges to freely associate and has not discussed in substance whether a particular membership was compatible with judicial independence.[152] For example, the ECtHR has noted that a reprimand issued to a judge for being a member of a secret society could only be valid if the possibility of disciplinary sanctions based on such membership was clearly defined in law.[153]

There is currently a lack of clear international consensus on certain areas concerning freedom of association of judges and a variety of different practices, for instance as relates to membership in political parties. Notably, the **Commentary on the Bangalore**

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[145] Article 10(2) ECHR.
[146] Principle 8 UN Basic Principles on the Independence of the Judiciary (1985) which states that 'members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary;' see also UN Economic and Social Council (ECOSOC), UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct (the Bangalore Principles), UN Doc. E/RES/2006/23, 2006, Value 2.4 and 3.
[147] Article 19 ICCPR and Human Rights Committee General Comment 10.
[148] *Baka v. Hungary,* ECtHR, application no. 20261/12, Judgement of 23 June 2016, para. 145.
[149] *Baka v. Hungary,* ECtHR, application no. 20261/12, Judgement of 23 June 2016, paras. 107, 227; *Kudeshkina v. Russia*, ECtHR, application no. 29492/05, Judgement of 14 September 2009, para. 98.
[150] United Nations, Basic Principles on the Independence of the Judiciary, 6 September 1985, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, principles 8 and 9.
[151] Council of Europe, Recommendation CM/Rec (2010)12 'Judges: independence, efficiency and responsibilities`, paras. 19, 21 and 25.
[152] Human Rights Council, 'Independence of Judges and Lawyers: Report of the Special Rapporteur on the Independence of Judges and Lawyers', A/HRC/41/48, 41st session, General Assembly, 29 April 2019, para. 58.
[153] *Maestri v. Italy,* ECtHR, application no. 39748/98, Judgement of 17 February 2004, para. 42.

Principles provides concrete instances in which judges might join certain organizations like trade unions or non-profit organizations, which may help guide the application of this right.[154]

2.2.5. Right to participate in public affairs

Judges enjoy the right to participate in the conduct of public affairs (article 25(a) ICCPR, article 3 Protocol 1 ECHR). The exercise of this right may overlap with other rights, including the rights to freedom of expression, association and assembly. The UNHRC has stressed that without the enjoyment of these rights, the democratic process is jeopardized,[155] and has recognized that assaults on judicial independence adversely affect the exercise of this right in several cases.[156] Public service is a broad concept[157] and will, at a minimum, "encompass all positions within the executive, *judicial*, legislature and other areas of State administration (emphasis added)".[158] In its General Comment No. 25, the UNHRC also makes clear that any restrictions on the right to hold public office under article 25 ICCPR must be established by law and based on objective and reasonable criteria.[159]

There may be restrictions placed on some partisan political activities or participation, such as playing an active role in the activities of a political party or advocacy on contentious political issues that may reasonably be expected to come before them in their judicial capacity. Judges may be expected to refrain from jeopardizing their appearance of impartiality.[160] However, measures to avoid conflicts of interest and to safeguard judicial independence must not be instrumentalized to preclude the ability of judges to participate in public affairs.[161]

2.2.6. Freedom to choose an occupation, right to work and right to just and favourable conditions of work

The right to freedom to choose an occupation, right to work and right to just and favourable conditions of work (articles 15 and 30 EU Charter, articles 1 and 4 (and 24) (revised) European Social Charter, 6 and 7 ICESCR) concerns judges as well. Although the ECHR is focused primarily on civil and political rights, and therefore addresses work-related violations through other provisions such as Article 8 on private life, other instruments, such as the EU Charter, the European Social Charter and the International Covenant on Economic, Social and Cultural Rights address work-related rights directly.[162] As noted in Section 5, these standards and associated mechanisms have yet to be fully utilized in litigation, but offer an additional potential avenue for legal redress.

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[154] Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct, adopted by the United Nations Economic and Social Council (ECOSOC) Res. 2006/23, paras. 127, 135, 167–168 and 176.
[155] *López Lone et al. v. Honduras*, Inter-American Court of Human Rights, Series C No 302, Judgement of 5 October 2015, para. 160.
[156] *Adrien Mundyo Busyo et al. v. DRC*, HRC, Communication no. 933/2000, UN Doc. CCPR/C/78/D/933 (2003), para.5.2; *Mikhail Ivanovich Pastukhov v. Belarus*, HRC, Communication no. 814/1998, UN Doc. CCPR/C/78/D/814/1998 (2003), para. 7.3.
[157] Human Rights Committee, General Comment 25, UN Doc CCPR/C/Rev.1/Add.7 (1996), paras. 1-2, *et seq*.
[158] Joseph, Schultz, Castan, *Cases material and Commentary ICCPR*, 2nd ed., p. 671, §22.49
[159] Human Rights Committee, General Comment 25, para. 4.
[160] Human Rights Council, Independence of Judges and Lawyers: Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/41/48, 41st session, General Assembly, 29 April 2019, para. 66.
[161] Human Rights Committee, General Comment 25, UN Doc CCPR/C/Rev.1/Add.7, 1996, para. 16.
[162] Council of Europe, European Social Charter, ETS No. 035, 1961, and Revised European Social Charter, ETS No. 163, 1996; United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

2.2.7. Freedom of assembly and right to protest

Based on international jurisprudence[163] and standards,[164] judges have the right and may, in some circumstances, consider themselves to have a responsibility to exercise their rights to freedom of assembly and protest (article 21 ICCPR, article 11 ECHR, article 12 EU Charter). Where judges consider themselves to have a duty to speak out, they should be able to participate in peaceful demonstrations.[165] In situations of rule of law backsliding, judges may indeed have a duty to act to defend judicial independence.[166]

The principles of independence and impartiality, and especially the need to appear impartial to a reasonable observer may however justify certain limitations to the right of judges' exercise of their right to freedom of assembly. As with freedoms of expression and association, any such limitations must meet strict conditions, of legality, necessity, legitimate purpose, proportionality, and non-discrimination.[167] In any case, if there is a risk that a certain affiliation may jeopardize their independence and impartiality, the need to maintain the dignity of the office and their effectiveness in administering justice may require them to desist from involvement in certain social matters.[168]

2.2.8. Equality and non-discrimination

Fundamental to the rule of law and human rights law are the principles of equality, equal protection of the law, and non- discrimination on the grounds of race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, citizenship, nationality or migration status, national, social or ethnic origin, descent, health status, disability, property, socio-economic status, birth or other status (e.g. article 14 and Additional Protocol 12 ECHR, article 20 and 21 EU Charter, article 2, 4 and 26 ICCPR, article 2(2) ICESCR).[169] Non-discrimination is a feature of all universal human rights treaties.

For instance, Article 26 ICCPR guarantees "equal protection of the law", protection against discrimination and prohibits discrimination on any ground.[170] Article 26 prohibits the application of legislation "in an arbitrary or discriminatory manner",[171] meaning that it applies to decrees, policies and measures that target persons based on discriminatory grounds, including for example a political opinion opposing a particular executive action. The importance of guaranteeing non-discrimination in relation to judicial appointments is underlined by the UN Basic Principles.[172]

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[163] See for example *López Lone et al. v. Honduras*, Inter-American Court of Human Rights, Series C No 302, Judgement of5 October 2015, paras. 184-186.
[164] Commentary on The Bangalore Principles of Judicial Conduct, 2002, para. 140.
[165] Commentary on The Bangalore Principles of Judicial Conduct, 2002, para. 140.
[166] *Zurek v. Poland*, ECtHR, application no. 39650/18, Judgment of 10 October 2022, para. 222.
[167] See UNHRC, General Comment No. 37 (2020) on the right of peaceful assembly (article 21), UN Doc. CCPR/C/GC/37, 17 December 2020.
[168] Human Rights Council, Independence of Judges and Lawyers: Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/41/48, 41st session, 29 April 2019, para. 57.
[169] ICJ, *The Tunis Declaration on Reinforcing the Rule of Law and Human Rights*, March 2019, para. 9(L) reflecting grounds of discrimination recognized in international law. See e.g. article 2(2) ICESCR; Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 ICESCR); article 21 EU Charter; article 2 Convention on the Rights of the Child.
[170] Article 26 ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[171] Sarah Joseph and Melissa Caston, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary,* 3rd ed. (2013), p. 768, citing Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* pp. 605 to 606.
[172] Article 10 of the UN Basic Principles on the Independence of the Judiciary, 1985.

International law prohibits direct and indirect discrimination, as well as systemic and multiple discrimination, based on more than one ground, and clarifies that differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective.[173]

While discrimination on multiple grounds may arise when judges are targeted, or disproportionately affected, by measures infringing on their independence, discrimination on grounds of political opinion is, in such cases, particularly relevant. This was, for instance, the basis for the ECtHR's finding of a violation of the prohibition of discrimination, in conjunction with violations of articles 10 and 11, where the authorities had failed to adequately assess an applicant's allegations that she had, in the course of appointment procedures, been discriminated against due to her critical stance towards the High Council of Justice.[174]

3. Litigating judicial independence: Developing practice in EU Member States

Strategic litigation in relation to the erosion, encroachment on, or non-respect and non-implementation of judicial independence in EU Member States has taken many forms. It has addressed an array of issues, utilized a range of the legal tools described above, and been brought before diverse national and regional or international fora, by and with the support of various individuals and groups. While concerns regarding the 'independence and impartiality' of tribunals have most often been raised 'defensively,' by applicants challenging the fairness of trials, there has, in recent years, been a turn towards judges and other justice actors raising such concerns as rights holders.

Litigation in the target States reflects the core aspects of judicial independence. This report will treat the question under the following broad overlapping categories: first, cases that challenge arbitrary and unjustified **dismissals and sanctions**, often as a response to or reprisal for judicial or other conduct or the exercise of judicial independence; second, **abusive criminal investigations and/or prosecutions** against individual judges; third, **appointment** procedures that give undue control or influence and potential for abuse to political actors; fourth, encroachments into judges' **freedom of expression and other fundamental freedoms**; fifth, **inappropriate conditions of work and changes to the security of tenure**, sometimes manifested as changes to retirement ages or to working conditions that compromise judicial independence; sixth, **unfair or discriminatory treatment** of judges; and seventh, systemic **reorganization** of the courts, and limits placed to the role of judges undermining the authority of the judicial branch.

Litigation has also taken many other forms, commonly challenging the **fairness** of proceedings and the **effectiveness of remedies** (including investigation) in respect of the various ways in which justice actors are undermined in their work. While there are many more contexts where judicial independence is jeopardized, the legal prerequisites to bring action, and the economic and political pressures on judges not to do so, among other challenges, mean that litigation is often limited to extreme cases where judges have already suffered serious harm.

3.1. Dismissals and disciplinary sanctions

Litigation initiated by judges has commonly challenged the abuse of disciplinary proceedings, and the resulting sanctions or dismissals imposed in response to their judicial

[173] Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 ICESCR), paras. 10, 12, 13 and 17.
[174] *Bakradze v. Georgia,* ECtHR, application no. 20592/21, Judgement of 7 November 2024, para. 85.

conduct, public expressions of opinion concerning the administration of justice or criticism of powerful actors. Such claims often overlap with other claims noted below, such as in relation to judicial free expression and the fairness of proceedings. Challenging disciplinary proceedings has often also been linked to challenges regarding the appointment of judges, such as where those appointed lack the independence necessary to make impartial disciplinary determinations. One such case is *Juszczyszyn v. Poland,*[175] before the ECtHR.

Juszczyszyn v. Poland, **ECtHR**
articles 6, 8, and 18 ECHR

General overview of the case
This landmark case challenged disciplinary proceedings against a judge who had issued a court order seeking information on appointments of judges via the contested "new" National Council of the Judiciary (NCJ) following reforms to its structure and governance – and the impact of problematic appointments procedures on the legitimacy of such proceedings. Poland's Disciplinary Chamber of the Supreme Court found at first instance that Judge Juszczyszyn's actions had not justified his suspension, but a second-instance decision found the judge had "violated the dignity" of judicial office and was responsible for disciplinary offences under the Organization of the Ordinary Courts Act of 2001. It suspended Judge Juszczyszyn from his judicial duties and imposed a 40% salary reduction.

Litigation before the ECtHR
Before the ECtHR, the applicant alleged violations of articles 6(1) (right to a fair trial), 8 (right to respect for private and family life), 18 (limitation on use of restrictions on rights), and article 1 of Protocol No. 1 to the Convention (protection of property).

Judgement and impact
The Court found that the Disciplinary Chamber of the Supreme Court was not an "independent and impartial tribunal established by law," in violation of article 6. It specifically determined that: (i) the process for appointing judges to the Disciplinary Chamber was defective, as the recommending body – the NCJ – lacked independence; (ii) the Amending Act 2017 had compromised judicial independence by, among other things, removing the competency of judges to elect members of the NCJ; and (iii) there was no procedure under Polish law to challenge the alleged defects in the process of appointing judges to the Disciplinary Chamber.

Concerning the applicant's right to respect for private and family life (article 8), the ECtHR stressed that the alleged misconduct which was the basis for the suspension of the judge was not evident. When assessing the quality of the law requirements the ECtHR found that the characterization made by the Disciplinary Chamber was problematic, as it didn't address the first instance finding that the action could not be characterized as misconduct or refer to any case law to support its finding and because it found the applicant to have committed a professional misconduct which was not charged. The second instance finding of misconduct had therefore not been foreseeable for the applicant. Moreover, it stressed that the imposition of disciplinary liability in connection with giving a judicial decision is an exceptional measure that should be restrictively interpreted. Finally, the Court found that no procedural safeguards against arbitrariness had been put in place. After finding a breach of article 8 due to the lack of the quality of the law, the court considered itself dispensed from examining the legitimate aim of the suspension.

The ECtHR also found a breach of article 18 taken in conjunction with article 8 as it concluded that the ulterior purpose behind the suspension was incompatible with the ECHR. While acknowledging the existence of other legitimate purposes, the court was

[175] *Juszczyszyn v. Poland*, ECtHR, application no. 35599/20, Judgement of 10 May 2021.

satisfied that the predominant purpose of the disciplinary measures was to sanction him and dissuade him from assessing the status of judges appointed in a procedure involving the new NCJ. To reach this conclusion, the court noted the general context of reorganization of the judiciary in Poland, the aim of the act to achieve decisive influence over the composition of the NCJ and the fact that other restrictive measures had been taken against the judge prior to the suspension due to disciplinary charges. The Court held that the disciplinary proceedings and suspension of Juszczyszyn were contrary to fundamental principles of judicial independence and the rule of law.

In several other cases, ECtHR litigation has challenged the **process** before disciplinary tribunals (as well as the independence of those tribunals) and the Court has analyzed whether Article 6 standards were met in such proceedings. In *Volkov v. Ukraine* (2013) it recognized that lack of independence in the disciplinary tribunal, the vast majority of which consisted of non-judicial members appointed directly by the executive and the legislative authorities, violated the judge's rights.[176] The court also determined that "the subsequent determination of the case by Parliament, did not remove the structural defects of a lack of "independence and impartiality" but rather only served to contribute to the politicisation of the procedure and to aggravate the inconsistency of the procedure with the principle of the separation of powers."[177] In this regard, the Court has reiterated in several recent cases the importance of strict safeguards in any disciplinary proceedings against judges.[178]

3.2. Challenging the criminalization of the judicial role

Resort to criminal prosecution of judges for offenses related to the exercise of their judicial functions, as a form of sanction, remains exceptional in the European Union, though as noted above, there are laws which allow it in several EU Member States. In *Garzón v. Spain*, a former judge challenged his dismissal and criminal prosecution before the UN Human Rights Committee. The Committee found among others that Spain had arbitrarily prosecuted the judge for his judicial interpretations and had failed to provide the essential guarantees of a fair trial, independence and impartiality.[179]

***Garzón v. Spain,* UN Human Rights Committee**
articles 14(1–3) and (5), 15 ICCPR

General background of the case
Baltasar Garzón's lengthy career in the Spanish Audiencia Nacional (National High Court) was truncated when he was dismissed, investigated and prosecuted for the crime of "prevaricación" (criminal malfeasance) in respect of his judicial role in several politically contentious cases. Garzón is best known for his role exercising universal jurisdiction, famously issuing the Pinochet arrest warrant and pursuing accountability for international crimes committed in States where justice was precluded by amnesty laws or statutes of limitation. Yet when he sought to apply those principles in Spain, he was removed from the bench and placed in the dock.

In the first of the criminal cases against him, his alleged crime was the decision to authorize preliminary investigative steps into thousands of deaths and disappearances during the Franco regime, determining that the Spanish amnesty law did not apply to crimes against humanity. In response, a criminal complaint was lodged by a right-wing

[176] *Volkov v. Ukraine*, ECtHR, application no. 21722/11, Judgement of 9 January 2013 (Supreme Court judge dismissal overturned due to multiple procedural defects in the disciplinary tribunal and taking a Parliamentary vote when few members were in session and available to cast a vote on the judge's position).
[177] *Volkov v. Ukraine*, ECtHR, para. 118.
[178] *Tuleya v. Poland*, ECtHR, application nos. 21181/19 and 51751/20, Judgement of 6 October 2023, para. 432.
[179] See *Garzón v. Spain,* Human Rights Committee, Communication no. 1361/2005, UN Doc. CCPR/C/132/D/2844/2016 (2023). iews of 23 May 2023.

organization, assisted by Spanish judges, and a lengthy criminal process ensued which eventually ended in acquittal. While this '*Franquismo'* trial was pending, a second prosecution was brought, for the decision to take preliminary investigative steps in one of the largest corruption investigations in Spain to date (*Gürtel* case) affecting the governing 'Partido Popular' and other powerful actors. Although Spanish law at the time was controversial, and other judges reaching comparable decisions without being investigated or prosecuted, Judge Garzón was convicted in this case, and suspended from office for 11 years.

Litigation before the UNHRC

Having exhausted domestic remedies, a petition was submitted to the UNHRC on 31 January 2016. The claim challenged the prosecution of a judge, based solely on his judicial decisions, as a violation of his rights and an attack on judicial independence. It was supported by significant expert opinions. One opinion submitted by judges from Latin America and South Africa, addressed international legal standards governing judicial independence. Another by a group of international scholars and judges made clear the duty to investigate and impermissibility of amnesty and prescription for crimes against humanity, demonstrating the reasonableness of Garzón's judicial interpretations and the arbitrariness of his prosecution. A third was submitted by an expert on the Spanish law on criminal malfeasance and showed that the application of the law in Judge Garzón's case was unforeseeable.

Decision and impact

On 25 August 2021, the UNHRC issued a ground-breaking decision finding Spain responsible for multiple violations of Baltasar Garzón's rights.[180] It found the criminal proceedings against Garzón in both the *Franquismo* and *Gürtel* cases to have been 'arbitrary,' in violation of fair trial rights (Art. 14 ICCPR). Notably this arose irrespective of whether the prosecution ended in acquittal or conviction. In support it noted Garzón's judicial decisions were indisputably reasoned, supported by other judges and the *Ministerio Publico*, and overturned on appeal (where any alleged errors could properly be addressed). It found the Spanish court trying him lacked impartiality. The denial of the right to appeal, on the ground that the first instance trial was before the apex court, violated his fair trial rights. The Committee emphasized that where judges are prosecuted in the first instance by the apex Supreme Court – whether or not intended as a safeguard – they must still have a right of appeal, an essential element in the right to a fair trial.[181] It also found a violation of article 15 ICCPR as his conviction followed an unforeseeable application of a broadly framed law on criminal malfeasance. The Committee considered that laws of "prevaricación" which provided the basis for prosecution were not sufficiently clear, specific and foreseeable to fulfil the requirements placed on criminal law.[182]

Notably the UNHRC called for Spain to make 'integral reparation' for these multiple violations, including taking steps to prevent similar violations from occurring in the future.[183]Regrettably, however, the Spanish government's response had been a deafening silence. In August 2023 the UNHRC's Rapporteur reported that Spain has wholly failed to take the necessary measures to implement the UNHRC decision.

The *Garzón* case reveals both remarkable impacts and limitations. It exemplifies both advantages and limitations of pursuing litigation before UN Treaty Bodies, the most obvious of the latter being that the decisions themselves do not carry binding effect in the strict sense and implementation and follow-up are at times deeply inadequate.

[180] *Garzón v. Spain*, UNHRC, Communication no. 2844/2016, UN Doc. CCPR/C/132/D/2844/2016, 25 August 2021.
[181] *Garzón v. Spain*, UNHRC, para. 5.5.
[182] *Garzón v. Spain*, UNHRC, para. 5.17.
[183] *Garzón v. Spain*, UNHRC, para. 7.

It was a ground-breaking cases in some ways, marking one of the first UN Treaty Body decisions finding a State in violation of human rights obligations for prosecuting a judge for actions in the course of their judicial duties. It also provided important vindication of Garzón's role as judge, exposing and illustrating some of the serious problems with judicial independence in Spain – including attacks from within the judiciary itself – and underscored the need for reform. As litigation was accompanied by communications with the press and legal community during and after the case, at the implementation stage, it garnered significant attention. Yet, the Human Rights Committee also took five years to reach a decision and its impact is dramatically diminished by Spain's flagrant non-implementation.[184]

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Alleged violations of the principle of legality were also challenged in *Romanian Judges (I),* where the CJEU found violations arising from Romanian legislative changes that created a special prosecutorial office for investigating judges and levying personal fines against them for "judicial errors". Violations of article 19 TEU arose as the new mechanisms might "be used as an instrument of pressure on judicial activity" and impair public confidence in the judiciary.[185]

One pending national case is *Kolíková v. Doláková*,[186] where the Slovak Minister of Justice initiated disciplinary proceedings against Judge Doláková concerning her judicial decisions, which allegedly unduly favoured a plaintiff at the behest of another judge. The judge was disciplined and prosecuted under the offence of abuse of authority by a public official. The initial hearing found no reason to remove Doláková from office, the case is currently pending appeal, but delays have resulted from the inability to choose a judge to hear the appeal.[187]

3.3. Judicial appointments

Successful challenges to the alleged arbitrary or otherwise abusive use of judicial appointment processes to undermine judicial independence are relatively uncommon, but it has arisen in several national and international cases, including the *Juszczyszyn* ECtHR case discussed above. The ECtHR has not generally reviewed the decisions by State authorities on the appointment of judges, which generally fall within the States' discretion and authority to administer justice. However, where appointment procedures are under the undue influence of the executive, such that the totality of the circumstances mean that courts or tribunals are politically captured or compromised, the Court has been robust in its condemnation.[188]

In the context of the alleged systemic capture of the Polish legal system in *Xero Flor v. Poland,*[189] the Court reasoned that political tampering with the election of three judges to Poland's Constitutional Court "impair[ed] the legitimacy of the election process" to such a degree that it "undermin[ed] the very essence of the right to a 'tribunal established by law."[190] In several other cases concerning Poland, the ECtHR underscored that a tribunal's

[184] See e.g. Human Rights in Practice, "Garzón v. Spain: UN report indicates complete failure of Spain to implement the UN Human Rights Committee's decision", press release, 21 August 2023 (accessed 3 December 2024).
[185] *Romanian Judges (I)*, CJEU, C-83/19 et al., Judgement of 18 May 2021.)
[186] *Kolíková v. Doláková*, Slovakia Supreme Administrative Court.
[187] Šipulová, K. and Spáč, S. (2023) '(No) Ghost in the Shell: The Role of Values Internalization in Judicial Empowerment in Slovakia', *German Law Journal*, 24(8), pp. 1412–1431 (accessed 18 December 2024).
[188] *See Xero Flor v. Poland*, ECtHR, application no. 4907/18, Judgement of 7 May, 2021 (finding that court decisions in a system where judges lack independence are not legitimate, final decisions on a claim.
[189] *Xero Flor v. Poland*, ECtHR, application no. 4907/18, Judgement of 7 May 2021.
[190] *Id.* at p. 77, para. 287.

decision is illegitimate if the processes establishing that tribunal or selecting its judges are themselves illegitimate.[191]

The ECtHR has also addressed judicial appointment procedures in several other cases, in relation to more limited and specific problems, as well as in response to the systemic problems in Poland. In one case concerning Iceland, it found that a decision made by a judge appointed through procedures that violated a State's constitution was not a valid judicial decision.[192] While vetting processes in Albania were not deemed necessarily to violate the Convention, where a judge sitting on the body that decided on dismissals of prosecutors was himself appointed in contravention of law and procedures for judicial appointments, the Court found a violation of article 6.[193]

Although the CJEU has established a foundation for judicial independence claims involving, for instance, the improper removal or disciplining of a judge, it has so far declined to establish a requirement for strong safeguards to ensure independent judicial appointment procedures.[194] The CJEU did not find the Maltese system of judicial appointments by the Prime Minister to be inherently in violation of EU law, noting that the law only requires judges to "be free from any relationship of subordination or hierarchical control by either the executive or the legislature", not that they be appointed without any involvement from the executive or legislative branches.[195] This judgement appears to be in conflict with CoE standards.[196] The CJEU has, however, established that Member States may not change the organization of their justice systems in a way that would lower the level of protection for the rule of law.[197]

***C-896/19 Repubblika v Il-Prim Ministru*, CJEU[198]**

Background of the case

Repubblika, an NGO registered in Malta, filed an *actio popularis* case against the Prime Minister and Minister for Justice of Malta before the Maltese Civil Courts in their Constitutional jurisdiction.[199] Repubblika claimed that the system for the appointment of members of the judiciary regulated by the Maltese Constitution breached Malta's obligations under article 39(2) of the Constitution, article 6 of the ECHR, article 19(1) of the Treaty on the European Union (TEU) and article 47 of the EU Charter. Their claim was centred around the decisive power of the Prime Minister in the procedure for appointment of the judiciary as provided by the Maltese Constitution after amendments adopted in 2016. Repubblika specifically challenged the appointment of a number of members of the judiciary in 2019, which was done without regard for a Venice

[191] See also e.g. *Advance Pharma sp. z o.o v. Poland*, ECtHR, application no. 1469/20, Judgement of 3 February 2022.
[192] *Guðmundur Andri Ástráðsson v. Iceland*, ECtHR, application no. 26374/18, Judgement of 12 March 2019 (finding a decision made by a judge appointed through procedures that violated a State's constitution is not valid).
[193] *Besnik Cani v. Albania*, ECtHR, application no. 37474/20, Judgement of 4 October 2022. The applicant complained before the ECtHR for a breach of his rights under article 6 ECHR. The court held that there had been a violation of the applicant's right to a tribunal established by law due to the non-compliance of the SAC judge's appointment with domestic law.
[194] See Rafal Mańko, "ECJ Case Law on Judicial Independence: A Chronological Overview", European Parliament Research Service (October 2023); *Repubblika*, CJEU, C-896/19, Judgement of 20 April 2021.
[195] *Repubblika*, CJEU, C-896/19, Judgement of 20 April 2021. See case study box directly below.
[196] The European Charter on the Statute for Judges emphasizes that judicial appointments should be made by an independent authority or a body with substantial judicial representation to safeguard the independence of the judiciary. Similarly, Opinion No. 1 (2001) of the CCJE underscores the importance of independent judicial appointments, recommending that decisions concerning the selection and career of judges should be entrusted to an independent body to prevent undue influence from the executive or legislative branches.
[197] *Repubblika*, CJEU, C-896/19, judgement of 20 April 2021, para. 65.
[198] *Repubblika*, CJEU, C-896/19, Judgement of 20 April 2021.
[199] *Pace Asciak Marion et vs L-Onor Prim Ministru et* - 63/2019 - Civili Prim Awla (Sede Kostituzzjonali), Malta, judgement of 22 May 2019.

Commission opinion stating that the composition of the Judicial Appointments Committee was not in conformity with European Standards and that the Prime Minister should not have the power to influence appointments.[200]

Litigation before the CJEU

During the course of the local proceedings the Maltese Civil Court requested a preliminary ruling[201] on the interpretation of article 19(1) TEU and article 47 of the Charter. In particular it asked (i) whether the cited EU law provisions are applicable in the present case; (ii) whether the Prime Minister's decisive power in the process for the appointment of judges conforms with EU law; and (iii) if not, whether this should be taken into consideration only in regard to future appointments, or also in regard to past appointments.

On the applicability of article 19(1) TEU, the CJEU concluded that article 19(1) requires Malta to ensure that courts and tribunals which may rule on matters of EU law provide effective judicial protection in the fields covered by EU law. Although the Charter was held not to be applicable to the dispute in the present case, article 47 of the Charter (right to an effective remedy and fair trial) should be taken into consideration for the purpose of interpreting article 19(1) TEU.

On the second question, the CJEU recognized that although the organization of justice is of national competence, States are required to comply with EU law obligations. Thus, independence was fundamental, and the judiciary must be protected from external pressure, whether direct or indirect.[202] States are therefore precluded from adopting provisions which reduce the protection of the rule of law, in particular the guarantees of judicial independence.[203] The CJEU took into consideration that prior to the 2016 amendments which established the Judicial Appointments Committee, the power of the Prime Minister had been limited only by the eligibility requirements that needed to be satisfied as set out in the Constitution. The CJEU highlighted that the latter provisions were in force when Malta acceded to the EU with a commitment to the common values of the EU, including the rule of law, as set out by article 2 TEU. The CJEU determined that the 2016 amendments did not constitute a regression of laws that would undermine the independence of the judiciary, in contrast the amendments contribute to the objectivity of the process of appointment.[204] This process was deemed sufficient as to not raise legitimate doubts about the independence of the judges being appointed.

The CJEU did not rule on the third question. Repubblika ceded the case in April 2021 after the CJEU decision.

Impact of the litigation

At a European level the case introduced the principle of *non-regression* on the rule of law, relying on the connection between articles 2[205] and 49[206] of the TEU. This means that Member States are prohibited from introducing or amending legislation when this would result in a deterioration of the protection of the rule of law.[207] Furthermore, the

[200] Venice Commission, Opinion No 940/2018, *Malta - Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement*, CDL-AD(2018)028-e, adopted its 117th Plenary Session, 2018. The system of appointment of the judiciary was further amended in 2020, Act No. XLIII of 2020 - Constitution of Malta (Amendment) Act.

[201] *Repubblika*, CJEU, C-896/19, judgement of 20 April 2021.

[202] *Repubblika v. Il-Prim Ministru*, CJEU, C-896/19, Judgement of 20 April 2021, paras. 51 – 55.

[203] *Repubblika v. Il-Prim Ministru*, CJEU, C-896/19, Judgement of 20 April 2021, para. 65.

[204] *Repubblika v. Il-Prim Ministru*, CJEU, C-896/19 para. 69.

[205] Article 2 TEU "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

[206] Article 49 TEU "Any European State which respects the values referred to in article 2 and is committed to promoting them may apply to become a member of the Union."

[207] *Repubblika v. Il-Prim Ministru*, CJEU, C C-896/19, para. 57.

CJEU reiterated the importance of judicial independence. From a procedural point of view, the admissibility of the reference itself demonstrated that references relating to judicial independence and article 19(1) would be accepted by the CJEU without the need to demonstrate any individual interest in the outcome by the applicant.

At the national level, the decision had a negative impact on the advocacy work being carried out by civil society to strengthen the rule of law and judicial independence in Malta, following serious issues relating to corruption, governance and the assassination of Daphne Caruana Galizia. It resulted in reinforced anti-rule of law narratives in Malta and the perpetuation of a system in which possibly politically biased members of the judiciary continue to work. It furthermore weakened the standing and importance of recommendations and reports from the European Parliament,[208] the European Commission[209] and the Venice Commission, whose 2018 recommendations for serious reform were blatantly disregarded by the appointment of six members of the judiciary in 2019. While the Advocate General's concerns relating to legal certainty and the backlog of cases in the event that the CJEU found the Maltese system incompatible with EU law are understandable, it begs the question of whether the appearance of impartiality and independence of the judiciary is sufficient for the courts to be deemed EU law compliant to avoid catastrophe. Ironically, the same system so vehemently defended by the Maltese State in these proceedings was changed in 2020[210] to address the concerns highlighted by EU institutions and the Venice Commission, which had been ignored by the CJEU in its decision.

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3.4. Cases concerning judges' exercise of their fundamental freedoms

Some cases concerning disciplinary proceedings or removals have involved the exercise of fundamental freedoms by judges, particularly the freedom of expression including the *public* expression of opinions, and the appropriate limits that can be placed on such expression and the necessary attendant safeguards. Emblematic cases, such as *Baka v. Hungary* and *Żurek v. Poland,* highlighted later in this report, led the way in successfully challenging unlawful interference with freedom of expression. As a result, in several cases, the ECtHR has underscored the importance of protecting freedom of expression by judges, finding that judges not only have the right, but in some cases also a *duty* to speak out to defend the rule of law and judicial independence when those fundamental values come under threat.[211]

One such national example is *Kydalka v. Municipal Court of Prague*, where the Czech Court considered national, CJEU, and ECtHR case law in its judgement, but ultimately ruled against the judge.[212] The judge was subject to disciplinary proceedings for expressing political opinions publicly by allowing political leaflets to be distributed in his name stating his position in regard to municipal elections and publishing op-eds in a local newspaper commenting on the election and on potential coalitions to be formed, which was found to conflict with policies requiring discretion among judges. The Constitutional Court rejected the petitioner's claims of violations of his freedom of expression, finding that the restrictions were reasonable given the need for an impartial judiciary. The Constitutional

[208] European Parliament resolution of 18 December 2019 on the rule of law in Malta following the recent revelations surrounding the murder of Daphne Caruana Galizia, 2019/2954(RSP) .
[209] European Commission, Rule of Law Report - Malta Country Chapter, SWD(2020) 317 final.
[210] The law on the appointment of the judiciary was amended in 2020, removing the decisive power of the Prime Minister and changing the composition of the appointments committee to ensure independence.
[211] *Zurek v. Poland*, ECtHR, application no. 39650/18, Judgment of 10 October 2022, para. 222. For a summary of the case, see *Zurek v. Poland* case study below.
[212] *Kydalka v. Municipal Court of Prague*, the Czech Republic Constitutional Court, ÚS 2617/15, Judgement of 5 September 2016.

Court found other allegations regarding a fair trial were also unfounded as the judge had been properly informed of their rights prior to the disciplinary hearing, and the single-instance nature of the disciplinary hearing was lawful as there is no right to appeal in disciplinary civil cases under the Czech Constitution or the ECHR.

In other cases, outspoken judges have been targeted under the pretext of other grounds. In *Todorova v. Bulgaria*, for example, Bulgaria's Supreme Judicial Council (SJC) invoked a backlog of unresolved cases to initiate disciplinary proceedings against a judge, then president of the Bulgarian Union of Judges, following the judge's public statements criticizing senior judges and government ministers for corruption.[213] Although the ECtHR recognized that the judge's backlog of cases may have been real, the punishments imposed suggested that the repression of criticism, rather than common administrative inefficiencies, had improperly motivated the disciplinary proceedings.[214]

***Todorova v. Bulgaria*, ECtHR[215]**
articles 6, 10 and 18 CEDH

Brief overview of the facts of the case and context
Miroslava Todorova, a judge at the Sofia City Court and the Chair of the Union of Judges in Bulgaria (UJB), faced disciplinary sanctions following her public criticism of alleged corrupt and biased practices among politicians and senior members of the judiciary. She condemned the allegedly opaque procedures used to appoint the Vice President of the Sofia Appellate Court, the Supreme Judicial Council's (SJC) position on a major corruption case within the judiciary, and the Minister of the Interior's efforts to undermine the independence of the judiciary. Following Todorova's critiques, the Supreme Judicial Council in 2012 reduced her salary by 15% over two years – allegedly due to delays in processing cases – and later ordered her dismissal from the Sofia City Court.

Todorova challenged the dismissal and won at the Supreme Administrative Court (SAC). Although the SAC did not reverse all disciplinary measures, it determined that dismissal had been a disproportionate sanction for her alleged misconduct. Dismissal was replaced with a two-year demotion to a lower court.

In 2013, Todorova applied to the ECtHR, claiming that the disciplinary proceedings had not taken place before an impartial tribunal (article 6 ECHR) and that the proceedings were brought in retaliation for her criticism of the SJC and the executive (article 10). She also claimed that the disciplinary proceedings were brought against her for unauthorized purposes – in response to her political critiques, rather than for actual procedural mistakes – in violation of article 18.

ECtHR findings
The ECtHR found violations of Todorova's right to freedom of expression (article 10) and the improper restriction of her rights (article 18), but found no violations of her right to a fair trial (article 6) and no sufficiently negative impacts on her private life to warrant a violation of article 8. Although the ECtHR determined that the disciplinary proceedings taken against her had been "prescribed by law" and applied to all judges within the City Court of Sofia, the context of the disciplinary actions, including their timing and the

[213] *Miroslava Todorova v. Bulgaria*, ECtHR, application no. 40072/13, Judgement of 19 October 2021. See also *Kovesi v. Romania*, ECtHR, application no. 3594/19, Judgement of 5 May 2020 (Prosecutor relieved from her position before the end of her term without the possibility of a meaningful appeal following her criticisms of government reforms).
[214] The improper use of disciplinary proceedings in *Todorova* contrasts with the proper use of such proceedings in *Kydalka v. Municipal Court of Prague*, Czech Republic Constitutional Court, ÚS 2617/15, Judgement of 5 September 2016 (holding that a judge was correctly disciplined for expressing political views unrelated to the judiciary or to his work as a judge).
[215] *Miroslava Todorova v. Bulgaria*, ECtHR, application no. 40072/13, Judgement of 19 October 2021.

gravity of the sanctions imposed, particularly the salary reduction and the attempted dismissal, suggested intentional and unwarranted interference with her right to freedom of expression. Moreover, the Court held that such disproportionate punishments threatened to chill the exercise of freedom of expression by all Bulgarian judges dissenting against the SJC and the SAC.

With respect to a fair trial and the minimal interference with her private life (articles 6 and 8), the Court determined that the trial procedures had not been demonstratively unfair and the judges hearing the case, even if not randomly assigned, had appeared sufficiently objective. It likewise held that while the salary reduction and demotion where disproportionate and had an effect on Todorova's personal and private life, her negative experience had been balanced out by the massive public support she received, and that there was therefore no violation of article 8.

Impact of the litigation

The real and potential impacts of *Todorova v. Bulgaria* are threefold. First, Judge Todorova, as a direct victim, received personal validation of her victim status and harm suffered. Second, the litigation offers a useful precedent for protecting the freedom of expression of judges in Bulgaria and in other European countries. Although the ECtHR recognized that judicial expression can sometimes be curtailed, it offered a strong and clear foundation for protecting judicial expression, especially when it is combined with a public role or with the judge's constitutionally granted decision-making. Third, it further exposed and condemned the use of administrative disciplinary proceedings in response to a judge's political actions and public statements – a common tool in regimes suppressing dissent and other forms of public expression and moving towards autocracy.

The broader impacts of the case are still largely indeterminate. Todorova's success in the ECtHR occurred long after she had filed the case and been demoted, and she did not apply for or receive any compensation for her years on an improperly reduced salary. By the time of the ECtHR's decision, Todorova had returned to her prior position at the Sofia City Court and remained a member of the UJB – albeit a less outspoken one. The sanctions imposed on Todorova seem to continue to have a chilling effect on Bulgarian judges even after the ECtHR judgement in her favour.[216] At the implementation stage, the Committee of Ministers took into consideration the importance of the judgment and encouraged the authorities to adopt specific measures to reform the judicial system in depth.[217] Undue influence over the judiciary and suspicious mechanisms for judicial elections continue, and, despite Todorova's strong public support, broader political resistance to interferences with the judiciary remains weak.[218] Although the ruling provoked some calls for judicial and constitutional reforms, whether these deepest and most beneficial impacts of the ECtHR's decision will take place remains a matter of speculation.

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[216] See e.g. Submission of the Bulgarian Helsinki Committee to the Committee of Ministers for the forthcoming review of the case *Miroslava Todorova v. Bulgaria*application no. 40072/13), 19 April 2024, paras. 16 and 26.

[217] See Committee of Ministers, 1468th meeting, 5-7 June 2023 (DH) H46-7 *Miroslava Todorova v. Bulgaria* (application no. 40072/13), Decision CM/Del/Dec(2023)1468/H46-7, 7 June 2023; Committee of Ministers, 1501st meeting, 11-13 June 2024 (DH) H46-9 *Miroslava Todorova v. Bulgaria* (application no. 40072/13), Decision CM/Del/Dec(2024)1501/H46-9, 13 June 2024.

[218] See e.g. ICJ, Judicial Independence Podcast, Episode 9 on Bulgaria with Adela Katchaounova, 10 December 2024; Submission of the Bulgarian Helsinki Committee to the Committee of Ministers for the forthcoming review of the case Miroslava Todorova c. Bulgarie (no. 40072/13), 19 April 2024; Addendum to earlier submission of the Bulgarian Helsinki Committee from 19/04/2024 to the Committee of Ministers for the forthcoming review of *Miroslava Todorova v. Bulgaria* (application no. 40072/13), 5 June 2024.

3.5. Changes to judicial retirement ages, qualifications, working conditions or pay that compromise judicial independence

Litigation in domestic courts and the ECtHR has successfully challenged changes to the tenure, qualifications or working conditions of judges, that can be used to intimidate or to remove them, thereby compromising judicial independence.[219] Both the ECtHR[220] and the CJEU have also repeatedly addressed the indirect removal of judges through measures such as altering the judicial retirement age.

In *European Commission v. Poland,*[221] the European Commission brought an action against Poland for lowering the mandatory **retirement age** of Supreme Court judges from 70 to 65, effectively cutting short the terms of many of the judges. The new law also authorized the President to extend the appointment of judges beyond the new retirement age. Infringement proceedings were brought by the Commission under article 19(1) TEU (duty to observe treaties of the EU) and article 47 EU Charter (independent and impartial judiciary). The CJEU found that lowering the retirement age of judges and thereby reducing their terms of office led to interference with their tenure. It criticized the President's unilateral power to extend terms past the retirement age without oversight or fairness limitations. It also raised doubts as to the goals of homogenizing retirement ages of the judges, suggesting it was a method of undermining judicial independence. Poland was found to have failed to comply with article 19(1) TEU requiring Member States to provide remedies sufficient to ensure effective legal protection under Union law.

Changes to judicial **conditions of tenure and pay** have also been challenged in several cases, which reveal that this may also raises independence issues, depending on the facts and circumstances. The CJEU's foundational judicial independence decision in *Portuguese Judges* established that the article 19 TEU "effective judicial protection" mandate necessitates a minimum standard of judicial independence and that a failure to meet that standard implicitly violates the article 47 EU Charter guarantee of a fair trial.[222] In the particular case, the CJEU however accepted that a legislature may lower judicial salaries given sufficient economic need.[223]

At the domestic level, in *Pay XV (the Czech Republic),*[224] the Municipal Court of Brno challenged legislative action reducing judges' pay. The Constitutional Court held that the proposed pay reduction was unconstitutional. It reasoned that judges must possess certain material guarantees to remain independent from both political and business actors, and that these must be: 1) predictable; 2) fixed at a higher rate than the average public salary to reflect judge's expertise and attract the most meritorious candidates and; 3) adjusted in-line with adjustments across the public sector. A key factor was that the size of the judges' salary reduction was disproportionate to that of other public sector employees. Overall, it could not be justified by pressing economic need and was therefore unconstitutional. The court further ruled, however, that judges were not owed back pay for the period of the reduction, noting that although procedural rules might suggest otherwise, the unconstitutional pay scheme was not so low as to render a judges' salary below a reasonable cost of living and that retroactively reimbursing judges would add

[219] *Kolíková v. Doláková*, Slovakia Supreme Administrative CourtSee *Kornasová v. Minister of Justice*, Czech Republic Supreme Administrative Court (NSS), Decision of 15 September, 2022 (determining that the removal of a prosecutor following the creation of abusive working conditions by the Minister of Justice violated the principle of prosecutorial independence and lacked adequate justification); See also *Volkov v. Ukraine*, ECtHR, supra.
[220] *Pająk and Others v. Poland*, ECtHR, application no. 25226/18 et 3 others, Judgement of 24 January 2024.
[221] CJEU 24 June 2019, Case C-619/18, *European Commission v. Republic of Poland (I) (Independence of the Supreme Court)*, Judgment of the Court (Grand Chamber). The CJEU found similar violations in a related case, *Commission v. Poland (II)*, regarding the retirement age of municipal judges in Poland.
[222] *Portuguese Judges*, CJEU, C-64/16, Judgement of 27 February 2018.
[223] *Portuguese Judges*, CJEU, C-64/16, Judgement of 27 February 2018.
[224] Pl.ÚS 28/13 of 10 July 2014.

unpredictability to State budgets and divert money needed for other public purposes. The case makes clear that judicial salary alterations can be an independence issue, but it may also illustrate tensions, and how judges may need to be cautious not to perceived to serve their own self-interest or to influence public opinion in such cases.

Where new **qualifications** are imposed on judges as terms for **continued service,** this too may indirectly interfere with independence guarantees in respect of judicial tenure. In *PL US. 21/2014 (2019)* before the Constitutional Court of Slovakia, legislative amendments that prescribed new requirements on judges – including age limits, qualifying exams, and preparatory reports on judicial candidates from police agencies – were challenged. Judicial bodies, including the Judicial Council, had opposed the amendment, sending it for review by the Slovak Constitutional Court. The Constitutional Court struck down the proposed amendment, determining that as a whole the modifications substantially broadened the legislature's hold over the judiciary and pressured sitting judges to leave, thus violating judicial independence.[225] In doing so, the court also established its power to review constitutional amendments, not just legislation, including amendments regulating the judiciary.[226] The case was however later undermined by a constitutional amendment brought by the legislature, establishing that the Constitutional Court does not have the competence to review the compliance of constitutional acts with other constitutional acts or with the Constitution itself.

Strategic litigation successes can be short-lived, as this case illustrates. Although the Constitutional Court prevented the amendment from altering Slovakia's system of judicial appointments and discipline in the short-term, the legislature responded by passing additional amendments limiting the Constitutional Court's ability to review constitutional amendments related to the judiciary's role.[227] The tenure of many Constitutional Court justices ended shortly after this decision, and the court has since then taken a more permissive route in its constitutional review of new legislation, facing criticism for bowing to political pressure.[228]

3.6. Discriminatory or disparate treatment

Discriminatory treatment of a judge or prosecutor based on, for example, their political beliefs, background or identity,[229] can be difficult to establish, but may give rise to violations of the right to equality where public statements or judicial interpretations lead to rights restrictions. More commonly in practice, as cases before both domestic and international courts show, applicants may support their claims of arbitrary interference with independence by demonstrating that the judge in question had been treated differently from other judges in comparable situations, suggesting an individualized and unfair application of the law.[230]

In *Todorova v. Bulgaria*, [231] the judge's freedom of expression claim was based on disparate and unusual treatment that she claimed were discriminatory in violation of article 14 ECHR, albeit without specifying the grounds of discrimination. While the ECtHR found the disciplinary actions taken to have far exceeded those in similar administrative

[225] *See* PL. ÚS. 21/2014, Slovak Constitutional Court, Judgement of 30 January 2019. *See also* Tomáš Ľalík, "The Slovak Constitutional Court on Unconstitutional Constitutional Amendment", *European Constitutional Law Review, Volume 16*. June 2020.
[226] Tomáš Ľalík, 'The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)', *European Constitutional Law Review*, 16(2), 2020, pp. 328–343.
[227] See Peter Čuroš, "Mária Kolíková is leaving", *Verfassungsblog*, 28 September 2022.
[228] See e.g. Peter Čuroš, "Slovak Constitutional Court kneeled before Robert Fico", *IACL-AIDC Blog*, 24 October 2024.
[229] See also Section 2. 2. above, providing an overview of the prohibition of discrimination, including a list of the applicable discrimination grounds, and the right to equal protection of the law.
[230] E.g. *Garzon v Spain*, UNHRC.
[231] *Todorova v. Bulgaria*, ECtHR, application no. 40072/13, Judgement of 19 October 2021.

proceedings and to have amounted to violations of other rights, it did not deal with the issue of discrimination, which it found unnecessary in the circumstances.[232]

By contrast, *Bakradze v. Georgia* before the ECtHR is a rare case where a violation of the prohibition of discrimination was successfully established. Here the applicant alleged that in the course of reappointment procedures for judicial office she had been discriminated against due to her political opinion, consisting of her critical stance towards the High Council of Justice and her membership in a CSO which also held critical views. The ECtHR found a violation of article 14 in conjunction with the right to freedom of expression and association (articles 10 and 11) due to the insufficient judicial review of her discrimination claims at the domestic level and the failure to disprove a *prima facie* case of discrimination.[233]

Several cases before the UNHRC have also alleged discrimination, leading the Committee to find a violation of the right to access public service in general terms of equality (article 25(c) ICCPR in conjunction with articles 14 and 2) in a case of early dismissal of a judge.[234]

3.7. The (re-)organization of the judiciary, including judicial councils, and limiting judicial powers

Litigation has not only addressed violations of the rights of particular judges, but also systemic questions regarding judicial independence. One way in which it has done so is to challenge *institutional and procedural* changes that affect the composition of the judiciary and judicial councils charged with maintaining its independence. These include the cases concerning retirement ages that remove older, potentially more dissident judges,[235] and other measures that pressure existing judges to step down or remain silent, such as pay reductions,[236] as noted above. Litigation has also pushed back against efforts to curtail the judicial branch's powers and *authority* to review measures impacting its independence.

Interference with the power or authority of courts takes many forms, and so has litigation in response. Litigation has, for example, challenged constitutional amendments or legislation that narrow the jurisdiction of judges or impede their ability to reach decisions concerning judicial independence. In *Decision no. 3/2014,* Romania's Constitutional Court narrowed the scope of the Supreme Council of Magistracy's (SCM) advisory opinions – a tool long-used by the SCM to issue non-binding but persuasive opinions on draft legislation.[237]

Several cases have challenged the 'reform' of **judicial councils.** In Romania, adding new seats to a judicial council through a legislative amendment affected the proportional representation of non-judges on the Supreme Council of Magistracy, and the Romania

[232] *Todorova v. Bulgaria*, ECtHR, para. 186.
[233] *Bakradze v. Georgia,* ECtHR, application no. 20592/21, Judgement of 7 November 2024, para. 85.
[234] See e.g. *Mikhail Ivanovich Pastukhov v. Belarus*, Communication no. 814/1998, UN Doc. CCPR/C/78/D/814/1998 (2003). A pending example where this has been argued is *Bouzheker v. Tunisia*, UNHRC, filed February 2024; see International Commission of Jurists, "Complaint to the UN Human Rights Committee: Tunisia must answer for attacks on judicial independence", 12 February 2024.
[235] *See* PL. ÚS. 21/2014, Slovak Constitutional Court, Judgement of 30 January 2019. (determining that new age limits and qualifications imposed on the judiciary sufficiently erode judicial independence as to be unconstitutional);
[236] *See Judges Pay XV*, the Czech Republic Constitutional Court, Decision no. Pl. ÚS 28/13, Judgement of 10 July 2014 (holding that pay reductions that uniquely target judges and not other similarly qualified government employees inadmissibly weaken judicial independence).
[237] *Decision no. 3/2014,* Romania Constitutional Court, Judgement 2014 (Finding that the SCM's advisory opinion jurisdiction does not extend to laws outside the organization of the judicial branch, thus narrowing the judiciary's authority). See also Bianca Selejan-Guțan, "Romania: Perils of a "Perfect Euro-Model" of Judicial Council*", German Law Journal*, Vol 19.07. 2018.

Constitutional Court found the amendment to violate the Constitution.[238] The ECtHR has also found multiple violations of the rights of judges dismissed or sanctioned by Judicial Councils elsewhere, in circumstances where those councils operated under executive influence, such that the affected judges were denied access to a court of law.[239]

The far-reaching changes to the composition of the National Council of the Judiciary (NCJ) in Poland, and the adverse impact on the independence of the entire judiciary, have been challenged before the CJEU and the ECtHR. *AK v. Krajowa Rada Sadownictwa* C-585/18, C-624-18, and C-625/18 before the CJEU, was a combined series of such cases by a group of Polish judges who challenged the 'early retirement law' and the lack of independence of the judicial council following its reform, as a result of which the NCJ became composed almost entirely of members appointed by the legislature. The CJEU analyzed the case under article 47 EU Charter on judicial independence, interpreted in light of the ECHR, and found serious independence deficits. This prompted the Supreme Court of Poland to ultimately respond by declaring that the Disciplinary Chamber of the Supreme Court could not be considered a 'court' under Polish or EU law, as it and the National Council of the Judiciary lacked impartiality and independence.[240] However, the government did not take remedial action in response, but instead passed laws preventing courts from questioning the independence of other courts and judges.

The ECtHR's approach is further illustrated by, among others, the more recent *Żurek v. Poland* case, summarized below.[241]

***Żurek v. Poland*, ECtHR[242]**
articles 6 and 13 ECHR

Background of the case
Waldemar Żurek is an experienced Polish judge who was a member of the National Council of the Judiciary (NCJ). He was elected by the Representatives of the General Assemblies of the Regional Court judges in 2010 for a four-year term and re-elected in March 2014. He was also appointed by the NCJ as its spokesperson. He is also a member of the 'Themis' Judges' Association.

After the parliamentary elections won by the Law and Justice party in 2015, public debate on matters concerning the functioning of the administration of justice intensified. Judge Żurek repeatedly expressed himself critically regarding the justice reforms, the need to defend the rule of law, the separation of powers and the independence of the judiciary.

As part of the general reorganization of the Polish judicial system by the government in 2017, *Sejm* (Parliament) enacted three new laws: Act on the Organization of Ordinary Courts, Act on the National Council of the Judiciary and Act on the Supreme Court. The bill on the NCJ proposed that the judicial members of the NCJ would be elected by the *Sejm* instead of by judicial assemblies and that the term of office of the sitting

[238] *See Supreme Council of the Magistrate v. Romanian Legislature,* Romania Constitutional Court; Decision no 80/2014, Romanian Constitutional Court, Judgement of 16 February 2014 (finding that a legislative amendment to the proportional representation of non-judges on the Supreme Council of Magistracy violated the Romanian Constitution).
[239] See multiple cases from Turkey, e.g. *Eminağaoğlu v. Turkey*, ECthR, application.no. 76521/12, Judgement ofMarch 9, 2021; *Bilgen v. Turkey*, ECtHR, application no. 1571/07, Judgement of 9 March 2021; *Kozan v. Turkey*, ECtHR, application no. 16695/19, Judgement of 1 March 2022. Turkish law No. 6524 (2014) expanded government control over the High Council of Judges and Prosecutors.
[240] See Supreme Court of Poland, Case III PO 7/18, judgement of 5 December 2019, paras. 79 and 88.
[241] See also *Grzeda v. Poland*, paras. 124-142, citing e.g. Parliamentary Assembly of CoE resolution (2359 (2021)) and Venice Commission report on the Independence of the Judicial System (CDL-AD(2010)004) on judicial councils.
[242] *Żurek v. Poland*, ECtHR, application no. 39650/18, Judgement of 16 June 2022.

judicial members would be terminated. The bill amending the Act on the NCJ came into force in early 2018, despite being widely criticized by the NCJ, the Supreme Administrative Court, the National Bar Association, the Commissioner for Human Rights and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE). The opinions expressed a variety of views, but generally agreed that that the proposed amendments violated the Constitution, especially the separation of powers, and led to the unconstitutional termination of the four-year term of office of the judicial members of the NCJ.

On 6 March 2018 the Sejm elected, in a single vote, fifteen judges as new members of the NCJ by a three-fifths majority. On the same day, the applicant's term of office as member of the NCJ was terminated *ex lege* pursuant to the Amending Act. The law did not provide dismissed members of the NCJ with any way to appeal their dismissal.

Litigation before the ECtHR:
In August 2018, Judge Żurek filed a complaint relying on article 6(1) (right of access to court) and article 13 (right to an effective remedy) of the ECHR, Judge Żurek alleged that he had been denied access to a court and that there had been no procedure, judicial or otherwise, to contest the premature termination of his mandate. Relying on article 10 (freedom of expression), he also alleged that his dismissal as spokesperson for the regional court, combined with the authorities' decisions to audit his financial declarations and to inspect his judicial work, had been intended to effectively sanction him for expressing criticism of the Government's legislative changes and to warn other judges not to do the same.[243]

In its judgement, the ECtHR held by, 6 votes to 1, that there had been a violation of article 6 § 1, and unanimously, that there had been a violation of article 10 of the ECHR. In finding a violation of the applicant's right to access a court to assess the legitimacy of his removal from the National Council of the Judiciary (NCJ), the court considered it necessary to take into account "the strong public interest in upholding the independence of the judiciary and the rule of law" and "the overall context of the various reforms undertaken by the Polish Government which have resulted in the weakening of judicial independence and adherence to rule-of-law standards."[244]

On the right to freedom of expression, the Court stated that the general right to freedom of expression of judges in matters concerning the functioning of the judiciary may also come with a corresponding **duty to speak out** in defense of the rule of law and the independence of the judiciary when these fundamental values are threatened. The Court found that the actions of the public bodies were aimed at intimidating or even silencing Judge Żurek, who was trying to defend the rule of law and the independence of the judiciary. The actions of state services and institutions were aimed at creating a "chilling effect" - not only against Judge Żurek, but also against other judges participating in the public debate.

Impact of the litigation:
The ruling is one in a series of judgements critical of the changes in the Polish judicial field in recent years, and its impact can be understood alongside others. It is important in the context of the continued repression of judges daring to stand up for the rule of law, expressing views and criticizing those in power, that the issues were raised repeatedly before the Court. Judge Żurek also has other cases pending before the ECtHR.

[243] See written comments submitted by various actors, illustrating the importance of the issue: The European Network of Councils for the Judiciary, the Commissioner for Human Rights of the Republic of Poland, Amnesty International jointly with the International Commission of Jurists, the "Judges for Judges" Foundation (the Netherlands) jointly with Professor L. Pech, the Helsinki Foundation for Human Rights (Poland), the Judges' Association Themis and the Polish Judges' Association Iustitia.
[244] *Żurek v. Poland*, ECtHR, application no. 39650/18, Judgement of 16 June 2022, para. 148.

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3.8. Inter-State Cooperation

Litigation has also challenged **inter-state cooperation** in criminal matters where judicial independence is alleged to be compromised, before the ECHR[245] and the CJEU.[246] In the CJEU case *Minister of Justice and Equality,*[247] a European arrest warrant was issued by Polish officials to an Irish court, which refused to turn over the individual, citing reports of the Venice Commission[248] on the backsliding of the independence of the Polish judiciary and concerns over the individual's right to a fair trial in Poland under article 6 of the ECHR. The case before the CJEU was brought in part under article 7 TEU (risk of serious breach by a Member State), article 47 EU Charter (right to fair trial) and article 37(1) European Arrest Warrants Act (providing exceptions for surrenders that would be incompatible with the ECHR). The CJEU ultimately concluded that, in determining whether to surrender an individual, courts must consider whether there are substantial grounds to believe that the individual would be subjected to an unfair trial if he is surrendered to the requesting State.[249] The Irish Supreme Court later determined that there were no grounds to believe the particular individual in question would be denied a fair trial in Poland.[250] Nonetheless the case reveals an interesting example of how one State can push back against rule of law backsliding in another.

3.9. Prosecutorial independence

While this report focuses primarily on judicial independence litigation, various types of litigation have also sought to safeguard the functional independence of prosecutors, who in some jurisdictions play a quasi-judicial role with significant decision-making power. Such litigation often raises comparable issues and plays a role in ensuring judicial independence and the integrity of the justice system. While prosecutorial authority may be administered under an executive branch ministry or department, they must have the capacity to act and make decisions without interference or undue influence from political players, ensuring they can play their role in the justice system.[251]

In *Constitutional Case No. 15/2019 (Bulgaria),*[252] the Council of Ministers requested a constitutional interpretation regarding the scope of prosecutorial authority over investigations into the conduct of the Prosecutor General and/or their office. The Court held that the Prosecutor General must not exert authority over the legal or methodological approaches taken by prosecutors in cases that involve probes, investigations and other

[245] Many non-refoulement cases before the ECtHR have challenged the lawfulness of transferring persons to face trial before tribunals that lack independence and impartiality, as a "flagrant denial of justice;" see e.g. *Abu Qatada v UK* ECHR 2012.
[246] Case no C-216/18 *Minister of Justice and Equality, CJEU*. Some have criticised the unduly high threshold applied by the Court in comparison to the ECHR standard; see 'How Flagrant is Flagrant? The latest judgment in the Celmer Saga' Leiden Law Blog (2018)
[247] *Ibid.*
[248] See e.g. Venice Commission, Opinion No 904 /2017, *Poland - Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, CDL-AD(2017)031-e, 113th Plenary Session, 8-9 December 2017.
[249] *Supra* note 3, Ruling.
[250] Supreme Court of Ireland, *The Minister for Justice and Equality v. Artur Celmer and The Irish Human Rights and Equality Commission*, Judgment of 12 November 2019.
[251] See e.g. Gabriela Knaul, Report of the Special Rapporteur on the independence of judges and lawyers, Human Rights Council, UN Doc. A/HRC/20/19, 7 June 2012.
[252] Decision 11/2020.

activity directly related to the Prosecutor General's office or their personal actions. The Constitutional Court's decision initiated a new set of reforms aimed at holding the Prosecutor General accountable for potential wrongdoing. It also established the constitutional necessity of ensuring prosecutors retain some degree of independence, particularly in cases that involve other legal actors or politicians.

In *Kolevi v. Bulgaria*,[253] a high-ranking prosecutor alleged that he had been framed for drug offences by the Prosecutor General. He brought a case to the ECtHR under the right to liberty (article 5 ECHR) but was shot dead before the case was resolved. His family pursued the application and submitted additional applications, including alleging a violation of Mr Kolev's right to life (article 2). The ECtHR held that Bulgaria had violated article 5 by unlawfully depriving the applicant of his liberty under drug charges, and article 2 by failing to conduct an adequate investigation into his death, as the investigation that had been conducted had lacked independence and impartiality. The Court noted that the Prosecutor General's control over all other prosecutors inhibited investigations into his own misconduct – as alleged by Mr Kolev prior to his murder. Systemic reasons therefore made it impossible for prosecutors to act independently, particularly when the Prosecutor General might have a conflict of interest. Although the ruling in the case exposes the need for reforms to strengthen prosecutorial independence and give greater discretion to individual prosecutors, Bulgaria has for many years resisted implementing the necessary changes to the prosecutor's office, allowing potential conflicts of interest to continue to chill prosecutorial actions.[254] The case did establish, however, that the structure of Bulgaria's prosecutorial office is legally flawed and that additional legal safeguards are needed to ensure prosecutorial independence, particularly in politically charged cases.

***Wróbel v. Poland*, ECtHR (pending)[255]**
articles 6, 8, 10 and 18 ECHR

Background of the case
Judge Włodzimierz Wróbel served as a judge in the Criminal Chamber of the Supreme Court of Poland. He was appointed to the Supreme Court in 2011. In late 2015, the Polish Government began a general reorganization of the Polish judicial system. Judge Wróbel was a co-rapporteur of a Supreme Court resolution[256] finding, among other things, that the National Council of the Judiciary (NCJ) lacked independence and that the Disciplinary Chamber operating in the Supreme Court did not meet the requirements of an "independent and impartial tribunal established by law".

On 16 March 2021 the State Prosecutor's Office sought to lift the immunity of Judge Wróbel with a view to charging him with unintentional criminal negligence[257] in relation to a judgment of the Criminal Chamber of the Supreme Court given by a bench of three judges, including the applicant. The panel had quashed the contested judgment and remitted the case. According to the State Prosecutor, the applicant had failed to fulfil an obligation to verify whether the accused had already been serving his prison sentence, which had resulted in his being unlawfully detained. On 31 May 2021, the Disciplinary Chamber of the Supreme Court, sitting as a court of first instance, refused to lift the applicant's immunity. It held that the applicant had shown negligence, which could have been investigated in regular disciplinary proceedings. The delivery of the resolution and oral presentation of its reasons were broadcast by Polish media outlets. The applicant was described as a "perpetrator" and found to have "unintentionally failed to fulfil his

[253] *Kolevi v. Bulgaria*, ECtHR, application no. 1108/02, Judgement of 5 November 2009.
[254] See e.g. Committee of Ministers, Interim Resolution CM/ResDH(2019)367, Execution of the judgments of the European Court of Human Rights: S.Z. and Kolevi against Bulgaria, Adopted by the Committee of Ministers on 5 December 2019; Committee of Ministers, Execution of Judgements, *Kolevi v. Bulgaria*.
[255] *Wróbel v. Poland*, ECtHR, application no. 6904/22, pending, communicated in March 2022.
[256] Supreme Court's resolution of 23 January 2020, no. BSA I-4110-1/20.
[257] Article 231 § 3 of the Criminal Code of Poland.

duties". The State Prosecutor's Office appealed against the resolution and the applicant against its reasoning.

Litigation before the ECtHR
Judge Wróbel initiated the proceedings before European Court of Human Rights on 4 February 2022 by lodging the request for interim measures. On 8 February 2022, the court decided to indicate an interim measure under Rule 39 of the Rules of Court in the case.[258] The Court asked the Government to ensure that the proceedings concerning the lifting of Judge Wróbel's judicial immunity comply with the requirements of a "fair trial" as guaranteed by article 6(1) of the ECHR, in particular the requirement of an "independent and impartial tribunal established by law", and that no decision in respect of his immunity would be taken by the Disciplinary Chamber until the final determination of his complaints by the ECtHR. The case was communicated to the government on 31 March 2022 and is pending.[259]

Impact of the litigation
The decision regarding interim measures issued by the ECtHR was groundbreaking for a number of reasons, including because it was the first interim measure that so broadly safeguarded the interests of a party by ordering the State not to take any action in proceedings before an authority that did not meet the criteria of a court under article 6 of the ECHR.

Additionally, at the time, the interim measure was relevant to all cases pending before the Disciplinary Chamber (although issued in an individual case of a Supreme Court judge). The ECtHR hereby stated that if members of the Disciplinary Chamber, in defiance of such a decision, continued to pursue cases it would constitute another serious violation of European standards and the foundations of the Council of Europe, and they should face accountability in the future. It was, moreover, important in the context of the bill submitted by President Andrzej Duda on the abolition of the Disciplinary Chamber, which provided for the abolition of the Chamber itself, but left in the Supreme Court the so-called "neo-judges." (These are individuals appointed to judicial positions with the involvement of the National Council of the Judiciary composed in accordance with the amended provisions of the Act Amending the Act on the National Council of the Judiciary of 8 December 2017). Meanwhile, the ECtHR foresaw a violation of the Convention precisely in the adjudication of cases by those who do not meet the standards of independent, impartial judges.

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4. Strategic litigation: enhancing impact and overcoming challenges

The purpose of strategic litigation is often not only to vindicate the rights and interests of the primary subject, but also to serve a broader class of individuals or to advance structural or systemic changes in law, policy and practice. So far as the cases explored in this report have sought to strengthen an independent judiciary, or to resist its erosion, and thereby to advance the rule of law and human rights of many, they may be seen as quintessential 'strategic' or 'impact' litigation. [260]

[258] ECtHR, "Interim measures in the case of Polish Supreme Court judge's immunity", press release, 8 February 2022.
[259] *Wróbel v. Poland*, ECtHR, application no. 6904/22, pending, communicated in March 2022 (status as of August 2024).
[260] See generally Helen Duffy, *Strategic Human Rights Litigation (SHRL): Understanding and Maximising Impact*, Hart Publishing, 2018.

A strategic litigation lens invites us to consider how legal processes can influence change of many types, directly and indirectly, immediately and often in the much longer term. That impact is often about much more than "winning or losing"; some benefits arise from the *process* of engaging in litigation, not always from the *outcome* of those cases. Cases may be lost but still contribute in various positive ways to change, or they may be won but the decisions not be appropriately implemented or lead to setbacks or backlash. As the cases in Section 3 make clear, progress is rarely linear; short-term setbacks may still lead to progress in the longer run. Moreover, litigation should not be taken as a self-standing objective and considered in isolation. Its strength often lies in the subtle ways in which it may bolster and contribute to other processes or developments that seek to strengthen the rule of law beyond the courtroom.

Understanding the contribution of litigation to change is complex, and this report does not purport to provide a comprehensive evaluation of the impact of litigation on this topic to date. However, the ROLL project consultations revealed diverse array of ways in which litigation has contributed to change, from which we might learn for the future.

This Section highlights some of those forms of impact in Part 4.1. It then considers some of the many challenges to the effectiveness of litigation, that must be overcome to maximize that impact, in Part 4.2.

4.1. Outcomes and impact of litigation on judicial independence

ROLL project participants identified a range of ways in which the litigation highlighted above has contributed to positive impact.

4.1.1. Impact on legal standards

Together, the burgeoning body of litigation has contributed to establishing or clarifying legal standards on judicial independence. This report provides many examples of how human rights in binding treaties have been interpreted and applied in judicial independence cases. In an area with a relatively limited body of case law in Europe until recent years, such litigation has clarified, for example, the scope of the rights of judges and some essential elements of an independent judiciary. Litigation has also had an important impact on the progressive development of international standards by introducing them into case law and re-affirming their value.[261]

Equally, judgements of international courts and bodies have been invoked and applied in national level litigation and advocacy, thereby strengthen domestic frameworks and potentially paving the way for future cases.[262] In this way, those bringing these cases have contributed normative tools and provided pathways for others to bring claims in the future.

4.1.2. Exposing, validating and reframing problems

Litigation has exposed and drawn attention to critical problems concerning the administration of justice, and engage influential actors in their solutions. The sheer volume of cases on, for example, the encroachment of judicial independence in Poland, spoke volumes. Judgments in turn can have an important declaratory value, and have for example made clear findings that situations that may be presented as 'reform,' or as the fault of judges themselves, actually amounted to breaches of human rights obligations and rule of law principles.

[261] ROLL Workshop II, 23-24 November 2023, Malta.
[262] ROLL Workshop I, 13-14 June 2023, Brussels.

Depending on how cases are presented, and communicated, they can help reframe situations in the public eye. Some meta cases have highlighted how issues concerning particular judges actually have a broader impact on the judiciary, rule of law and the rights of all. Conversely, individual human rights cases may give a human face to issues, exposing how abstract concepts actually impact on real lives.

4.1.3. Concrete changes to policy and institutional practice

Some cases have resulted in direct actions and improvements in law, policy and/or practice. For instance, the *Kolevi v. Bulgaria* case,[263] which identified defects in the centralized structure of Bulgaria's prosecutor's office and impediments to impartial investigations, led to reform efforts to limit the powers of the Prosecutor General and the Supreme Judicial Council. Following the judgement in *Todorova v. Bulgaria*,[264] in which the ECtHR found a violation of the right to freedom of expression, the Supreme Administrative Court nullified certain decisions imposing disciplinary measures on judges or prosecutors that were based on insufficient reasoning or procedural irregularities.[265] The case of *Baka v. Hungary* influenced the adoption of a code of judicial ethics.[266] Such outcomes are far from inevitable, and full or appropriate implementation is often lacking,[267] but litigation can help to ensure that the issue of concern becomes a priority on the political or policy agenda and may promote reform efforts, guided by international standards and legal findings. Crucially, litigation can also influence and support the policy and practice of third parties, such as other States and international institutions, in their efforts to ensure that the rule of law is respected.[268]

4.1.4. Increasing political impetus

Sometimes even unsuccessful litigation has an impact on the ground, for example by bringing public attention to an issue, and creating political pressure and momentum for change.[269] Courts may ultimately reject claims, but *how* they reject them matters too. Decisions may contain affirmation of the underlying principles or obligations underpinning a case, sending a warning to the State in question, even if the court may find that the evidence is not conclusive or the victim not sufficiently directly affected. Such cases can also help shape later cases, and therefore carry a cumulative impact over a number of cases.

For instance, although the CJEU ruling in the *Repubblika* case[270] was viewed as disappointing, the efforts of civil society leading up to the case and the public attention brought to the issue of the rule of law and judicial appointments, were no doubt critical to the government's decision to commit to changing the system. The government promised to implement reform plans by 2026, including a new judicial appointment system where the Minister for Justice would appoint a commission to go through candidates and make a recommendation.[271] The judgement was also a significant development in the judicial

[263] *Kolevi v. Bulgaria*, ECtHR, application no. 1108/02, Judgment of 5 November 2009
[264] *Miroslava Todorova v. Bulgaria*, ECtHR, application no. 40072/13, Judgment of 19 October 2021.
[265] See also *Kövesi v. Romania*, ECtHR, application no. 3594/19, Judgement of 5 May 2020
[266] See case study box, below.
[267] See further challenges discussed below in Section 4. 2.
[268] For instance, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) references ECtHR's decisions in its work concerning judicial independence and ethics (e.g. in the Comments on the Commentary on the Code of Judicial Ethics of Kazakhstan, the ODIHR highlights the *Kudeshkina v. Russia* case as a pertinent example); The Inter-American Court of Human Rights (IACtHR) draws upon the jurisprudence of the ECtHR to reinforce judicial independence and uphold the rule of law (e.g. in the *Constitutional Court (Camba Campos et al.) v. Ecuador* case, the IACtHR underscores the importance of security of tenure and the need for proper procedures in the dismissal of judges).
[269] ROLL Workshop I, 13-14 June 2023, Brussels.
[270] *Repubblika v. Il-Prim Ministru*, CJEU, C-896/19, Judgment of 20 April 2021.
[271] ROLL Workshop I, 13-14 June 2023, Brussels.

independence case law of the CJEU, clarifying EU legal standards applicable to all Member States and establishing the principle of non-regression on judicial independence.

In the face of non-implementation, litigation can still make a difference in various ways. It can highlight clearly how judicial practice and procedure *need* to change, even if this only takes place later, after a political transition for example. In the case of Poland, the judgements concerning judicial independence provide guidance on restoring the rule of law in the country following the change of government.

Cases such as the *Criminal proceedings against IS* case highlighted that apex courts must not interfere with preliminary references to the CJEU, although Hungary refused to remedy the deficiency identified and the procedural rules allowing challenges to the necessity of a preliminary reference before the Kúria remain in place.[272] Follow-up litigation, or infringement proceedings, focused on non-implementation can send a clear message about the extent of the demise of the rule of law in the State.

4.1.5. Contributing momentum to protest and mobilization

Litigation has contributed to, and been assisted by, other forms of advocacy and mobilization. Poland may provide the clearest example of this iterative relationship. Litigation helped question the legitimacy of hundreds of judges appointed by the National Judicial Council, in light of *A.K. and Others,*[273] among other cases. In response, the government sought to contain the effects of the ruling and resorted to further attacks against individual judges who sought to use it. This led to widespread **protests** and an escalating rule of law crisis.[274] Despite the **backlash** from the government, the judgment empowered Polish judges to make individual independent decisions and led to the Supreme Court adopting a resolution allowing motions to exclude the 'neo judges'[275] from pending cases, disqualifying the Disciplinary Chamber and reminding courts of the primacy of EU law.[276] This had broader implications, leading courts at all levels to begin excluding judges whose independence could be questioned from hearing cases, so as to ensure their judgements could not be challenged on this basis.[277] Although the *A.K. and Others* judgement was not implemented and led to government backlash, it gave Polish judges the tools to make individual independent decisions.[278]

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[272] *Criminal proceedings against IS*, CJEU, GC, C-564/19, judgement of 23 November 2021. *"1. Article 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted to the Court under Article 267 TFEU by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings, without, however, altering the legal effects of the decision containing that request. The principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court. 2. Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice under that provision."*

[273] *A.K. and Others v. Krajowa Rada Sądownictwa*, CJEU, C-585/18, Judgement of 19 November 2019, where the CJEU highlighted concerns about the independence of the Disciplinary Chamber of the Supreme Court and the, which dealt with judicial appointments

[274] Eva Zelazna, "The Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy", in *European Papers*, Vol. 4, 2019, No 3, *European Forum*, *Insight* of 12 January 2020, pp. 907-912.

[275] The term has been widely used in the context of Poland to refer to judges appointed or promoted on the request of the politically captured National Council of Judiciary.

[276] See Supreme Court of Poland, judgment of 5 December 2019, *A.K.*, PO 7/18.

[277] Eva Zelazna, "The Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy", in *European Papers*, Vol. 4, 2019, No 3, *European Forum*, *Insight* of 12 January 2020, pp. 907-912.

[278] ROLL Workshop I, 13-14 June 2023, Brussels.

4.1.6. Impact on victims and survivors

Finally, whether or not judgements lead to direct change in national law, policy or practice, litigation may have other impacts and effects for both victims and society at large. Cases can bring judicial recognition and vindication to affected individuals, play a restorative and empowering role, and lead to reparations or other beneficial results for the victim.[279] These may include a range of concrete benefits in terms of salary or compensation.[280] For instance, in *Baka v. Hungary*, despite the State's failure to implement the judgement and the continued chilling effect among Hungarian judges, the applicant expressed the view that the ECtHR judgement itself entailed an important success and recognition of his and other judges' rights, among other impacts.[281]

***Baka v. Hungary*, ECtHR**[282]
articles 6 and 10 ECHR

Brief overview of the facts of the case and context
In 2009 the Hungarian Parliament elected András Baka as President of the Supreme Court (Kúria) for a six-year term. In 2011, Judge Baka expressed criticism at different pieces of draft legislation including: the draft new constitution, the proposal to lower the mandatory retirement age of judges from 70 to 62, effectively forcing around 10 percent of judges to retire before the end of their tenure; a draft act nullifying certain court judgments; the proposal to modify the model of judicial self-governance by the National Council of Justice; and two draft bills on the organization and legal status of the judiciary. He also challenged new legislation on judicial proceedings before the Constitutional Court.

The mandates of the President and the Vice-President of the Kúria were terminated prematurely on 1 January 2012. The new law terminating their mandates did not provide for any legal remedies. Judge Baka could continue to work as a judge.

The ECtHR litigation and results up to date
The Court held that article 6 of the ECHR was applicable,[283] as Judge Baka was not "expressly" excluded from the right of access to a court. As the premature termination of Judge Baka's mandate as President of the Supreme Court had not been reviewed, nor was open to review, by an ordinary tribunal or other body exercising judicial powers, it amounted to a violation of article 6.

The Court also held that there had been a violation of his right to freedom of expression under article 10 of the ECHR. The Court considered the facts of the case and the sequence of events "in their entirety" and found that Judge Baka had publicly expressed his views on various legislative reforms affecting the judiciary in his professional capacity as President of the Supreme Court. The *ex lege* termination of his mandate came "within a strikingly short time" after a speech highly critical to the government's judicial reform. Consequently, there was "*prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate*".

Execution of the Baka judgment is still pending, and the CoE's Committee of Ministers regularly deliberates responses to the lack of implementation. The Committee, seeing

[279] See Helen Duffy, *Strategic Human Rights Litigation (SHRL): Understanding and Maximising Impact*, Hart Publishing, 2018.
[280] *Kuczyński v. Poland*, ECtHR, application no. 42664/18, Judgment of 4 June 2019; *Xero Flor w Polsce sp. z o.o. v. Poland*, CJUE, case C-621/18, Judgment of 16 July 2020; *Ciorbă v. Romania*, ECtHR, application no. 8666/18, Judgment of 1 October 2019.
[281] G. Szabó Dániel, "Azért rúgták ki, mert bírálta a kormányt", *Index*, 27 May 2014.
[282] *Baka v. Hungary*, ECtHR, application no. 20261/12, GC, Judgement of 23 June 2016.
[283] It did so under the *Eskelinen* test used to determine the applicability of the right to access a court under article 6 ECHR to civil servants; *Vilho Eskelinen and others v. Finland*, ECtHR, application no. 63235/00, GC, Judgement of 19 April 2007, para. 62.

no action from the government's side for six years adopted an interim resolution in the case in March 2022.[284] The Committee called on Hungary to resolve two additional issues, namely i) the possibility of removing the President of the Kúria without effective oversight by an independent judicial body and ii) the "chilling effect" of the violations affecting the freedom of expression of judges.[285]

Impact of the litigation
Judge Baka commented after the Chamber's judgment that it represented "a moral vindication" not only for him but for all judges.[286] Of the EUR 762,520 he claimed as pecuniary and non-pecuniary damages, the Court awarded him an aggregate sum of EUR 70,000. Moreover, of the EUR 153,532 Judge Baka claimed, the Court awarded him EUR 30,000 for the costs and expenses incurred. The Hungarian government has paid these amounts to the applicant. Judge Baka was not reinstated to his office. No apology or other form of recognition of institutional responsibility was offered to him. No legislative changes at the national level have been made by the Parliament, the government, or the National Office for the Judiciary to repair the violations.

Rule 9 follow-up submissions[287] by Hungarian NGOs and associations as well as a 2020 Amnesty International research report[288] showcase the existence of long-term chilling effect caused by the termination of Judge Baka's mandate and other factors. These include smear campaigns against individual judges or attacks from politicians against judgments or the judiciary.

However, the Baka judgment did arguably have a positive impact on the adoption of new internal ethical rules for judges. In 2021-2022, the National Judicial Council (NJC), with the involvement of all judges, drafted a new Code of Ethics. During the discussion of the draft Code,[289] there was specific reference to the non-execution of the *Baka v. Hungary* judgment, and the adopted new Code grants a freer space for judges to participate in public debates, empowering judges to defend judicial independence by criticizing or voicing opinions related to the legal or judicial system. A concerning development, however, is that the Kúria President, being fully aware that the implementation of the Baka judgment is closely connected to drafting the Code provisions allowing wider freedom of expression of judges, challenged the Code at the Hungarian Constitutional Court.[290]

Author: Gábor Hacsi, Amnesty International Hungary, Hungary.

4.1.7. Potential negative impacts

Litigation can also carry adverse impacts, as practice in this report shows. From the stigmatization of judges and applicants, by governments or the public, as a consequence of bringing complaints, to broader backlash, or the change in laws and policies so as to more clearly undermine judicial independence or limit the judicial role, negative effects come in many forms. Losing cases, while not the whole impact story, may arguably contribute to regression in advocacy advances and in public perception regarding the issues exposed by the case, as has been noted in Malta and Romania. This is especially

[284] Council of Europe Committee of Ministers, H46-14, *Baka v. Hungary*,application no. 20261/12, Interim Resolution CM/ResDH(2022)47, adopted at 1428th meeting, 8-9 March 2022.
[285] Council of Europe Committee of Ministers, H46-14, *Baka v. Hungary*, application no. 20261/12, Decision CM/Del/Dec(2024)1501/H46-15, adopted at 1501st meeting, 13 June 2024.
[286] G. Szabó Dániel, "Azért rúgták ki, mert bírálta a kormányt", *Index*, 27 May 2014.
[287] See Council of Europe Committee of Ministers, *Baka v. Hungary*, Case documents.
[288] Amnesty International Hungary, *Fearing the unknown: How rising control is undermining judicial independence in Hungary*, 2020.
[289] National Judicial Council (NJC), Meeting minutes of 6 October 2021, p. 34.
[290] Amnesty International Hungary, "NGOs turn to the Constitutional Court in support of judicial independence", 11 July 2022.

concerning where the government uses such judgements in bad faith and leverages them to further disregard rules and undermine the rule of law.[291]

Examples throughout this report speak to each of these consequences.[292] However, it should be recalled that positive and negative impacts are rarely linear, and short term setbacks may lead to further litigation, advocacy or pressure, and contribute to longer term gains. Undoubtedly in many cases, the proper implementation of judgements is lacking, seriously impeding impact, as noted below.[293] Litigation may indeed result in the flagrant refusal to implement decisions, or even result in **backlash** from the authorities, revealing the extent of the rule of law crisis in the state.[294]

The limitations carry reminders of the need for long-term strategic thinking around litigation and surrounding advocacy, which should be taken into account before litigation is undertaken. There also may be a profound toll on judges who overcome the many challenges to bring litigation, which is either rejected or not implemented, in a way that compounds the harm and suffering. In developing a litigation strategy, it is therefore essential to consider carefully the costs on various levels, and the negative as well as positive impacts of litigation, to enable victims and others to make informed decisions on whether, when and how to litigate.

4.2. Challenges, tensions and obstacles

Planning and developing litigation strategy should be predicated on understanding and overcoming challenges that arise in this field. Challenging attacks on judicial independence through the courts may be complicated and burdensome. Legal, institutional, practical, political and social challenges have arisen in diverse contexts. Some can be addressed, to some extent, through the development of creative, strategic approaches to litigation, while others require slow systemic change and are simply realities to be borne in mind in realistically assessing the contribution litigation can make.

Some of the many challenges identified in the ROLL project are highlighted below.

4.2.1. Complementing judicial independence with accountability

As noted above, the particularities of the judicial role necessarily may entail some limitations on human rights, as the treaties make clear.[295] Human rights treaties and national constitutions have been interpreted as allowing certain **restrictions on the rights of judges** for public order that go beyond the restrictions that would not generally apply to others,[296] such as limitations on freedom of expression and freedom of association, where, for example, this may undermine the independence or impartiality, or the perception of a court or the justice system.[297] As noted, any restrictions must be narrowly tailored, in accordance with the principles of legality, legitimate purpose,

[291] This has been observed in for instance Malta. ROLL Workshop II, 23-24 November 2023, Malta.
[292] See *Paksas v. Lithuania*, ECtHR, application no. 34932/04, Judgment of 6 January 2011; *Kövesi v. Romania*, ECtHR, application no. 3594/19, Judgment of 5 May 2020; *Reczkowicz v. Poland*, ECtHR, application no. 43447/19, Judgment of 22 July 2021
[293] ROLL Workshop I, 13-14 June 2023, Brussels.
[294] See e.g. Eva Zelazna, "The Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy", in *European Papers*, Vol. 4, 2019, No 3, *European Forum*, *Insight* of 12 January 2020, pp. 907-912, on the Polish authorities' backlash to CJEU litigation on judicial independence.
[295] Article 10(2) ECHR.
[296] See e.g. Bangalore Principles of Judicial Conduct, adopted by the United Nations Economic and Social Council (ECOSOC) Res. 2006/23, July 2006, Principle 4.2, 4.6, as well as 4.11.
[297] *See Kydalka v. Municipal Court of Prague*, the Czech Republic Constitutional Court, ÚS 2617/15, Judgement of 5 September, 2016; *Di Giovanni v. Italy*, ECtHR, application no. 51160/06, Judgement of 9 July 2013; *Miroslava Todorova v. Bulgaria*, ECtHR, application no. 40072/13, Judgement of 19 October 2021.

necessity, proportionality and non-discrimination. On the other hand, great importance is attached to the capacity to exercise expression within these limits, especially on matters of public importance concerning the judiciary and the formation of judicial associations. The result is that there may in some cases be a need for a nuanced application of the law to the particular facts and evidence.

Likewise, while entirely compatible in principle, judicial independence may also stand in tension with **judicial accountability** in practice, including when countering corruption or potential complicity in human rights violations. Like other State officials, judges are capable of committing and being complicit in crimes and unethical conduct, which may sometimes even entail violations of international law, attributable to the State. Judicial accountability is therefore central to the rule of law and the protection of human rights.[298] Human rights lawyers and CSOs will seek to walk a line consistent with all of these principles. The need to dually enforce the complementary objectives of independence and accountability also means that on this particular issue, litigants must often overcome seemingly reasonable measures and show that they were based not on legitimate, necessary or proportionate restrictions or pursuit of accountability.

As a result, a nuanced and complex evaluation of facts is often required by courts to comfortably reach the conclusion that violations have taken place, with a correspondingly high burden on litigants to prove the violations in all the facts and circumstances. How this evaluation by a court will unfold may be difficult to reliably predict. What is clear is that it will often be a deeply fact-specific determination. It will depend on consideration of the range of factors discussed in Section 2, including the facts justifying interference, the measures taken against judges and their impact, the context, and respect for due process and safeguards.[299]

A number of cases dismissed for lack of sufficient or convincing evidence show the importance of thoroughly investigating and preparing evidence. This in turn may be impeded by lack of access to information, for example on grounds of national security or where early-stage investigations are concerned.

4.2.2. The independence of the national judicial system and access to justice

An inherent challenge in litigating the lack of judicial independence may, of course, be the very lack of independence in those who would pass judgement in the case. Litigating these issues before a **national judiciary that lacks independence**, and is seen to be complicit in the problem or at least a beneficiary of it, is naturally problematic.[300] The extent of these problems is evident in Polish cases where, as the ECtHR confirmed, there simply was not a "tribunal established by law" within the meaning of article 6 ECHR before which to bring a claim given the lack of independence.[301]

In addition, where judicial independence is eroded, **legal restrictions are often also imposed on access to justice**. Cases surveyed illustrate how laws at times directly deny

[298] See further e.g. International Commission of Jurists, *Judicial Accountability – A Practitioners' Guide* (Practitioners' Guide no. 13), June 2016, Chapter 2.
[299] Compare e.g. two cases regarding vetting of prosecutors in Albania: *Nikëhasani v. Albania*, ECtHR, application no. 58997/18, Judgement of 13 December 2022 (dismissal of prosecutor and lifetime ban from re-entering justice system due to serious doubts as to her financial propriety based on findings of vetting process, no violation of article 8); and *Sevdari v. Albania*, ECtHR, application no. 40662/19, Judgement of 13 December 2022 (vetting proceedings resulting in the applicant's dismissal from the post of prosecutor due to an isolated professional error and her spouse's failure to pay tax on a small part of his income – disproportionate, violation of article 8).
[300] ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report.
[301] E.g. *Xero Flor w Polsce sp. z o.o. v. Poland*, ECtHR, application no. 4907/18, Judgement of 7 May 2021.

access to an effective remedy for judges,[302] or otherwise impose obstacles to accessing relevant justice processes, such as where a Supreme Court referral is required to access the Constitutional Court.[303] Measures against individual judges have sometimes been undertaken alongside the capture or muzzling of the judicial council or similar body, removing another avenue for recourse and support. Specific due process rules that negatively affect judges' access to justice include the impossibility, in several States, of appealing a criminal conviction against a judge. This may be the case where they are tried in the first instance by the apex court, as in *Garzón v. Spain*. Finding redress at the domestic level may therefore be difficult, if not impossible.

While national cases may not engender positive outcomes, they may nonetheless serve significant strategic ends, such as exposing the injustice and the nature of the problem, igniting debate, and paving the way for other international approaches. Where domestic routes are frustrated, the availability of international venues for strategic litigation becomes especially critical.

4.2.3. International justice avenues: Access, delays and deference

The **requirement to exhaust domestic remedies** before turning to international venues is a rule in most international jurisdictions, but it may impose a significant burden, and occasion real delays in accessing justice, particularly where domestic laws and court processes create a chimera of administering justice, but lack independence in practice.[304] For both the ECtHR and UNHRC the remedies that must be exhausted are those that are available in law and effective in practice, such that special circumstances can dispense the applicant from the obligation to exhaust available remedies.[305] Where there is an "administrative practice" consisting of a repetition of acts incompatible with the ECHR, which renders proceedings futile or ineffective, exhaustion may not be required.[306] However, the ECtHR has not squarely and definitively resolved the question of exhaustion of remedies in situations where the highest courts suffer from systematic problems related to judicial independence.[307] In practice, the ECtHR has been generally reluctant to deny domestic courts the opportunity to ensure justice, which also contributes to a broader problem of delays.

Relatedly, international jurisdictions typically accord a degree of **deference to national courts**, a practice sometimes justified in accordance with the purported principle of subsidiarity. The ECHR has been reluctant to find that the judiciary is not independent (as has been criticized by NGOs in the Turkish context for example),[308] and a range of different decisions have been handed down regarding whether the procedure for the appointment

[302] For instance, in Poland, the Act on the Supreme Court (2020) prevents judges from seeking remedies by prohibiting them from questioning judicial appointments or referring cases to the CJEU; in Hungary, the Administrative Courts law (Act CXXVII of 2019, later postponed) would have placed judicial oversight under government control, limiting remedies for judges facing political pressure.
[303] For instance, in Romania, Supreme Court referral is required to access the Constitutional Court. ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report.
[304] See e.g. article 35 ECHR.
[305] *Sejdovic v. Italy*, ECtHR, GC, application no. 56581/00, Judgement of 1 March 2006, para. 55.
[306] See e.g. *Aksoy v. Turkey*, ECtHR, application no. 21987/93, Judgement of 18 December 1996, para. 52; *Ukraine v. Russia (re Crimea)* (dec.), ECtHR, GC, applications nos. 20958/14 and 38334/18, Decision of 16 December 2020, paras. 260- 263, 363-368.
[307] See e.g. Mathieu Leloup, "The Duty to Exhaust Remedies with Systemic Deficiencies", in *Verfassungsblog*, 8 February 2022; ECtHR, "Practical Guide on Admissibility Criteria", last updated 31 August 2023, paras. 122-141.
[308] See e.g. the evidence showing the lack of judicial independence presented by a group of NGOs in *Kavala v. Turkey* since the ECtHR's 2019 ruling : https://www.turkeylitigationsupport.com/s/Kavala-v-Turkiye-2-Third-Part-Intervention-by-TLSP-HRW-ICJ.pdf (*Kavala v. Turkey*, ECtHR, application no. 28749/18, Judgement of 10 December 2019). See also *Ahmet Hüsrev Altan v. Turkey*, ECtHR, application no. 12778/17, Judgement of 16 February 2018

of judges was sufficient to render the tribunal not independent.[309] Nonetheless, as several cases discussed in this report show, the Court has been persuaded in certain contexts that the threshold had clearly been crossed.

This speaks to an overarching challenge how to meet the high threshold that arises in practice in these types of cases, and the need to ensure sufficiently compelling **evidence** and argumentation to convince international courts of the need to intervene in respect of domestic justice systems.

4.2.4. Judges as claimants and the question of standing

Judges may well be **reluctant advocates or activists,** preferring to remain on the other side of the bench. Their role and training are such that they may typically feel uneasy as claimants and shirk from an advocacy role. Sensitivity to protect and be seen to protect judicial integrity and reputation may well justify and compel them to speak out and, where necessary, litigate, but it may also bring caution or concern. As highlighted by the litigation to date, there may be well-founded fear of potential reprisals against particular judges, and of the chilling effect on other judges further afield. Experience suggests that there may well be implications for judges' reputations, stigmatization, or concrete professional and economic repercussions.

There can also be pushback against judges referring decisions to the CJEU, as well as against judge applicants. Judges may feel more comfortable litigating collectively, as a group of victims, or in tandem, where the facts and timing of violations so permit. In practice, however, much of the litigation in this area depends on judges being committed and confident enough to take a controversial and difficult step. As noted below, part of the challenge for lawyers is how to effectively support them to minimize their vulnerability.[310]

Standing for others to litigate, for example in the public interest, will depend on domestic rules and procedures, and these vary greatly between national systems within the EU. Some jurisdictions allow for litigation to be brought by NGOs or human rights bodies, at least in some kinds of cases,[311] but there is not yet a developed practice of such standing being relied upon or granted in judicial independence cases.[312] Also international mechanisms differ in their approach to standing, as will be considered below.[313]

4.2.5. Challenges related to the capacity of and attacks on CSOs

As noted, compelling **evidence** is generally needed to successfully litigate cases of judicial independence, including at the international level. Finding sufficiently weighty evidentiary support to show the consequences of a specific model or measures for the independence of the judiciary, is often difficult.[314] Inappropriate pressure from, for instance, a Ministry of Justice or even other judges may be difficult to prove, making the results of litigation uncertain. For instance, in Poland, migration judges have been sanctioned for being too liberal in their approach to asylum claims,[315] but proving these linkages and ulterior motivation is extremely difficult, where other reasons are proffered.

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[309] See e.g. *Campbell and Fell v. UK*, ECtHR, application no. 7819/77; 7878/77, Judgement of 28 June 1984, para. 79; *Flux (no. 2) v. Moldova*, ECtHR, application no. 31001/03, Judgement of 3 July 2007, para. 27; *Filippini v. San Marino*, ECtHR, application no. 10526/02, Decision of 26 August 2003.
[310] See Section 5 on strategy, below.
[311] For instance, in Slovakia, this can be done based on the Anti-Discrimination Act.
[312] ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report. This is the case for instance in Spain, where organizations such as Greenpeace have however been granted standing on other issues before national courts.
[313] See Section 5. 5. below.
[314] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 3.
[315] This has been suggested during the ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 13.

These evidentiary and factual challenges sit alongside questions regarding the **lack of capacity and resources of the CSOs** that often, in practice, make strategic litigation possible. The **lack of funding** for strategic litigation and related advocacy efforts, including specifically in relation to rule of law and judicial independence, presents a real challenge.[316] The strategic litigation on judicial independence in this report has at times needed to be carried out pro bono, or with limited resources, despite its importance and potential impact.

4.2.6. Popular sympathy and mobilizing on judicial independence

Strategic litigation often has the greatest impact when it is combined with **mobilization of public support and coordinated advocacy**. However, there are some inherent challenges to mobilizing the public on issues of judicial independence.

For one, there are variable levels of public trust in, and support for, the judiciary.[317] Trust can be adversely affected by a variety of factors, including the actions of individual judges and perceptions of corruption or inefficiency of the justice system, often inflamed by depictions of the judiciary in the media or by the authorities. These may in extreme cases form part of a campaign to delegitimize or neuter the judiciary.[318] In addition, judges are often perceived as privileged, elitist and distant and as such, a professional group the rights of whose members do not need defending. Third, the issues themselves may be seen as remote and the significance of the rule of law not readily accessible or compelling. In some countries, where judicial independence has been effectively undermined, many of the changes were enacted by constitutional majority, meaning that they were seen to have democratic legitimacy.

Ensuring a more nuanced appreciation of the role of judges in protecting rights, within the democratic rule of law, is essential but extremely challenging in the current climate. These challenges underscore the importance of paying attention to communication, essential to any litigation strategy and advocacy effort but particularly central to these issues. Framing the problem to highlight the importance of judicial independence for the lives of people and for ensuring public services is central to securing buy-in from the public.

4.2.7. Timeliness and prevention

Delays in legal processes are a perennial challenge. And litigation is almost always inherently reactive, and only rarely preventive.[319] In judicial independence cases, a delay of many years may mean that litigation cannot prevent the incremental erosion of the justice sector or protect the careers and rights of individual judges. It may come too late. The situation in Poland recalls how difficult it is to undo the effects of attacks on judicial independence and underscores the need to pursue timely, preventative, justice.

Maximizing the preventive potential of litigation may in part require more engagement with creative lawyering to enable early interventions. The use of interim measures has had some effect in this context, as Polish cases reveal, but this is made more challenging as a result of the narrow approach to the criteria for the grant of such measures by, for example, the ECtHR.

4.2.8. Non-implementation and remedies

The non-implementation of judgements has been raised recurrently as an enormous challenge for strategic human rights litigation on judicial independence. It frustrates or at

[316] ROLL Workshop III, 21-22 March 2024, Prague. See Workshop report, p. 8.
[317] ROLL Workshop III, 21-22 March 2024, Prague. See Workshop report, p. 5.
[318] ROLL Workship III, 21-22 March 2024, Prague. See Workshop report, p. 5.
[319] See strategy below, below on eg interim measures and early intervention.

least clearly limits the impact of individual cases, both for the specific applicant and for wider structural or systemic change.[320] The lack of political will among responsible authorities is often particularly pronounced in rule of law and judicial independence cases, where full implementation may require systemic changes to law and policy to strengthen and protect judicial independence, and where vested and powerful political interests are often at stake.[321] Forms of redress that go to addressing systemic wrongs are those most often left without implementation.

4.2.9. Weaponization of strategic litigation against judicial independence

There is a growing risk that strategic litigation, and the mobilization of public opinion, may be used against judicial independence, as well as in its defence. Indeed, judicialized attacks on judges, NGOs, and human rights defenders are an increasingly common feature of the human rights landscape, in Europe and globally.[322] Various initiatives seeking to counter so-called strategic lawsuits against public participation ("SLAPPs") within the EU and elsewhere are an indication that this problem is becoming more widely recognized.

Spain provides a concrete example. Numerous cases against judges and others have been brought by organizations, including the right wing *Manos Limpias* organization behind the initiation of the first *Garzón* prosecution, which has also lodged many other criminal complaints against judges[323] and other democratic actors.[324] The complaint against Catalan judges lead to disciplinary proceedings and eventually a finding of violations of private and family life by the ECtHR as a result of the handling of the investigation and leaking information to the press in *MD and others v. Spain* (2017).[325] Likewise, the right wing political party Vox's challenge to a provisional law seeking to enable the judicial council to function, during the five year impasse in the renewal of the Council, provides illustration of the growing resort by political actors to the courts in a way that may seek to influence the functioning of the judiciary and its independence.[326]

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[320] ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report; European Implementation Network et al, *Justice Delayed and Justice Denied: Non-Implementation of European Courts Judgments and the Rule of Law*, 3 July 2023.

[321] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 13-14.

[322] ROLL Workship III, 21-22 March 2024, Prague. See Workshop report, p. 2.

[323] Eg. in 2007, Manos Limpias brought a complaint before the GCJ against Judges Juan del Olmo and Garzón, and lawyer Olga Sanchez in relation to the hearings in the 11-M terrorism case,

the Supreme Court, declared inadmissible - and requested an investigation against Manos Limpias for the potential commission of the offence of *denuncia falsa* (false complaint); Europa Press, 'Crónica 11-M.- El Supremo ordena investigar a Manos Limpias por un presunto delito de denuncias falsas en torno al 11-M', 11 January 2007 < https://www.europapress.es/otr-press/cronicas/noticia-cronica-11-supremo-ordena-investigar-manos-limpias-presunto-delito-denuncias-falsas-torno-11-20070111184937.html > However other complaints have continued and been facilitiated since then.

[324] E.g. Manos Limpias brought a case against Prime Minister Pedro Sanchez for engaging in negotiations and signing an agreement with a Catalan party; Supreme Court (criminal chamber), in the Judgement 3883/2024 -ECLI:ES:TS:2024:3883A.

[325] *MD and others v. Spain*, ECtHR, application no. 36584/17, Judgement of 28 June 2022.

[326] Judgement of the Constitutional Court: STC 128/2023, of 2 October -*ECLI:ES:TC:2023:128 in response to* unconstitutionality appeal submitted by 50 VOX MPs against the Organic Law 4/2021 of 29 March, on the Judiciary (Poder Judicial), to establish the judicial regime applicable to the "Acting" General Council of the Judiciary (GCJ *en funciones*).

5. Developing strategic litigation on judicial independence: Reflections and recommendations

5.1. Litigation in context

There is no such thing as a uniform blueprint for good litigation strategy, still less in the complex area of judicial independence. What is possible and effective is deeply contextual, influenced by myriad variables. These include changing political situations, the security context, popular trust in the judiciary, available resources and support, among many other factors. One lesson is not to conflate situations, or to assume that what works in one situation or case will work in another.

Nonetheless, experience of strategic litigation on judicial independence highlights areas of good practice and lessons learned that may be relevant elsewhere and assist lawyers in responding to challenges and pursuing strategic litigation.[327] While strategies will need to be developed in light of conditions in the country or jurisdiction, situation and case at hand, the following strategic considerations and lessons learned may inform effective strategies elsewhere.

5.2. Goals, limits and litigating for social and political change

Litigation can pursue a range of **goals**, in line with the impacts outlined above. Identifying and evaluating goals with clients and partners is crucial in any litigation, to avoid unmanaged expectations and enable decision-making as well as tailored strategic litigation. It is important to recognize that goals sometimes will need to be flexible and may shift over time. Some objectives may be the concrete outcomes of litigation, but goal-setting should also consider how the litigation can play a part of the slow process of change through the various forms of direct and indirect impacts identified. Such impacts may include those of a legal, social, political, informational or evidentiary character or may consist in exposing the truth or shaping the narrative.

Litigation will often meet some goals, and not others. It may be ambitious and aspirational, and such litigation can often achieve more than advocates may anticipate. But it must also be done with a pragmatic outlook that recognizes the **limitations** of litigation as a tool. Litigation alone can only do so much, and many of the factors that influence impact lie beyond the control of litigators and advocates. For example, in practice, the key factor in shaping change in Poland was elections and political transition, which are clearly central to protecting and re-instating judicial independence where the rule of law is under attack.[328] Some Polish advocates suggested that the litigation and associated advocacy around rule of law played a part in spurring for and influencing that transition. In turn, undoing the harm done to judicial independence and the rule of law continues to pose a challenge and requires institutional rehaul beyond the scope of litigation.[329]

This speaks to giving due attention to the role of litigation within **a broader political and social context**. Litigation must not therefore be undertaken in a vacuum or necessarily be privileged over other forms of advocacy. To be most effective in addressing systemic problems, litigation may be one part of a broader movement for change, distinct from but complementary to other tools. Litigation can be recognized as one modest but significant part of such a broader effort to address entrenched and complex rule of law problems, but not as an alternative to them. For instance, the push for reform through legislative and administrative process does not necessarily require litigation through the justice system. We should ensure then that it does not unduly detract resources from other forms of

[327] ROLL Workshop III, 21-22 March 2024, Prague. See Workshop report, p. 7.
[328] ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report.
[329] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report.

political advocacy and action. Grassroots organizing, lobbying, coalition-building, and public awareness campaigns, sometimes complementing legal action, can shape public opinion, influence policy, and create momentum for reform.

5.3. Alliance building, mobilization, communication and activism

For maximum impact, litigation is often part of a broader movement for change. Its effect is heightened when complemented by other measures, including advocacy, research, alliance-building, communication and campaigns. Practice shows that organizing **demonstrations and mobilizing to show discontent** with measures undermining judicial independence or supporting an affected judge can in some contexts be an effective tool for pressure, as seen for instance in Poland.

To allow for effective mobilization and advocacy, relevant actors need to consider and address the challenges related to the lack of public interest in and support for the judiciary. **Communicating effectively** and mobilizing widely before, during and after the legal process is crucial. Strategies may seek to address the remoteness of the judiciary, negative public perceptions and lack of trust. This may be done by undertaking efforts aimed at **humanizing judges in the public eye,** telling their stories, encouraging their involvement in advocacy efforts and increasing the public's understanding of the importance of judicial independence, by linking it to other human rights or social concerns.[330] In the longer term, enhanced **education** on the rule of law and judicial independence – of the public and the judiciary itself – and public is important to guard against backsliding and may be linked to litigation strategy. [331]

Engaging **media** can be key to garnering popular support and buy-in. But negative impacts and risks must, as always, be fully considered and addressed,[332] as media can be an ally or a threat to human rights work. Oftentimes, media, whether in traditional form or newer social media contexts, has contributed to backlash against the judiciary. This is particularly problematic in countries where media freedom has itself been affected by rule of law backsliding.[333] Building a long-term relationship with interested journalists and even "influencers" on social media can be considered a good practice, and especially important on issues that are harder to understand and convey to the public. Assessing which journalists and outlets will be beneficial, including among small independent media, is essential. In addition, social media can be an extremely important tool for mobilization and advocacy, if leveraged in an effective way.[334]

During the implementation of the ROLL project, the importance of **alliance-building** on a wide scale was also particularly highlighted by the experts and practitioners involved. This could include for instance improving cooperation between NGOs, the media, lawyers, bar associations, academia, and national human rights institutions. Also, associations of judges and public prosecutors can play a particularly important role in strengthening judicial independence and speaking with weight and authority to certain audiences. Such collaborations can greatly enrich coalitions set up with civil society. Engaging political actors, legislatures, and monitoring mechanisms may lend support, authority and momentum to advocacy and litigation.[335] Building **trust** and dialogue between civil society organizations and the judiciary also warrants attention, within the constraints of judicial independence and mutual respect for different but complementary roles within democratic systems. Where possible, the support and involvement in litigation and advocacy work of judges and **associations of judges**, at national and international level, can be crucially important. Of course, as a number of lawyers attending the Prague workshop noted, care

[330] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 12.
[331] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 12.
[332] ROLL Workship III, 21-22 March 2024, Prague. See Workshop report, p. 2.
[333] ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report.
[334] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 12.
[335] See Implementation below.

and vetting are also due to ensure alliance partners have aligning interests and values, and do not pose a threat to the alliance.[336]

Poland again provides an illustrative example of litigation combined with complementary strategies employed by judges, lawyers and civil society facing a rule of law crisis. The main elements of the strategy were good organization, careful communication, public mobilization and training. 'Justice Committees' composed of judges, prosecutors, lawyers, and NGO representatives, were instituted and met regularly to report on and discuss developments and political attacks they experienced. They organized conferences and events, engaged with the media, organized trainings on strategic litigation for judges and produced a manual on using preliminary rulings and bringing cases to the CJEU. These cooperative efforts allowed Polish lawyers to make active use of the CJEU and ECtHR, catching the attention of EU institutions, leading to further pressure and eventually helping contribute to the impetus towards the launching of infringement procedures.

Finally and crucially, Polish judges were brave enough to speak up and expose themselves, both by bringing cases to the courts and by communicating openly about the attacks against the rule of law they saw in the country.[337] Affected judges became personally involved in communicating about their cases and the systemic issues facing the rule of law in the country, for instance by appearing at music festivals to engage with young people.[338] External actors lending assistance and support were many institutions and associations, and unusually included judges from other countries who accompanied Polish counterparts and who took to the streets in their robes, in a very rare form of public protest that drew international media attention, further heightening pressure for change.

Much work remains to be done to undo the harm caused to the independence of the judiciary and the rule of law in Poland. Nevertheless, the experience highlights the value of courageous and broad mobilization on judicial independence.

5.4. Shaping the narrative: Contextualizing, framing and proving systemic violations

Litigation by its nature typically involves a narrow focus on issues, reducing them to the facts surrounding particular individual applicants and violations of the particular law that comes within the jurisdiction of the particular court. An unduly narrow framing may fail to **capture** wider concerns or violations, including what may be **the systemic nature, implications and importance** of attacks on judicial independence. Courts and human rights mechanisms at the international level may be particularly removed from facts and situations at national and local levels. They may be unable – or given political sensitivities or practical obstacles, unwilling – to grapple with the broad rule of law problems underlying particular cases. Litigation and judgments on this issue may therefore be most powerful when they engage with and explain the context, stakes, and broader social, political or other implications. Lawyers carrying out strategic litigation on judicial independence, and others supporting or intervening, should consider how they may provide the courts with the necessary information and evidence to understand the wider context and the significance of the case.[339]

At the same time, there may also be practical and strategic reasons as to why litigation arguments (as opposed to broader advocacy) should be tightly focused on the particular facts and circumstances of the applicant(s). Litigation must be framed to meet the **jurisdictional requirements** of the relevant court or body, as well as other doctrinal requirements, such as standing, or bars, such as immunities or conflict of law

[336] ROLL Workshop III, 21-22 March 2024, Prague. See Workshop report, p. 8.
[337] ROLL Workshop III, 21-22 March 2024, Prague. See Workshop report, p. 7.
[338] ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report.
[339] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 14.

considerations. It generally works best when it provides judges with clear, specific violations of applicable law, a clear and persuasive path of legal arguments to justify the desired outcome, and pointedly clear indications as to how these can and should be resolved with respect to remedy. In an individual application, as opposed to a collective complaint, most of the brief would be expected to focus clearly and concretely on how the impugned measures affected individuals, their rights, and their interests. Moreover, **strategic considerations around argumentation** should be borne in mind. For example courts are often most willing to engage with progressive interpretations in cases where the issues are presented as narrow and exceptional, rather than widespread and affecting many other victims. Strategic considerations as to what arguments are likely to prevail, and be effective, in the particular context, therefore sit alongside the need, where possible, to contextualize to help shape the narrative and impact of judgments and decisions.

In strategic litigation an accommodation may be needed between **internal and external facing arguments**. Litigation documents and outputs can serve advocacy purposes, and speak to audiences beyond the bench, but this should not and need not compromise their effectiveness and authority within the legal process. Public advocacy documents that provide a lay description of the content and process of a case and explain how the rule of law is impacted in the country in question can be produced and can be very valuable for wider impact.[340] An effective coalition of actors and allies collaborating inside and outside the legal process can help ensure different messaging for different audiences, and that arguments that may work in court can be translated meaningfully and accessibly to broader audiences.

Sometimes, particular **legal provisions and arguments** can help focus the court on the broader nature of the problem. For example, before the ECtHR this may be done invoking article 18 ECHR, which constrains the capacity of the State to limit rights.[341] Such a strategy has been employed in cases of measures taken for political or other illegitimate purposes, measures to demonstrate the broader political implications of a situation and the various elements contributing to a chilling effect or hostile environment against judges. Article 18 cases may in turn serve as significant indicators of rule of law backsliding in Europe.[342] In simpler terms, Article 18 helps to highlight when governments use legal measures to undermine fundamental rights for reasons unrelated to the intended purpose of the law. Selecting powerful arguments that go to the heart of the violations, in content, may be more effective inside the court and in advocacy beyond the parameters of the legal process, than a "kitchen sink" approach that includes all possible arguments or violations.[343]

Where relevant, highlighting negative perception of the judiciary that may be held by segments of the general public in the country may also be a strategy to support claims of systemic issues. In *Romanian Judges (I)*, the CJEU found that the executive's *de jure* ability to make direct interim appointees to the body responsible for judicial discipline could "give rise to reasonable doubts that the power and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those

[340] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 14.
[341] Article 18 ECHR states that "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."
[342] Philip Leach, 'What potential for upholding the rule of law through invoking Art. 18?', presentation at European Implementation Network (EIN), Conference: "Safeguarding the Rule of Law: Implementing ECtHR Judgements for Lasting Impact", 19 June 2024, the Hague, Netherlands. For examples of rule of law cases finding violations of article 18 ECHR, see e.g. *Juszczyszyn v. Poland*, ECtHR, application no. 35599/20, Judgement of 6 October 2022; *Miroslava Todorova v. Bulgaria*, ECtHR, application no. 40072/13, Judgement of 19 October 2021.
[343] Ioulietta Bisiouli, 'Lessons learnt from implementing ECtHR rule of law judgements', presentation at European Implementation Network (EIN), Conference: "Safeguarding the Rule of Law: Implementing ECtHR Judgements for Lasting Impact", 19 June 2024, the Hague, Netherlands.

judges."[344] It ruled that such "reasonable doubts" violate articles 2 and 19 TEU. Connecting legislative and constitutional reforms to the loss of public confidence in courts can therefore enable litigants to highlight how seemingly innocuous changes to a court system can bear negative consequences for the judiciary's independence.

Demonstrating systemic problems, and their connection to the facts of the case, is a key evidence-related challenge. **Meeting evidentiary challenges** may require collaboration with various other actors and use of a variety of sources. These may include civil society organizations working at local levels and, for instance, providing information and statistics on judicial "trends" and their impact; public statements of executive officials, legislators and other decision-makers; the testimonies of other judges; information and internal documents from whistleblowers; and independent experts and IGO staff. Sources can include the monitoring, fact-finding and analysis by other human rights and rule of law actors and mechanisms, both IGO and NGO, as well as the scholarly work of academics.[345]

5.5. Collectivizing and supporting

There can be real strategic benefit from **individual judge applicants** being willing to bring claims in their own name, particularly where there are strong cases brought by sympathetic judges that can provide a human face to an abstract problem. Individualizing can, on occasion, help clarify issues and tell understandable stories. But there is also strength in numbers. The challenges highlighted above reveal the very real price that judges may pay for being the person who challenges systemic attacks on judicial independence, which often implicate powerful executive and sometimes judicial actors. Strategic considerations include whether it may be possible to collectivize complaints within the relevant system.

At times, **claims may be brought collectively**, by a number of victims, where that would more powerfully show the systemic nature of the issue. In others, cases can be brought in the public interest.
Where available, collective complaints (which in some jurisdictions for certain kinds of claims may be referred to as ***actio popularis*** litigation) may present opportunities to avoid the need for any one individual to bring the claim, and put the systemic issue at the centre of the case, and facilitate the pursuit of systemic solutions.

Rules on standing vary, but where justice systems allow collective action, it may present opportunities for NGOs and others to bring claims, at least in certain sorts of cases. The subset of European countries that allow such claims includes Malta, Portugal, Slovakia, Spain and Hungary. In Spain, national law allows associations, organizations and trade unions to bring *actio popularis* claims, and intervene in criminal cases, but this has not been fully utilized to protect (and has been invoked to undermine) judicial independence.[346] Hungary and Slovakia permit civil society organizations to bring collective claims in discrimination cases on behalf of numerous or non-identifiable victims.[347] More public interest claims may provide alternatives to relying exclusively on individual judges to bring claims in the future.

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[344] *Romanian Judges (I)*, CJEU, C-83/19 et al., Judgement of 18 May 2021.
[345] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 14.
[346] This right mainly applies in criminal proceedings. See e.g. European network of legal experts in gender equality and non-discrimination, Country report: Non-discrimination, Spain 2023, p. 84; Spain, Law regulating Criminal Procedure, article 101. See also SLAPPS below.
[347] Slovakia, Anti-discrimination Act, 365/2004, Section 9a; European network of legal experts in gender equality and non-discrimination, Country report: Non-discrimination, Slovakia 2024, p. 10; European network of legal experts in gender equality and non-discrimination, Country report: Non-discrimination, Hungary 2024, p. 9.

The ECtHR, in turn, is vociferous in its rejection of the move towards a collective complaint or "*actio popularis*" system, and there is no such possibility in the UNHRC either.[348] The CJEU will however hear such claims if the domestic court requesting a preliminary ruling sits in a jurisdiction that accepts them. In *Repubblika v. Malta*, for example, Maltese civil society organizations used *actio popularis* to challenge the system for judicial appointments. The European Committee of Social Rights, which receives and adjudicates collective complaints regarding alleged non-implementation of obligations under the European Social Charter, and therefore does not allow an individual victim to act as the litigant, could also provide a useful although as of yet underutilized mechanism for litigation, where labour or other social rights are undermined.[349] Collective complaints can however only be brought by or with international NGOs with the necessary participatory status with the Council of Europe.[350] For the most part, such claims are likely to arise at the national level.

For those judges who do decide to claim as applicants, **support** can be provided in many different ways to minimize concerns.[351] For lawyers, enabling judges to litigate may well depend on building relationships of trust with clients, or potential clients, over time. As noted above, this may not be straightforward as regards the relationship between lawyers, NGOs and the judiciary. Such efforts can also entail psychological support for litigators and witnesses as part of good litigation practice. In extreme situations, it may be appropriate to seek support or respite from associations working with 'frontline human rights defenders',[352] to minimize risks associated with challenging rule of law violations and affording practical support and protection. Support can also be provided to organizations targeted due to their work on issues related to the judiciary.[353]

Peer support involving facilitating exchanges and collaboration with other judges, including but not limited to those facing similar issues in other States, can be empowering and an important complement to litigation strategy. Polish judges could and, to a limited degree, did intervene in cases in other States, while judicial associations and collectives, national and regional, played a particular role in proceedings concerning Poland. Respect, support and solidarity from peers can be important for judges who may be vulnerable and under attack.

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[348] Although collective communications in the strict sense are not permitted under the UN treaty bodies' mechanisms, it is possible for very large groups of individuals to be named as communicants in some cases. In practice, this may not necessarily involve making full claims for each individual. Rather, it can show that these individuals were similarly situated to those in the complaint, for whom a full case is made. See, for example, a draft of the Optional Protocol on a Communications Procedure for the Convention on the Rights of the Child (Article 7, A/HRC/WG.7/2/4) contained provisions allowing for collective communications. Despite strong lobbying efforts by the ICJ and other NGOs, as well as support from several States for its retention, this provision did not survive the negotiation.

[349] The mechanism is available in States which have ratified the European Social Charter or the Revised European Social Charter and accepted the collective complaints mechanism. See further Section 5. 7. below and e.g. Council of Europe, Collective complaints, website (accessed 2 December 2024).

[350] Governmental Committee of the European Social Charter and the European Code of Social Security, List of International Non-Governmental Organisations (INGOs) Entitled to Submit Collective Complaints, GC(2024)22, 1 July 2024. See also Council of Europe, "Non-Governmental Organisations entitled to lodge collective complaints" (accessed 5 September 2024). Nikolaos A. Papadopoulos, "Strategic litigation before the European Committee of Social Rights: Fit for purpose?", in *Netherlands Quarterly of Human Rights*, (2022) 40(4), 379-398, p. 385. In addition, any State may grant representative national non-governmental organisations (NGOs) within its jurisdiction the right to lodge complaints against it, but so far only Finland has done so.

[351] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 13-14.

[352] This includes Frontline Defenders, an NGO working to protect Human Rights Defenders (HRDs) at risk, with grants, capacity building, visibility, networking, and advocacy including 24x7 emergency and crisis response, payment of legal fees, and temporary relocation.

[353] The Bulgarian Helsinki Committee (https://www.frontlinedefenders.org/en/case/threat-deregister-bulgarian-helsinki-committee) faced charges regarding "interference with the judiciary" leading to potential deregistration for seminars and educational events organised for judges and prosecutors. Judges have been supported in several others contexts.

5.6. Amicus, third party interventions and experts

Third-party support can also be brought into litigation in various ways. Depending on the rules governing the particular system or jurisdiction, third parties, including those with expertise in the area under dispute, may intervene through ***amicus curiae*, third-party submissions or as experts.** This can lend weight, legitimacy and expertise to a case. Of course, 'amicus curiae' strictly means a 'friend of the court', not of a party, so an amicus bears no duty to the interests of either party. Rules for third party interventions, such as those applicable in the ECtHR, require that interveners not specifically address facts or overall merits of the case (though some domestic jurisdictions do recognize third-party interventions that are expressly in support of a party to the case).[354]

Experts on aspects of judicial independence and the administration of justice, Ombudspersons, UN Human Rights Council Special Procedures, the OHCHR, or the European Human Rights Commissioner's office, as well as many NGOs, can and often do intervene to good effect in judicial independence cases. For instance, the Polish NGO, Helsinki Foundation for Human Rights, intervened before the ECtHR Grand Chamber in the case *Ástráðsson v. Iceland*, concerning defective judicial appointments and their impact on the right to an independent and impartial court.[355] Also, the Venice Commission has submitted a number of *amicus curiae* briefs on judicial independence issues, to both the ECtHR and domestic courts.[356]

There are many examples of third-party interveners or experts fulfilling multiple roles, complementing those of advocates, lawyers and victims. This can include fleshing out and explaining the international and comparative law and standards relevant to the concrete case, the broader context, or the implications or relevance beyond the confines of the case or the State. Some interventions may present factual research setting out elements of the prevailing human rights or rule of law situation in a particular country. In the context of Turkey, many interventions both at the ECtHR and the follow-up submissions on implementation at the CoE Committee of Ministers have provided detailed analysis to show the lack of judicial independence.[357]

While such intervention requests typically come directly from the intervener, that is independent of the applicant, expert statements, opinions and similar briefs can also be introduced by a party to the proceedings. In the *Garzón* case, the applicant submitted expert statements from a series of distinguished international judges and international law experts on judicial independence, and on accountability, demonstrating that Judge Garzón's decisions, for which he was prosecuted, were comparable to those of many other judges, in Spain and across the globe, and compatible with international human rights law.

5.7. Exploring underexplored arguments, fora and applicants

The **choice of forum, where there may be multiple options,** is always an important consideration. Many factors will influence which courts and quasi-judicial bodies and which processes are most effective, when there is indeed a choice. These include their formal or de-facto authority or powers; whether their decisions carry a strictly binding effect; the subject matter jurisdiction; whether the decision is precedential in effect; and accessibility.

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[354] See e.g. under Slovak law, third-party interventions are admissible in support of either the applicant or the defendant in certain civil proceedings (Paragraph 93 Code of Civil Procedure).
[355] See Helsinki Foundation for Human Rights, "Rule of law threatened by defective judicial appointments. HFHR submits amicus curiae brief in Ástráðsson v. Iceland", 7 January 2020 (accessed 3 December 2024).
[356] See e.g. Venice Commission, Amicus curiae briefs prepared by the Venice Commission upon requests of the European Court of Human Rights (accessed 3 December 2024); Venice Commission, Republic of Moldova - Amicus Curiae Brief for the Constitutional Court on the Criminal liability of judges, CDL-AD(2017)002-e, 13 March 2017.
[357] See e.g. the level of detail and evidence presented by a group of NGOs organised by the Turkey Litigation Support Project in *Kavala v. Turkey* in their written submissions.

The main fora in the European contexts, discussed above, are the ECtHR and CJEU, supported by the UNHRC, each with its strengths, weaknesses and limitations. Considering whether litigation before one of these bodies may be needed or even possible is advisable at the outset, so as to maximize chances of success. Arguments related to the applicable international rights and standards should be formulated and presented from the beginning. Consideration should also be given to whether the case can and should be developed in a way that frames the matter as a question of EU law and enhances the prospect of obtaining a preliminary question, which can provide both legal clarity and shed light on any systemic issue in the country.

Infringement proceedings before the CJEU offer a potentially powerful – but difficult to access – remedy in judicial independence cases. Bringing about such proceedings requires providing the European Commission with strong and compelling evidence of severe issues related to the rule of law. This strategy has proved successful for instance in relation to Poland and Hungary, but these situations remain exceptional.[358] Where such proceedings are started, they offer strong political and enforcement leverage, including the possibility of sizeable fines for non-implementation of judgements, in addition to potential international "embarrassment".

Other fora, such as the UN Treaty Bodies and other non-judicial actors may not offer the same enforcement power as courts, but they have proven useful either as alternatives or as complements to judicial venues, covering additional legal grounds, and should be considered.[359] Non-judicial mechanisms and procedures, such as the European Human Rights Commissioner or UN Special Procedures Commissions of Inquiry, fact finding missions, and other forms of reports and petitions can also play a role and advocates may choose to invoke these alongside other procedures, or instead of them, where judicial litigation is not feasible.

While there are lessons to be learned from what has worked to date, creative lawyering may also involve exploring new potential bases for litigation, fora or applicant groups. For example, while litigation on judicial independence has so far focused on relevant civil and political rights, economic and social rights of judges have been more neglected. These rights are directly relevant to many of the issues concerning judicial work, such in relation labour, housing, education, and health rights. Such rights fall under the jurisdiction of, for instance, the UN Committee on Economic, Social and Cultural Rights, the UN Committee on the Rights of the Child, the **European Committee of Social Rights** (ECSR) and the CJEU.[360]

The ECSR does not yet appear to have addressed any judicial independence case, yet it carries several potential benefits that are very unusual in human rights litigation; there is no requirement of exhaustion of domestic remedies and no need for individual victims to bring the claim, as the system involves collective complaints that can squarely address systemic problems. While it may not be treated by some States as carrying the same "authority" as the ECtHR and does not issue strictly binding judgments, for those States that allow complaints it should be borne in mind as one potential mechanism.[361]

[358] ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 12.
[359] For instance, the *Garzón v. Spain* case was rejected as inadmissible by the ECtHR without explanation, but deemed admissible by the UNHRC and led to a powerful decision, albeit one lacking in implementation to date; *Garzón v. Spain*, UNHRC, communication no. 2844/2016, UN Doc. CCPR/C/132/D/2844/2016, 23 May 2023; the UNHRC admitted the case, reasoning that the ECtHR had provided no indication of having considered the issue at all, thus there was no impediment to its own determination of the issue under the rule precluding bringing the same case to multiple international for a.
[360] See relevant articles of the International Covenant on Economic, Social and Cultural Rights, the European Social Charter, and EU Charter respectively.
[361] See Section 2 above mechanisms.

Another potentially interesting area to explore may be the use of **whistleblower** protection frameworks in judicial independence litigation. A number of potential scenarios arising in litigation may concern judges and other judicial staff publicly revealing attempts to undermine judicial independence, which could therefore be litigated with reference to whistleblower protection. Whistleblower protection has been addressed for instance in the jurisprudence of the ECtHR, which provides tools to be invoked in this context.[362] In *Guja v. Moldova*, regarding a staff member of the Prosecutor General's Office who had leaked letters to the media, the ECtHR defined six criteria to evaluate whether a State Party's interference with individual freedom of expression was necessary and justified. In *Halet v. Luxembourg*, the ECtHR consolidated its previous case-law on the protection of whistle-blowers and fine-tuned the criteria established in the Guja judgment and decided that the criminal nature of the sanction against the applicant was enough to create a chilling effect and to excessively affect the applicant. [363]

Appropriate domestic legal frameworks and bodies on whistleblower protection are on the increase across Europe, reflecting the EU whistleblower protection directive.[364] For instance, Slovakia has a strong whistleblower protection law introduced in 2023,[365] which is based on and in some ways provides wider protection than the Directive. The whistleblower protection in the country is underpinned by the independent Whistleblower Protection Office, which works to protect whistleblowers, assist them during the process, intervene in retaliation cases, raise awareness about protections and best practices, direct disclosures to the appropriate investigative body, assist organizations in establishing their internal whistleblower programs and to issue sanctions in certain cases.[366] Accessing the services of this Office could potentially provide a tool to address repression against judges or other concerned stakeholders who use their freedom of expression to reveal instances of pressure being exercised on the judiciary.

5.8. Prioritizing implementation and effective remedies

One way to enhance the impact of litigation is to **engage strategically and early enough on how to counteract the major challenge of non-implementation**. Experience suggests that advocacy and strategic thinking on implementation begins prior to and continues during and after the litigation phase.[367] Litigation is time-consuming and waiting until judgment to consider implementation would be short-sighted and may be too late to effectively harness the coalitions, allies and strategies upon which impact and implementation depend.

Follow-up may need to be multi-faceted.. It may involve engaging alliances, as noted above, and international monitoring mechanisms. For example, however imperfect, the Universal Periodic Review (UPR), a human rights peer-review cycle among States that are Members of the UNHRC, provides one human rights mechanism at the UN level, where

[362] *Guja v. Moldova*, ECtHR, GC, application no. 14277/04, Judgement of 12 February 2008; *Herbai v. Hungary*, ECtHR, application no. 11608/15, Judgement of 5 November 2019; *Halet v. Luxembourg*, ECtHR, GC, application no. 21884/18, Judgement of 14 February 2023; ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 6-7.
[363] *Ibid.*
[364] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.
[365] Act No. 189/2019 Coll. (the Amendment Act), amending Act No. 54/2019 Coll. on the Protection of Whistleblowers (and others), was adopted on 10 May 2023 and came into effect on 1 July 2023.
[366] CEELI Institute, Beyond paper rights: Implementing whistleblower protections in Central and Eastern Europe, November 2023, pp. 7-8, 16, 19.
[367] Ioulietta Bisiouli, 'Lessons learnt from implementing ECtHR rule of law judgements', presentation at European Implementation Network (EIN), Conference: "Safeguarding the Rule of Law: Implementing ECtHR Judgements for Lasting Impact", 19 June 2024, the Hague, Netherlands.

civil society can engage and advocate in a number of ways.[368] The UPR results in recommendations by the Council for implementation of human rights reforms, some of which will be accepted and committed to by the concerned State. The State periodic reporting procedure before UN Treaty Bodies can provide follow-up to individual communications, during the implementation process.[369]

Petitioning and engaging political organs nationally and internationally may assist; for example, the European Parliament[370] and the PACE[371] may offer an additional route to gain the attention of EU institutions and bring attention, legitimacy and momentum to the issue. Other EU institutions can be engaged to help give effect to decisions, as part of broader EU action on rule of law issues.

A related challenge is securing **clear, strong and implementable remedies** that can contribute to reparations for victims and/or legal or policy changes in the concerned jurisdiction. Depending on the court or body, remedies may be declaratory rather than remediative, and may be narrowly focused on compensation that does not reflect the form of redress victims may be seeking or address the wider nature of underlying threats and violations. Traditionally, the ECtHR has tended to issue declarative judgements, finding violations of Convention rights but leaving it up to the State to determine the kind of implementation needed. However, the Court has also shown itself willing to make increasingly prescriptive orders where appropriate, ordering for instance the release of individuals wrongfully detained, or the restoration of professional activities.[372] This has included, for example, ordering the reinstatement of a dismissed judge who was returned to his position on the Supreme Court of Ukraine.[373]

Lawyers bringing cases may also **seek to influence concrete remedies** by explicitly requesting courts for appropriately tailored remedy and reparation, and spelling out what international law requires. This can lead to more effective redress, which can make efforts on implementation of the judgement much more effective and targeted. International law provides useful tools, by specifying the broad nature of reparation in international law for human rights violations.[374] These include compensation, rehabilitation, restitution, satisfaction, including restitution and guarantees of non-repetition. This could include, for example, restitution in the form of a judge wrongly dismissed restored to their position. It may also require legal reform, for example reform of over-broad laws that are being used to undermine the judicial role, in order to ensure guarantees of non-repetition, including institutional reform where needed to guarantee independence in practice. In the *Garzón* case, for example, the majority made clear the need for holistic 'integral' remedies, and the concurring opinion spelled out restitution as one essential element.

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[368] For more on the Universal Periodic Review process and how civil society can participate, see for instance UN Human Rights, Universal Periodic Review (accessed 19 August 2024); UPR Info, Get involved (accessed 19 August 2024).

[369] In Garzón v. Spain, the follow up rapporteur's report finding Spain in non-compliance noted review will continue under the periodic state reporting and review process.

[370] For an overview on the European Parliament petition system, see e.g. European Parliament, "Petitions", webpage; and European Parliament, "Petitions Web Portal" (accessed 8 August 2024). ROLL Workshop I, 13-14 June 2023, Brussels. See Workshop report.

[371] Rule 71 of Procedure of the PACE

[372] See e.g. *Fabris v. France*, ECtHR, GC, application no. 16574/08, Judgement of 7 February 2013, Concurring Opinion of Judge Pinto De Albuquerque; *Aliyev v. Azerbaijan*, ECtHR, application nos. 68762/14 and 71200/14, Judgment 20 September 2018, para. 228.

[373] In *Volkov v. Ukraine* the court held that the respondent State shall secure the applicant's reinstatement to the post of judge of the Supreme Court at the earliest possible date. In 2015 this was done.

[374] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, adopted 16 December 2005, paras. 1-3; Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, adopted 29 March 2004.

Planning for **implementation-phase follow-up litigation** is critical. Today, many litigators find themselves engaged for prolonged periods, either seeking to engage national courts to implement through domestic frameworks, or engaging with supranational follow-up mechanisms. This activity may signal positive developments, in terms of increased attention on implementation and more available tools, but it is also challenging from the perspective of time, long-term commitment and resources.

There is for example an increasingly accessed Rule 9 procedure for the execution of judgements by the ECtHR, the CoE COM, and an NGO network specifically facilitating follow-up work.[375] This sits alongside the national human rights institutions, CSOs and many other actors that may work to pursue fuller enforcement of judgments.[376] The CoE CoM may, if pressed, go further in spelling out expectations on States than what will be prescribed in judgments, providing further advocacy tools and increasing pressure on States. It may refer the case back to the court for an interpretation of the judgement or to determine whether a State Party has fully implemented a judgement. Although exceptional, this tool has been used in recent years.[377] The UNHRC also has a follow-up mechanism, which can provide a rating on overall compliance, as it did in relation to Spain's failure to take any measures of implementation in the *Garzón* case.[378]

5.9. Seeking early intervention: Litigation for prevention not only response

More consideration is needed on how to exploit the **preventive potential, and early impact**, of legal action to support judicial independence. Litigation has its limits and is often too slow and too responsive to be wholly effective in preventing adverse developments and setbacks in emergency situations and in the short term. This can be countered by strategies that seek to maximize the **role and effect of the process** as it relates to filing, argumentation and hearings, where appropriate, and not only the outcome. At all stages litigation may provide tools for reframing, advocacy and media attention for example, to ensure the litigation has an effect long before judgement.

In addition, **urgent interim measures** may be sought in some contexts. Though, as noted above, the ECHR has been strict in its application of interim measures, it has been willing to apply them more broadly in recent years faced with systemic risks.[379] While likely to remain exceptional, by explaining the importance and urgency of immediate measures of prevention so as to preserve the interests of the litigants in protection of judicial independence and the rights of particular judges, advocates may shape the evolving approach to interim and provisional measures in the future.

Other efforts to secure expeditious impact may include **challenging the initiation of measures** against judges, such as disciplinary proceedings or criminal investigations, as themselves a violation of independence with an insidious chilling effect, irrespective of and without needing to wait for their outcome. However, *Garzón v. Spain* suggests that

[375] EIN assists NGOs and others to engage in effective follow up particularly within Strasbourg.
[376] For instance in relation to Poland and Malta (see e.g. *A.D. v. Malta*, ECtHR, Committee of Ministers). ROLL Workshop II, 23-24 November 2023, Malta. See Workshop report, p. 11. For an overview of the Rule 9 procedure, see Council of Europe, Department for the Execution of Judgements of the European Court of Human Rights, "Communications by NHRIs/CSOs" (accessed 9 August 2024).
[377] Article 46 ECHR. See e.g. *Kavala v. Turkey,* article 46 proceedings.
[378] See e.g. Human Rights in Practice, "Garzón v. Spain: UN report indicates complete failure of Spain to implement the UN Human Rights Committee's decision", press release, 21 August 2023 (accessed 3 December 2024).
[379] See e.g. *Wróbel v. Poland*, ECtHR case box above in Section 3. 9.; ECtHR, "Interim measures in the case of Polish Supreme Court judge's immunity", press release, 8 February 2022.

criminal prosecutions based only on judicial interpretations was itself arbitrary, irrespective of the conviction or acquittal at the end of the process.[380]

Intervening early to challenge those risks and violations may send a preventative **warning of greater violations** to come and is crucial, but also challenging, given victim impact requirements in some jurisdictions. Where victim status is essential, it is often a strictly applied requirement. There may, however, be some scope for flexibility, for example to apply as '**potential victims'**, or persons specifically affected by the existence of measures, even if these have not yet been implemented against them.[381] Associations of judges may be able to lodge a claim, for example, if the association's rights are affected, which may be the harbinger of further erosion of judicial independence.

5.10. Ongoing experience sharing and strategic support among legal practitioners

Considering the complexities of strategic litigation on judicial independence issues, the research revealed a continuing need for knowledge and capacity development among lawyers on how to effectively litigate such cases.[382] Lawyers engaging in such cases will continue to seek out available information and materials on the topic and build networks with other lawyers with experience of such litigation.

Through **networking and communication** across different EU Member States, lawyers can share experiences, lessons learned and tips for the different practical aspects of litigation. Closer cooperation between legal practitioners from different States could also provide avenues for the international advocacy, mutually reinforcing interventions and international efforts to raise public awareness. While this includes legal and jurisprudential sharing it should not neglect the importance of **solidarity** across borders and sharing on strategic thinking. Institutions and donors need to prioritize the rule of law and judicial independence. If legal professionals are to maximize the impact of litigation, and stronger implementation through complementary advocacy strategies, it will be imperative to ensuring that they are resourced and supported.

[380] There were 2 cases; one led to conviction and another acquittal, but both were violations of article 14 ICCPR.
[381] See e.g. *Klass and others v. Germany*, application no. 5029/71, Judgement of 6 September 1978, paras. 33-34; *Dudgeon v. United Kingdom*, 1981, para. 41
[382] Ioulietta Bisiouli, 'Lessons learnt from implementing ECtHR rule of law judgements', presentation at European Implementation Network (EIN), Conference: "Safeguarding the Rule of Law: Implementing ECtHR Judgements for Lasting Impact", 19 June 2024, the Hague, Netherlands.

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