



Judicial Reforms and Challenges in Central and Eastern Europe

SAMANTHA JOY CHEESMAN 

ATTILA BADÓ

*Author affiliations can be found in the back matter of this article

**ACADEMIC
ARTICLE**



ABSTRACT

The article analyzes the judicial reforms that have taken place in Central and Eastern European countries. Research will focus on the steps that have been taken to conform to the spirit of Article 2 of the TEU and take necessary measures to implement reforms required for EU accession. The core of the study focuses on the much-misunderstood concept of judicial independence which is increasingly becomes a much-debated concept in countries such as Hungary and Poland. A comparative legal method is used throughout the article to illustrate and help the reader to better understand the nuances of the problem in Central and Eastern European countries.

CORRESPONDING

AUTHOR:

Dr. Samantha Joy Cheesman

Institute of Comparative
Law and Legal Theory,
University of Szeged,
Hungary

samantha@juris.u-szeged.hu

KEYWORDS:

judicial reform; rule of law;
judicial independence;
post; socialist systems

TO CITE THIS ARTICLE:

Samantha Joy Cheesman
and Attila Badó, 'Judicial
Reforms and Challenges
in Central and Eastern
Europe' (2023) 14(2)
*International Journal for
Court Administration* 5. DOI:
[https://doi.org/10.36745/
ijca.532](https://doi.org/10.36745/ijca.532)

INTRODUCTION

This paper¹ will illustrate the challenges that the post-socialist countries of Central and Eastern Europe² have faced since the regime changes which occurred decades ago. Attention will be given to how they have sought to transform their judicial systems – mostly to align with Western European requirements and to implement the reforms necessary for EU accession – by breaking away from the Soviet sphere of interest. This trend will be outlined through the judicial reform efforts of the countries analyzed and the position that they are in today. Additionally, the common features that bind the legal systems of this region together will be analyzed. At the heart of the analysis is the much-misunderstood concept of judicial independence which has been a constant feature of political and academic discourse in these countries since the change of regime.³ The comparative legal method was used throughout the article as a mechanism by which conclusions could be drawn, providing readers with an objective picture of the situation in these post-communist countries.

The judicial systems will be analyzed through the lens of the constitutional bases and the rules laid out through the presentation of the literature on the institution. Having clarified the constitutional status of the courts, as well as the central forms of administration, an assessment will be given of how well-known aspects of judicial independence and accountability play a role in the administration of justice in each legal system.⁴ Specifically, the organizational independence of the judiciary, which determines the relationship of the courts with other branches of power, will be critiqued. The organizational independence of judges, along with their actual margin of appreciation, has had a knock-on effect on the reforms in the Central and Eastern European judicial systems. These effects, as the systems transitioned toward democracy after periods of dictatorship and single-party rule will be examined in this article. These issues also reveal how the various legal systems attempted to meet the requirements of European accession and how they responded to societal needs. Although the system of the organization of the judiciary in post-socialist countries has undergone reform, mainly due to constitutional amendments to enforce the principle of access to justice, no analysis of the changes will be undertaken here due to a lack of space. Although it is possible to talk about a broader and narrower meaning of the concept of justice, the situation of Central and Eastern European legal systems based on the narrower concept will not be presented, also for reasons of length. Thus, the focus will shift to the courts, which are the central actors in the application of the law. The presentation of the activities of the constitutional courts will also be dispensed

1 The research was supported by the ICT and Societal Challenges Competence Centre of the Humanities and Social Sciences Cluster of the Centre of Excellence for Interdisciplinary Research, Development and Innovation of the University of Szeged. The authors are members of the Digitalization and Democracy research group.

2 This study focuses on the situation in Central and Eastern European countries facing the challenges of European integration. We based our research analysis on those countries from which we have obtained more in-depth information via local experts which have fed into our research interests. This research is part of a larger body of investigation into this field.

3 The authors refer to judicial independence throughout the article even though in the judicial traditions of post-communist states, there is not a strong culture of autonomy and separation of powers in this region but we use this expression for ease of understanding.

4 M. Bencze, "Obstacles and Opportunities-Measuring the Quality of Judicial Reasoning," in Mátyás Bencze-Gar Yein Ng (ed.), *How to Measure the Quality of Judicial Reasoning* (Springer, Switzerland, 2018, Ius Gentium: Comparative Perspectives on Law and Justice 69), p.87.

with here. The article will begin with an analysis of how the Court of Justice of the European Union and the Council of Europe, which connect the broader European community, interpret the concept at the heart of our analysis: judicial independence. This will be followed by an analysis and discussion of the constitutional foundations and the central administration of the courts. In conclusion, the possible ways for development in the post-socialist judicial systems will be outlined.

I. JUDICIAL INDEPENDENCE AND JUDICIAL ORGANIZATIONAL INDEPENDENCE ACROSS EUROPE

Judicial independence, despite being a principle enshrined in almost every constitution in Europe (especially in post-communist constitutions), remains a vague concept today. The exact content of this principle is difficult to determine, and the phenomenon of judicial independence can be examined from various angles: the organizational independence of the judiciary, the existential security of the judge, and the independence and impartiality of the judge in performing judicial functions.⁵ International agreements as well as international and domestic jurisprudence have managed to establish basic yet occasionally very restrictive and vague standards concerning judicial independence.

While the institutions of the European Union are endowed with very limited competences and even more limited tools to safeguard judicial independence in Member States; there are several unexploited institutional possibilities in the EU for the effective monitoring of judicial independence, including other means for active involvement, if needed. Pursuant to Article 2 of the Treaty on European Union (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. 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.” The breakdown of the relationship between the rule of law, and judicial independence at the national Member State level can signal that the Charter is not being enforced or is at least institutionally weakened.⁶ Article 19 (1) of the TEU provides that the CJEU will ensure that, “in the interpretation and application of the Treaties the law is observed”. This principle is further reiterated in Article 6 (3) TEU which underlines that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and, as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” An alternative argument for EU involvement is the creation of an Area of Freedom, Security and Justice that is based *inter alia* on the automatic mutual recognition of judicial decisions rendered in other Member States. Mutual recognition is based on mutual trust, and a crucial component of this trust is the conviction that a judgment rendered in another Member State has been adopted by an independent and impartial tribunal in a fair procedure. Despite an unequivocal

⁵ P. H. Russel and, D. M. O’Brien, *Judicial Independence in the age of democracy. Critical perspectives from around the world*, (Charlottesville and London: University Press of Virginia, 2001), pp.1–325.

⁶ Dimitry Kochenov, John Morjin, “Strengthening the Charter’s Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing,” 27(4) *European Public Law* (2021), pp.759–780.

theoretical commitment to upholding the rule of law, the EU has very few tools to effectively implement it. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations (Art. 7 TEU).⁷

The principle of judicial independence's authority has been reduced and undermined by limiting it to Article 47 of the Charter.

The EU Charter of Fundamental Rights might serve as another basis of EU action. Pursuant to Article 47 of the Charter, "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended, and represented." However, Article 51 of the Charter limits the scope of these provisions by stating that the provisions of the Charter are addressed to the institutions, bodies, offices, and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles, and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. Furthermore, the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Consequently, the Charter is not very likely to prove an effective tool to promote the independence of domestic courts in Member States. However, since 2010, the Commission has been publishing an annual report on the implementation of the Charter and has had the ability to initiate infringement procedures but these are usually not based exclusively on the Charter.⁸ Another important European initiative on judicial independence, including the organizational independence of the judiciary, is the action plan⁹ proposed by the Council of Europe by the Committee of Ministers of the CoE in 2017, which included recommendations and the monitoring of Member States. The action plan aims to depoliticize the courts but continues to respect the specificities of the Member States. It does not require the establishment of Judicial Councils everywhere; it does, however articulate the need to avoid the election of members of the Councils or other judicial bodies. Overall, there are many different views and ideas in the EU about what the independence of the judiciary

⁷ Based on the unsatisfactory experiences related to the application of Art. 7 TEU as a nuclear option, on 11 March 2014 the Commission presented a new initiative for addressing systemic threats to rule of law in Member States that was supposed to be complementary to infringement procedures and Art. 7 procedure. Activities on monitoring 'rule of law' in Member States and taking proportionate and effective action if needed.

⁸ For example, when – as mentioned above – the Commission contested the early retirement of around 274 judges and public prosecutors in Hungary caused by a sudden reduction of the mandatory retirement age for this profession from 70 to 62, the Court of Justice of the European Union upheld the Commission's assessment that this mandatory retirement is incompatible with EU equal treatment law (the Directive prohibiting discrimination on the basis of age and Article 21 of the Charter) – and not on considerations related to the independence of the judiciary.

⁹ Council of Europe Action Plan on strengthening judicial independence and impartiality (CM(2016)36 final) <https://rm.coe.int/1680700285> [accessed 15 May 2023].

entails. The analysis and examination of the different solutions used in the various EU Member States must also consider the specificities of each country's domestic political institutions.

For Central and Eastern European countries, it is often difficult to understand the criticisms from EU institutions or human rights organizations that call into question the behavior of a court. This is most noticeable when discussing the administration of justice and, more specifically, the selection and disciplinary accountability of judges, for which stable Western European democracies have demonstrated various solutions and mechanisms. For decades, individual legal systems in Europe have been experimenting with ways and means of ensuring the separation of powers, mutual control, and a balance of independence and accountability in the judiciary. Although most countries are seeing a clear trend of former ministerial powers being transferred to judicial councils designed to establish judicial self-government, the competences and composition of these councils vary considerably. In addition, there are European countries (Austria and Germany) which, not following the indicated trend, still carry out the external administration of the courts under governmental oversight.¹⁰ What becomes evident is that even judicial systems with a long history of legal traditions may employ institutional solutions that might arouse doubts concerning the independence and impartiality of judges. Despite this fact it is quite possible that due to the peculiarities of the legal and political culture these solutions do not lead to the violation of the fair trial principle in practice. However, political and legal culture is also a vague concept, so, based on this it would be very difficult to make an informed decision concerning the violation of judicial independence.

II CENTRAL ADMINISTRATION OF COURTS

Concerning the courts of the post-socialist countries of Central and Eastern Europe, after the collapse of the Soviet bloc, almost everywhere, the challenge was in adapting the institutional structures and principles governing the judiciary – which were rooted in Western democracies after the Second World War – to a legal system defined for decades by a dictatorial framework.

Since the 1990 regime change, East Central European post-socialist countries have been struggling with the issue of how to meet the judicial independence requirement with a view to accession to the European Union. Judicial reforms were seen as key to the accession process to the EU as judicial independence represents a key aspect of maintaining the rule of law. The emphasis on this requirement in the pre-accession process stems from the understanding that judicial independence is a fundamental precursor to a society being deemed democratic. Additionally, it is becoming increasingly important to garner support for the 'European mandate' to have effective implementation mechanisms in place at Member State level.¹¹ To this end, certain legal systems pushed through several reforms leading to multiple restructurings of

¹⁰ A. Rieger, *Verfassungsrechtliche Legitimationsgrundlagen richterlicher Unabhängigkeit*, (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien, 2011), p. 209.

¹¹ D. Preshove, I. Damjanovski, and Z. Nechev, "The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a solution or a new cause of concern for Judicial Reforms", *Cleer Paper* 2017/1, https://www.asser.nl/media/3475/cleer17-1_web.pdf [accessed 16 May 2023].

the judicial organization.¹² One could witness the expansion of the application of the judicial self-administration bodies in accordance with Western European trends. Since the accession of East Central European post-socialist countries to the EU proved to be successful, a new development occurred. The EU disposes of rather limited means to exert influence over the judicial administration systems of its Member States; thus, considerable leeway is given to post-socialist countries where the democratic traditions and the fragility of the politico-legal culture provide fertile ground to orientate towards the creation of an opportunist judiciary loyal to the government or, even better, the court management if the political climate expresses an interest in reforming the management. Regarding enforcement attitudes, the dictatorial state apparatus that lasted for almost half a century left an indelible mark in these countries.

In the post-socialist countries, which underwent regime change the rule of law reforms were guided by the impetus of the fact that judicial independence could be realized despite decades of party statehood, which was characterized by communist governments being involved in the substantive issues of the administration of justice. In the initial euphoric state following the regime change the political elite of democratizing societies placed more emphasis on being 'democratic' rather than on the question of the accountability of judges. Moreover, accountability seemed to be more of an obstacle to the realization of judicial independence. However, in post-socialist countries, similarly to Western European countries, regime change parties experimented with varied solutions to achieve the above goals. Previously, the government had been responsible for the external administration of the courts, as well as the degree of external pressure which could be applied on the judiciary. It was up to the politicians to decide when and to what extent they allowed more judicial self-government.

Western European (ministerial, self-government and mixed) administrative models can also be found in the assessed post-socialist legal systems. The aim is to briefly present these varied solutions. Although important empirical studies have been conducted on the effectiveness of the administrative models introduced in post-socialist countries, describing them here would exhaust the scope of this study.¹³

To achieve these necessary judicial reforms, judicial councils were deemed to be one mechanism by which to ensure that there was judicial independence. However, as will be demonstrated, the judicial councils have, in some parts, further contributed to compromising the judicial integrity and independence of the judiciary.¹⁴

The EU touted councils as being, "powerful judicial councils as institutions for judicial self-administration and guardians of judicial independence."¹⁵ This was part of

¹² See, for example, J. H. Anderson and C. W. Gray, *Transforming Judicial Systems in Europe and Central Asia*, Annual World Bank Conference on Economic Development, (2007), 329–355, https://www.mdtfjss.org.rs/archive//file/resources/Transforming_Judicial_Systems_in_Europe_and_Central_Asia.pdf [accessed 16 May 2023].

¹³ See, for example, the work on the operational experience of the Czech ministry and the Slovak local government model: D. Kosář, *Perils of Judicial Self-Government in Transitional Societies*, (Cambridge University Press, 2016), p.488.

¹⁴ *Ibid.*

¹⁵ J. Omejec, *Appointment, Promotion and Dismissal of Judges and Ethical Standards*, (2019) Dialogue between Judges, Strasbourg: European Court of Human Rights; Denis Preshova, Ivan Damjanovski, Zoran Nechev, *The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms*, (2017/1) CLEER Papers, Centre for the Law of EU External Relations, https://www.asser.nl/media/3475/cleer17-1_web.pdf [accessed 15 May 2023].

a movement to increase the adherence to rule of law principles. There are many different theoretical frameworks for explaining the way in which different Member States have incorporated varying models of judicial councils into their domestic systems. One of these models is referred to as the ‘logic of consequences,’ which is a rationalist approach explaining the behavior of Member States. This model argues that Member States adopt rule of law provisions which are, “enforced by the EU through a strategy of reinforcement by reward, meaning that if the EU provides a credible membership incentive, the candidate states are more inclined to comply with EU conditionality.”¹⁶ So, there is a cost benefit exercise that Member States then conduct internally to weigh up if compliance is beneficial. This is apparent in the cases of Hungary and Poland. One of the key requirements for securing the Rule of Law provisions as well as judicial independence was the establishment of judicial councils to oversee the administration of justice. However, an unexpected consequence of the EU introducing judicial councils as one way of promoting legal harmonization as a precondition for membership – and now also for pre-existing Member States – is that they have in fact increased the democratic deficit present.¹⁷ This is in part due to the ‘disconnect problem’.¹⁸ Part of this problem is that up until very recently the EU has not actively monitored the implementation and adherence to Rule of Law provisions.

In Hungary, 7 years after the change of regime, a judicial council with a judicial majority council was established in the framework of the 1997 comprehensive justice reform, which resulted in the council taking over almost all the powers of the government concerning the administration of justice.¹⁹ The influence of the Ministry of Justice on the day-to-day operation of the courts has been only informal.

In addition to the Minister of Justice, the Council also included the Prosecutor General representing the Public Prosecutor’s Office and the President of the Bar, but the majority of the judges elected by the judges’ representative bodies provided full self-government. Prior to this, there were ongoing political battles, mostly over the appointment of court heads. Although this Council was a fairly balanced body, professional criticism has emerged in Hungary over the “full” self-administration of justice. Critics argue that administrative managers elected by judges can lead to a barely controllable corporate system, increasing nepotism within the judiciary. Taking advantage of the criticisms, the government, which gained a two-thirds parliamentary majority in 2010, implemented judicial reform, entrusting the administration of the courts to an administrative body with broad powers and headed by a leader appointed by a two-thirds majority of the Parliament. The supervision of this body was entrusted to the Judicial Council, composed exclusively of judges, but with less substantial powers. The new organizational form has been widely criticized for giving a single person exceptional power over the courts.²⁰ The National Office for the Judiciary (NOJ) is responsible for practically all matters related to the selection of judges and court leaders and supervises the administrative activities of all courts except the Hungarian

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ L. Pech, “The EU as a global rule of law promoter: the consistency and effectiveness challenges,” 14(1) *Asia Europe Journal* (2016), pp.7–24, at 7–8.

¹⁹ Act LXVII. of 1997 on the Organization and Administration of Courts.

²⁰ By the end of the 2010s, there had been a change of staff at the head of the Office due to increasing conflicts between the Judicial Council and the Head of the Office.

Supreme Court, the Curia. The Council's task in the field of central administration is effectively to control the activities of the NOJ.²¹ The service courts in Hungary have the right to adjudicate disciplinary cases. Since 2010, several international organizations have criticized the state of the Rule of Law in Hungary, including the judiciary, but, interestingly, tensions have also started to rise within the judiciary. This has intensified the criticisms calling for a gradual reduction in the independence of the judiciary. For a long time, the elected judges of the NJC seemed to tolerate, in silence, the inability to control the Parliament-appointed head of the NOJ without any power. However, in 2012 the Venice Commission issued an opinion²² on the legal reforms of the judiciary in Hungary. They were particularly critical of the methods by which the president of the NJO can be elected and removed. The report recognized that the Hungarian Government had indeed taken on board their previous comments. They were particularly pleased that the President of the NJO was more accountable and that the NJC's role had been elevated more so that it could have more oversight. However, there was still concern that the powers of the President of the NJO were too extensive and that the Hungarian Government should take measures to further ensure the independence of the judiciary.²³

Despite these recommendations things started to come to a head in 2018 when it was declared by the European Association of Judges and the European Commission that the Hungarian judiciary was facing a constitutional crisis.²⁴ This was characterized by a changing of the roles of the NJC and the NOJ. The 2018 period saw several developments concerning the judiciary which did not go unnoticed. This was apparent from the Sargentini report²⁵ which recommended that Article 7 proceedings be initiated against Hungary as the steps being taken posed a serious and systemic threat to the values of the European Union.²⁶

The conflicts between the National Office for the Judiciary (Országos Bíróági Hivatal Elnöke) and the National Judicial Council (Országos Bírói Tanács) centred on the way judicial appointments were occurring. The NJC, as the most senior self-governing

21 Section 103 (1) (a) of Act CLXI of 2011 on the organization and Administration of Courts.

22 European Commission for Democracy through Law, 'Opinion on the Cardinal Acts on the Judiciary that were Amended following the adoption of Opinion CDL-AD (2012) 001 on Hungary', (15 October 2012) Opinion no. 683/2012 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e) [accessed at 23 May 2023].

23 European Commission for Democracy through Law, 'Opinion on the Cardinal Acts on the Judiciary that were Amended following the adoption of Opinion CDL-AD (2012) 001 on Hungary', (15 October 2012) Opinion no. 683/2012 available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e) [accessed 31 May 2023].

24 Report on the fact-finding mission of the EAJ to Hungary, European Association of Judges, available: <https://www.iaj-uim.org/iuw/wpcontent/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>, p. 5. [accessed 15 May 2023].

25 J. Sargentini, 'Report on a proposal calling in 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 is founded,' (2017/2131(INL)) Committee on Civil Liberties, Justice and Home Affairs, https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.pdf [accessed 19 May 2023].

26 J.Sargentini, 'Report on a proposal calling in 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 is founded,' (2017/2131(INL)) Committee on Civil Liberties, Justice and Home Affairs, p.5, https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.pdf [accessed 19 May 2023].

body, started to investigate how the president of the NOJ was appointing judges and discovered several violations, indicating an attempt to overhaul the top tier of the judiciary. Attacks were mounted in the media against individual judges, who criticized the president of the NOJ. Some of the judges won defamation lawsuits. The NOJ appointed the court presidents, who could then put pressure on 'rogue judges' by using administrative measures, such as controlling the awarding of bonuses, exclusion from training opportunities, or enforcing harsher working conditions.²⁷

When the European Parliament triggered the Article 7 procedure against Hungary,²⁸ they cited the lack of 'independence of the judiciary and of other institutions and the rights of judges,' as being one factor amongst many which needed to be addressed by Hungary as a matter of urgency.²⁹ When the Commission proposed to suspend 65% of its commitments to Hungary, the justification was given that the concerns have not been adequately addressed and that the violations constituted systematic breaches affecting the core of the application of the rule of law within the meaning of Article 2 of the TEU. Hungary is also in need of the 13.2 billion euros that has been blocked because of what the EU commission has deemed as a gradual undermining of fundamental

27 Once it was realised that there remained a core of judges who were very resilient to governmental pressure as certain judges kept speaking out, and that they considered judicial independence to be something that ought to be taken very seriously, this led to the realization amongst politicians that it was necessary to shift strategy. This shift meant that the focus was no longer on domestication through court presidents but by shifting tactic and attacking the top tier of the judges in the Kuria. The first instance of this shift in tactic can be seen with the appointment of Andras Varga Zs. His appointment was made possible through a series of legal amendments. He used to be a prosecutor then a judge of the constitutional court (which is not part of the ordinary judicial system in Hungary) no judicial courtroom experience which would enable him to meet the requirements for judicial appointment. The NJC said that he is not sufficiently independent due to the way in which he was appointed. These criticisms fell on deaf ears. The NJC has been hamstrung in its ability to make effective changes as they are not a legal entity and do not have their own budget. The only tool they have available to them is to "signal" problems such as dismissing a judge, but this "signal" is ultimately decided upon by the Government.

28 However, for Hungary to be able to unlock the funding they must comply with a whole new component to the recovery and resilience plan which was adopted on 12 December 2022. The new component contains 111 new milestones 27 of which have been dubbed the 'super milestones'. These 'super milestones' refer to the conditionality measures which Hungary needs to take into consideration under the rule of law mechanism. The milestones also refer to the ongoing battle concerning the judicial independence questions. The multiannual financial framework for 2021–2027, established that the enabling conditions would include a budgetary conditionality. In order for the budgetary conditions to be triggered the European Commission must be convinced that the [in]actions of Hungary have demonstrated sufficiently that infringements affect, 'in a sufficiently direct way,' the management of the budget or the financial interests of the Union. The fact that Hungarian government has now pushed through a vote on a new law to address the shortcomings so as to unlock EU funding is a step in the right direction but it is not necessarily enough. The EU Commission will also need to judge the impact that the new law will have to ensure that the milestones as specified will be 'fully and correctly' implemented by Hungarian for the first payment to be made. András Schwarcz, "Rule of law-related 'super milestones' in the recovery and resilience plans of Hungary and Poland.", *European Parliament Briefing Policy Department for Budgetary Affairs* (2023) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI\(2023\)741581_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf) [accessed 15 May 2023]; E. Maurice, 'Rule of law: the uncertain gamble on conditionality,' *Fondation Robert Schuman The Research and Studies Centre on Europe*, European Issue no 660 Policy Paper (14 March 2023) <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf> [accessed 17 May 2023].

29 A. Schwarcz, "Rule of law-related 'super milestones' in the recovery and resilience plans of Hungary and Poland.", *European Parliament Briefing Policy Department for Budgetary Affairs* (2023) [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI\(2023\)741581_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf) [accessed 31 May 2023].

rights.³⁰ The recent proposal of a draft bill³¹ on reforming the judiciary is the result of just over a year and half of negotiations between Budapest and Brussels.³² In January 2023, the Hungarian government started the public consultation period of the draft law.³³ The new law will enter into force on the 1st of July 2023. It is hoped that this will free up the European funds that the Hungarian government needs.³⁴ Under the new law the NJC have been granted more extensive powers vis a vis the power of the President of the National Office of the Judiciary.³⁵ One significant amendment is that the new law will create a separate budget for the NJC as well as installing safeguards which would protect both the Constitutional Court and the Kuria from political influence.³⁶

The Hungarian government was indeed under pressure to comply with completion of the milestones as the Annex to the European Commission's proposal clearly states that, "[t]he implementation of the reform shall be completed by Q1 2023 and before the first payment request under the recovery and resilience plan."³⁷ Civil Society was invited to engage with the Ministry over the recommendations made to the draft law. It was highlighted at this stage that there needed to be a broadening of the powers of the NJC. It was further argued that development was needed to ensure the NJC's independence, impartiality, integrity, and probity, in line with the milestones. However, the Government stated that this would require the installation of a completely new

30 P. Tamma, 'Hungary embarks on judicial reform hoping to unlock EU funds.', *Politico* (2 May 2023) available at <https://www.politico.eu/article/hungary-embarks-on-judicial-reform-hoping-to-unlock-eu-cash/> [accessed 31 May 2023].

31 The draft bill T/3131 was first debated in parliament on the 2nd of May and was passed to the Hungarian Parliament who voted in its favour on the 3rd of May; The bill which was voted through represents the Hungarian government's response to the European Commission's request to improve the condition of judicial independence in particular the National Judicial Council (OBT); Cs. Balázs. M. Balázs, A. H. Kávai, "Hungarian judicial reform worth 13 billion euros voted through, hidden in amendment," *Telex* (3 May 2023) at <https://telex.hu/english/2023/05/03/hungarian-judicial-reform-worth-eur13-billion-voted-through-hidden-in-amendment> [accessed 31 May 2023].

32 P. Tamma, 'Hungary vows to overhaul its judiciary, hoping to unlock EU funds.', *Politico* (7 November 2022) <https://www.politico.eu/article/hungary-overhaul-judiciary-unlock-eu-funds/> [accessed 31 May 2023].

33 Hungarian Helsinki Committee, 'The Government's draft law on the judiciary does not comply with RRP super milestones.', (7 February 2023) t <https://helsinki.hu/en/the-governments-draft-law-on-the-judiciary-does-not-comply-with-rrp-super-milestones/>. [accessed 18 May 2023].

34 P. Sasvári, 'Judicial Reform in Hungary Reaches New Stage – Unlocking of EU funds in sight,' *Hungarian Conservative* (10 May 2023) https://www.hungarianconservative.com/articles/politics/judicial_reform_hungary_independence_judiciary_eu_funds_commission_approval/ [accessed 12 May 2023].

35 Cs. Balázs. M. Balázs, A. H. Kávai, "Hungarian judicial reform worth 13 billion euros voted through, hidden in amendment," *Telex* (3 May 2023) <https://telex.hu/english/2023/05/03/hungarian-judicial-reform-worth-eur13-billion-voted-through-hidden-in-amendment> [accessed 12 May 2023].

36 P. Sasvári, 'Judicial Reform in Hungary Reaches New Stage – Unl.ocking of EU funds in sight,' *Hungarian Conservative* (10 May 2023) t https://www.hungarianconservative.com/articles/politics/judicial_reform_hungary_independence_judiciary_eu_funds_commission_approval/ [accessed 31 May 2023].

37 Amnesty International Hungary, Eötvös Károly Institute and the Hungarian Helsinki Committee, 'Assessment of the Government's Draft Proposal on the amendment of certain laws on justice related to the Hungarian Recovery and Resilience Plan, published on 18 January 2023 in light of the milestones set out in the Annex to the European Commission's Proposal.' (3 February 2023) https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf [accessed 12 May 2023].

system which was not necessary and that it would also greatly reduce the powers of the Parliament.³⁸

The Hungarian Government is hopeful that before the new law enters into force on the 1st of July 2023, there will be time to fulfil the practical steps that are required of them by the European Commission.³⁹ As with the other countries, a review of the measures taken by Hungary will be a cautionary tale, illustrating how the European Commission will now respond.

Comparing the situation of Hungary to Romania, immediately after the fall of the Ceausescu regime, in 1991 the Judicial Council was established with a historical predecessor. (In 1909, well before the French Judicial Council was first recorded in the literature, a judicial council was established to assist the Minister in the promotion of judges and to have competencies in the disciplinary matters of judges.) The Council, established in 1991, had weak powers compared to the Minister of Justice; therefore, one of the key issues in the European accession process until 2007, was the extent to which the government was able to relinquish control of the judiciary, thus increasing the Council's powers. This occurred in parallel with what institutional guarantees the

38 Hungarian Helsinki Committee, 'Joint assessment of the government's judicial package aimed at unblocking EU funds,' (21 February 2023) available at <https://helsinki.hu/en/joint-assessment-of-the-governments-judicial-package-aimed-at-unblocking-eu-funds/> [accessed 12 May 2023]; Unfortunately it would appear that the Government has not heeded all the recommendations of civil society. When analyzing the requirements of the milestones the Hungarian Government has either in part or not all responded to the requirements. If we look at the milestones which have not been implemented, for example milestone 213. a) (iv) and milestone 213. b), 213. d) they all concern the strengthening as well as safeguarding of the independence of the NJC through independent selection criteria, the right of the NJC to have access to documents, information that relate to the administration of courts and finally it is recommended that the NJC members cannot be re-elected except for the next term of office and that court members as well as vice-presidents shall not be involved in the deliberation or voting concerning administrative matters. When reading the proposal the picture emerges that the Hungarian Government has paid lip service and tweaked the offending legislation just enough to hopefully unlock the purse strings of the European Commission; Amnesty International Hungary, Eötvös Károly Institute and Hungarian Helsinki Committee, 'Compliance of the Hungarian Government's Draft Proposal on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan with the milestones to be achieved by 31 March 2023 under Annex to the European Commissions's Proposal,' (21 February 2023) https://helsinki.hu/en/wpcontent/uploads/sites/2/2023/02/compliance_judicial_milestones_20230221.pdf#8 [accessed 17 May 2023].

39 In the coming weeks the EU Commission will send a delegation to overview as well as audit the use of EU funds. The delegation will be checking whether the EU conditions have been met which are the following:

- strengthening the role and powers of the National Judicial Council (Országos Bírói Tanács-OBT), which holds independent judicial oversight powers over the judiciary;
- the independence of Curia judges – formerly the Supreme Court – to protect them from political interference.
- the possibility for the authorities to challenge final judgments in the Constitutional Court to be abolished, and
- obstacles to be removed for Hungarian judges referring cases to the ECJ if they consider that Hungarian and EU law are not in line – the EU Court of Justice having previously ruled that the existence of such obstacles was a violation of EU law.

However, even though the Hungarian government has indeed made some steps to meet the requirement for unlocking funds the way in which the draft bill was presented before parliament and its contents have drawn criticism from civil society in Hungary. The Hungarian Helsinki Committee, Amnesty International and the Eötvös Károly Intézet published an open letter to Commissioner Reynders (the European Commissioner for Justice); B. Márton, 'Most akkor mi van az uniós pénzekkel?', (15 May 2023) *Telex* <https://telex.hu/kulfold/2023/05/15/europai-unio-europai-bizottsag-helyreallitasi-alap-jogallamisag-rrf-mff> accessed 17 May 2023].

government managed to establish to tackle corruption, which is a particular problem in Romania. Under pressure from the EU, a comprehensive reform took place in 2003. Following lengthy political debates, together with other constitutional and legal rules related to European accession, an extremely broad, judicial-majority body of 19 members representing the wider judiciary has emerged. In addition to the 14 judge members, elected by the general meetings of the magistrates, there were 2 renowned lawyers elected by the Senate, the Minister of Justice, the President of the High Court of the Court of Cassation and the Attorney General. The Council has been given full power over virtually all matters affecting the careers of judges. Judges and prosecutors are appointed by the President of the Republic on a proposal from the Council. The reform fundamentally changed the status of the judiciary. The government lost nearly all control of this branch of power. Although the Minister of Justice has become a member of the council, he cannot, for example, take part in the adjudication of disciplinary matters. The Council has been given full power, not only in matters concerning judges but also those regarding prosecutors. This significant change was associated with typical “side effects”. The full independence required by the European Commission has resulted in a lack of external control and strengthened the corporate nature of the system.⁴⁰ To counter this, the process of judicial reform between 2017 and 2019, which intensified the conflicts between the government and the judiciary, can also be seen as such. The Acts of Parliament on the appointment of prosecutors and the prosecution of judges have also been brought before them by the ECJ, resulting in judges finding certain elements of the reform to be incompatible with EU law and the independence of the judiciary.⁴¹ The central administration of the Romanian judiciary is the subject of more extensive and detailed debates than those described above, which, as in the countries of the region, continue to reflect a state of searching for a way forward.⁴² As a result of these tensions Romania, since its accession in 2007 was placed under the special mechanism of the Cooperation and Verification Mechanism (CVM).⁴³ The implementation of the CVM was the joint recognition that for both Romania and the EU, measures needed to be taken to ensure that the reform process would, in fact, meet the benchmarks. In 2017 the EU Commission carried out an assessment of the progress made by Romania and concluded that significant inroads had been made.⁴⁴ In 2022 it was concluded by the EU Commission, that it would cease monitoring the

⁴⁰ For details on “side effects”, see B. Selejan-Gutan, *Romania: Perils of a 'Perfect Euro-Model' of Judicial Council*, (Cambridge University Press, 2018), pp.1707–1740.

⁴¹ On May 18, 2021 the ECJ ruled on the legal nature of the Cooperation and Verification Mechanism and the EU Commission's progress reports, and their binding effect for the Romanian courts.

⁴² B. Selejan-Gutan, *Failing to Struggle or Struggling to Fail? On the New Judiciary Legislation Changes in Romania*, *Verfassungsblog* (31 January 2018) available at <https://verfassungsblog.de/failing-to-struggle-or-struggling-to-fail-on-the-new-judiciary-legislation-changes-in-romania/> [accessed 31 May 2023]; B. Selejan-Gutan, *New Challenges against the Judiciary in Romania*, *Verfassungsblog* (22 February 2019), available at <https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/> [accessed 31 May 2023]; D. Calin, 'Recent Controversy Regarding the Promotion of Judges in Romania: Searching of Meritocracy', 12(1) *International Journal For Court Administration* (2021), p.8 <https://www.ijcajournal.org/articles/10.36745/ijca.350/>.

⁴³ E. Maurice, 'Rule of law: the uncertain gamble on conditionality.' *Fondation Robert Schuman The Research and Studies Centre on Europe, European Issue no 660 Policy Paper* (14 March 2023) <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf>.

⁴⁴ European Commission Press Release, 'Romania: Benchmarks under the Cooperation and Verification Mechanism are satisfactorily met.' (22 November 2022) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7029 [accessed 31 May 2023].

country as enough progress had been made on judicial reform as well as the fight against corruption.⁴⁵ However, they would still be monitored through the annual rule of law reports in terms of their continued commitment to upholding the progress made in the reforms. The CVM cannot be used to withhold funding but is rather a method by which to influence member state's anti-corruption policies.⁴⁶ Even though progress has been slow in the context of Romania, the Commission determined that enough has been done to close the CVM and deemed that any other measures that should be taken could be covered by the Recovery and Resilience Plan (RRP).⁴⁷ In order for Romania to unlock the next round of financial packages it must implement laws which "reform the judiciary, status of the magistrates, the organization of the judiciary and the Superior Council of Magistracy."⁴⁸ Romania must evidence by the end of 2026 that they have taken steps to enact a plan to reform the judiciary as well as amend the criminal code and the criminal procedural code so as to bring into line laws on integrity and ethics of the government.⁴⁹

The question can be raised as to why it appears that the EU Commission has been more receptive to the progress being made in Romania (albeit slow and at times very piecemeal) compared to Hungary and Poland. The answer may lie in the political openness of the ruling parties to make the changes necessary to protect the rule of law and to align themselves with the principles of Article 2 of the TEU.

Poland also took some time to form the Judicial Council following the regime change. Although there were initiatives to set up a body, the creation of a body that took over a significant part of the government's powers in the administration of the courts was finally incorporated into the Polish constitution in 1997, along with Hungary. Since 1997, the National Council of the Judiciary has had 25 members: 15 judges elected by their peers, a representative of the President of Poland, the Minister of Justice, six members of parliament, the President of the Supreme Court of Poland, the President of the Supreme Administrative Court of Poland.⁵⁰ The Polish solution belongs to the so-called mixed system. In addition to the Council, the Ministry of Justice has retained significant powers in administrative matters, from the issue of the courts' budget to the appointment of heads of court. Although a number of conflicts of competence have arisen as a result of the Council's work, the really serious debate between the

45 B. Neagu, 'Commission lifts CVM monitoring on Romania', (23 November 2022) *Euractiv* <https://www.euractiv.com/section/politics/news/commission-lifts-cvm-monitoring-on-romania/> [accessed 31 May 2023].

46 Corina Lacatus & Ulrich Sedelmeier (2020) Does monitoring without enforcement make a difference? The European Union and anti-corruption policies in Bulgaria and Romania after accession, *Journal of European Public Policy*, 27:8, 1236–1255, DOI: 10.1080/13501763.2020.1770842.

47 E. Maurice, 'Rule of law: the uncertain gamble on conditionality.' *Fondation Robert Schuman The Research and Studies Centre on Europe, European Issue no 660 Policy Paper* (14 March 2023) <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf> [accessed 31 May 2023].

48 E. Maurice, 'Rule of law: the uncertain gamble on conditionality.' *Fondation Robert Schuman The Research and Studies Centre on Europe, European Issue no 660 Policy Paper* (14 March 2023) <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf> [accessed 31 May 2023].

49 E. Maurice, 'Rule of law: the uncertain gamble on conditionality.' *Fondation Robert Schuman The Research and Studies Centre on Europe, European Issue no 660 Policy Paper* (14 March 2023) <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf> [accessed 31 May 2023].

50 The council was established in Articles 186 and 187 of the Constitution of Poland.

government and the judiciary, and later the EU institutions, unfolded far beyond the particular problem in the late 2010s.⁵¹ The problem of accountability and independence of the judiciary in Poland has come to the forefront of political battles with the aim of changing the composition of the Judicial Council at the initiative of the government. The argument was to strengthen accountability, which was sought to be achieved by changing the interpretative practice for the selection of Council members. Until then, the judge members of the judicial majority panel had been elected by the municipal judicial panel. The government took the view that the way of election is also constitutional if these members are elected by the legislature, thus strengthening parliamentary control. The Polish opposition considered this step, together with other measures taken in the field of justice, to be a serious violation of judicial independence. A draft law in 2017 aimed at reforming the National Council of the Judiciary. The 15 judges nominated by the self-governments would, instead, be elected by the Sejm. However, the law was vetoed by President Andrzej Duda.⁵² The European Commission subsequently initiated a unique measure against Poland by triggering Article 7 of the Treaty of the European Union. It was proposed that Poland's voting rights should be suspended due to certain elements of the judicial reform. The Polish president responded by immediately signing the previously vetoed law. Voicing the violation of Polish sovereignty, the government has already raised the idea of "Polexit" following a European Court of Justice ruling on the disciplinary liability of Polish judges. The European Commission took the matter to the CJEU in October 2019 because it considered that Poland had failed to fulfil its obligations under EU law by establishing a disciplinary system in 2017. In the Commission's view, several elements of the disciplinary reform infringe EU law. Once the concept of a disciplinary offence had been broadened, this could, in their view, increase the number of cases in which court judgments can be brought under political control. Following the court ruling, the Polish Constitutional Court even handed down a judgment declaring the supremacy of Polish law over EU law.⁵³ In 2018, a disciplinary chamber for judges was set up within the Supreme Court, in response to which the European Commission launched infringement proceedings against Poland. The chamber is composed entirely of judges selected by the National Council of the Judiciary, whose members are appointed by the Sejm. An important milestone in the dispute between Poland and the EU was the 12–2 decision of the Constitutional Court, which ruled that the CJEU's interference in the Polish judicial system violated the rules guaranteeing the primacy of the Constitution and

⁵¹ For the history of conflict see: F. Zoll and L. Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland', 42 *Fordham International Law Journal* (2019), p. 875.

⁵² see D. Mazur and W. Żurek, 'So Called 'Good Change' in the Polish System of the Administration of Justice', Public Prosecutor, 2016/6 56, https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf [accessed 31 May 2023]; M. Matczak, 'The Strength of the Attack or the Weakness of the Defence? Poland's Rule of Law Crisis and Legal Formalism' (10 February 2018) available at, DOI: 10.2139/ssrn.3121611; M. Matczak, 'Poland's Constitutional Crisis: Facts and Interpretations', (Oxford: University of Oxford, 2018), pp.6–7.

⁵³ "The second subparagraph of Article 4(3) TEU in conjunction with Article 279 TFEU—in so far as the Court of Justice imposes, ultra vires, obligations on the Republic of Poland in the context of interim measures related to the justice system and jurisdiction of Polish Courts, as well as the mode of proceedings before Polish courts – is incompatible with Article 2, Article 7, Article 8(1) and Article 90 (1) in conjunction with Article 4(1) of the Constitution of the Republic of Poland, and, accordingly, is not covered by the principles of primacy and direct effect referred to in Article 90(1)–90(3) of the Constitution. (P 7/20/14 VII 2021).

EU rules respecting sovereignty. According to the ruling, Articles 1 and 4 of the Treaty on European Union are not in line with Articles 2 and 8 of the Polish Constitution and Article 90(1).⁵⁴ The dispute is therefore based on the fact that the Polish Constitutional Court does not recognize the primacy of EU law. This stance is established by invoking Article 8 of the Polish Constitution, which asserts that the Constitution is the supreme law of Poland. According to this Article, the provisions of the Constitution are directly applicable unless stated otherwise within the Constitution itself, and it emphasizes the country's sovereignty over certain elements agreed upon by the Member States in the joint exercise of their sovereignty.⁵⁵ It seems that there is still no resolution of the debate on the central administration of justice, either at home or at the EU level.

Building upon this situation is the fact that the conflict with Hungary and Poland, as it pertains to judicial independence, is in part not helped by the mixed messages being sent by the CJEU. Many academics criticize the lack of competence of the CJEU in addressing Member States who are flouting them and there is currently no way to reign them in effectively. This situation is further complicated by the absence of clarity in what is meant by 'Rule of Law', 'judicial independence' and what should constitute an 'independent tribunal'.⁵⁶ Much room for manoeuvre was afforded to Member States with respect to discretion in the context of their legal systems and in determining the appropriate application of judicial independence. This has unfortunately led to varying levels of application of the human rights standards established by the ECtHR when it comes to Article 6 of the ECHR. This is significant in the context of both Poland and Hungary as this has resulted in the interpretation of 'established by law' being applied contrary to the ECtHR case law.⁵⁷ Poland has subsequently fallen short of these standards when judges were found to have been appointed unlawfully to the Constitutional Tribunal.

⁵⁴ D. R. Cameron, 'EU charges Poland's Constitutional Tribunal with violating EU law', Yale Macmillan Center (3 January 2022) <https://macmillan.yale.edu/news/eu-charges-polands-constitutional-tribunal-violating-eu-law> [accessed 31 May 2023] Comp.: Opinion of the National Council of the Judiciary of 30 January 2017 on the government Draft Act amending the Act on the National Council of the Judiciary and certain other acts (UD73). Opinion No. 904/2017. European Commission for Democracy Through Law (Venice Commission) Poland – Opinion on the Draft Act Amending the Act on the National Council of the Judiciary. ([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e) [accessed 31 May 2023]). File No III PO 7/18 Judgement in the Name of the Republic of Poland (<https://curia.europa.eu/juris/showPdf.jsf?jsessionid=93EB10E7E9A4A3080F7381AF0F435AB4?text=&docid=222926&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1096125> [accessed 31 May 2023]).

⁵⁵ The Polish argument is somewhat contradicted by the fact that Article 90(1) of the Constitution states that the Republic of Poland may, on the basis of international agreements, delegate the powers of the organs of state power in certain matters to an international organization or international institution. It would appear that the status of judges and the independent functioning of the courts do not fall within this specific scope. Article 178(1) of the Constitution states that judges are independent in the exercise of their office, subject only to the Constitution and the law. And Article 190(1) states that the judgments of the Constitutional Court are generally binding and final. Thus, while the Polish Constitution itself recognizes that the Republic of Poland may delegate certain powers to an international organization or cooperation on the basis of an international agreement, these powers or competencies do not extend to areas that affect the system of judicial organization.

⁵⁶ D. V. Kochenov and P. Bárd, "Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe,"⁶⁰ *Journal of Common Market Studies* (2022), pp.150–165, pp. 151–152.

⁵⁷ D. V. Kochenov and P. Bárd, "Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe,"⁶⁰ *Journal of Common Market Studies* (2022), pp.150–165 p. 152.

It was argued by the ECtHR that the appointment of Mr. Zaradkiewicz was in clear violation of the ‘established by law’ test and that the reform of the judiciary in Poland was clearly an attempt to undermine the independence of the judiciary.⁵⁸ The CJEU has since held that, “The Court further clarified in *AB and others* that all the principles of the rule of law are to be safeguarded when the whole system of judicial appointments is changed, including proper judicial review of the crucial reformed irremovability requirements.”⁵⁹ Those judges who choose to make a stand against the encroachment into their independence frequently find themselves as isolated figures in a flawed system.

The case law of the ECtHR is quite clear, “a Court open to absolute interference by the sovereign in direct contradiction with the letter and the spirit of the law in a context where such interventions are not reviewable, is not a ‘tribunal established by law’ in the sense of *Xero Flor*.”⁶⁰ Building on the decision in *Xero Flor w Polsce sp. z. o. o.*, the case of *Grzeda v Poland*⁶¹ concerned the use of legislative reform to remove a member of the National Council of Judges. The court stated that,

“In order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it had to be compatible with the rule of law which required, inter alia, that any interference must in principle be based on an instrument of general application. Section 6 of the 2017 Amending Act could not be regarded as such an instrument since it was directed at a specific group of fifteen clearly identifiable persons – judicial members of the NJC elected under the previous regulation, including the applicant – and its primary purpose was to remove them from their seats on that body. The Court had already held that laws which were directed against specific persons were contrary to the rule of law.”⁶²

The judgment also further reiterated the importance of having independently elected members to the NJC, adding that even though Article 6 of the ECHR does not prevent Member States from reforming their judicial systems or institutions, any such measures should not undermine the independence of the judiciary.

The ECtHR further commented in their judgment that this particular case was not an isolated event but rather a part of a broader pattern of the Polish Government reforming the judiciary by a series of measures which started in 2015 with the election of judges to the Constitutional Court, subsequently followed by the remodelling of the NCJ, and the power of the Minister of Justice being expanded to control the courts. It was considering this that the events which unfolded in the case of *Grzeda* led in part to the case being determined. The ECtHR held that even judges should have recourse from being treated arbitrarily and that he had no possibility of effective remedy against

⁵⁸ D. V. Kochenov and P. Bård, “Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe,”⁶⁰ *Journal of Common Market Studies* (2022), pp.150–165 p. 153.

⁵⁹ D. V. Kochenov and P. Bård, “Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe,”⁶⁰ *Journal of Common Market Studies* (2022), pp.150–165 p. 155.

⁶⁰ ECtHR, *Xero Flor w Polsce sp. z. o. o. v. Poland*, ECtHR Judgment (7 August 2021) App. No. 4907/18.

⁶¹ ECtHR, *Grzeda v. Poland [GC]*, ECtHR Judgment (12 March 2022) App. No. 43572/18.

⁶² ECtHR, *Grzeda v. Poland [GC]*, ECtHR Judgment (12 March 2022) App. No. 43572/18 at para (b).

his sudden removal from his position within the NJC.⁶³ Article 19 (1) of the TEU was interpreted by the CJEU in *Commission v Poland*⁶⁴ to mean that the requirement of “effective judicial protection” is to include the need for an independent and impartial judiciary, as that is the only true mechanism for securing this right.⁶⁵

The events in Hungary and Poland are not isolated events and can also be found in other countries considered in this study. For a long time after the change of regime, the Slovak judiciary continued to operate in an almost unchanged form, under the administration of the Ministry of Justice. The Report of the European Commission Expert Mission and the Slovak Ministry of Home Affairs of November 1997 concluded that the Slovak judiciary did not comply with the rule of law, as the courts were completely dependent on the executive from an administrative point of view. Due to the lack of judicial self-government, the report called for a review of the system. An amendment to Chapter Seven of the Constitution and the establishment of the Judicial Council were therefore mainly due to external influences in 2001.⁶⁶ At the same time, the Slovak political elite were reluctant to completely let go of the judiciary by strengthening the role of judicial self-government. The Council does not necessarily have a majority of judge members. Among the 18 members, 9 judges are delegated by the judges, and the government, the President of the Republic and Parliament can also delegate a further 3 members each to the panel.⁶⁷ Although, for the latter nominations, a professional judge may be delegated to the panel, as evidenced by the current composition of the Council. The creation of the Judicial Council resulted in a significant change in the Slovak Republic. Based on the changes, the judicial self-government bodies are involved in the procedure for appointment, removal and transfer of judges.⁶⁸ In any case, the Slovak solution seeks a balance typical of Western European mixed models which can ensure mutual control of the branches of power over the judiciary so that management of a self-government character is also realized. Scandals, debates, and the resulting reform efforts in the Slovak judiciary intensified in the late 2010s when the new coalition government declared an anti-corruption fight after 13 judges were indicted for serious crimes. Subsequently, the government made proposals to strengthen the accountability of judges, change the composition of the Judicial Council, and establish the Supreme Administrative Court and other proposals requiring constitutional amendment.⁶⁹

63 ECtHR, *Grzeda v. Poland* [GC], ECtHR Judgment (12 March 2022) App. No. 43572.

64 CJEU, Case C-619/18, *Commission v Poland* (2018) ECLI:EU:C:2019:531.

65 A. T. Pérez, “From Portugal to Poland: The Court of Justice of the European Union as a watchdog of judicial independence,” 27(1) *Maastricht Journal of European and Comparative Law* (2020) pp.105–119.

66 Art. 141a of the Constitution concerning the Judicial Council of the Slovak Republic was inserted by the constitutional act No. 90/2001 Coll. entering into effect on 1 June 2001.

On 11 April 2002, the National Council of the Slovak Republic approved the Act No. 185/2002 Coll. on the Judicial Council of the Slovak Republic as amended.

67 • 9 judges elected and recalled by judges of the Slovak Republic,
• 3 members elected and recalled by the National Council of the Slovak Republic (parliament)
• 3 members appointed and recalled by the President of the Slovak Republic,
• 3 members appointed and recalled by the Government of the Slovak Republic

68 The Judicial Council of the Slovak Republic is constituted by the Constitution of the Slovak Republic. Competences of the Judicial Council are stipulated by the Constitution in Article 141a, paragraph 4 and by the Act No. 185/2002 Coll. on the Judicial Council of the Slovak Republic.

69 M. Domin, ‘Judicial Reform in Slovakia: How to deal with „bad” judges?’ IACL-AIDS Blog (30 July 2020) <https://blog-iacl-aidc.org/2020-07/30/judicial-reform-in-slovakia-how-to-deal-with-bad-judges> [accessed 31 May 2023].

Court administration in Czechia is the only one of the countries analyzed based on the dominant role of the Ministry of Justice. The “executive model” has survived only in this post-socialist country in Central and Eastern Europe, with the element of judicial self-government largely missing. Judicial councils have an exclusively consultative role, but do not participate in decision-making.⁷⁰ The judicial administration of the 8 regional and 86 district courts is carried out by the Ministry of Justice directly or indirectly through the presidents of these courts. The 2 Supreme Courts (the Supreme Court and the Supreme Administrative Court) are administered exclusively through the presidents of the courts. The presidents of the courts are nominated by the Ministry of Justice and appointed by the President of the Republic.

Each year, the President of the relevant Court is responsible for determining the court’s work plan for the following year, for setting out the composition of the judicial bodies and the mechanisms for allocating cases.⁷¹ Functions related to human resources and financial management are divided between the Ministry of Justice and the presidents of the courts. The presidents direct the professional training of the trainees and determine the number of lay judges. The presidents of the regional courts detail the state budget available for the operation and management of the respective regional and related district courts. As a result, the presidents of the district courts do not participate in the preparation and planning of the budget, their task is to ensure the functioning of the given court, considering organizational, personal, economic, financial and educational aspects.⁷² Each court employs a person known as a court director who deals with court administration. Court directors are appointed by the presidents of the courts based on a competitive examination. They do not have a law degree, usually economists fill this position. Their employment is regulated by the Labor Code, and they can fill their positions without any time limit. In disciplinary cases, the councils in the higher courts act in the first instance, in the second instance the disciplinary council of the Supreme Court acts. Disciplinary proceedings may be initiated by the president of the court concerned or by the Minister of Justice. The request may be submitted within a period of 60 days from the knowledge of the act giving rise to the disciplinary proceedings, but no later than 2 years from the date of the act. Judges are appointed by the President of the Republic based on a multi-stage appointment procedure. Given that most new judges are essentially appointed to the court of first instance, the initial step in the appointment procedure is taken by the president of the court in which the vacancy occurs. The President of the Court shall propose to the Ministry of Justice the appropriate candidates. Thereafter, the Minister of Justice is entitled to accept or reject the proposal received concerning the candidates.⁷³ Given that the President of the Republic may exercise the power to appoint a judge with the consent of the Government, the list of candidates shall be forwarded to the Government. If the Government agrees with the candidates on the list, the President of the Republic shall appoint the candidate(s).⁷⁴

70 B.C. Smith, ‘Models of Judicial Administration and the independence of the Judiciary: Comparison of Romanian Self-Management and the Czech executive model,’ 28(2) *Public Administration and Development* (2008), pp.85–93.

71 A. Blisa, T. Papousková, M. Urbániková, ‘Judicial Self-Government in Czechia: Europe’s Black Sheep?’ 19(7) *German Law Journal* (2018), pp.1951–1976.

72 M. Fabri, ‘Exploratory study on the position of: Court President, Court Manager, Judicial Assistant, and Media Spokespersons in Selected Council of Europe Member States,’ (2013), p.101, <https://rm.coe.int/joint-project-on-strengthening-the-court-management-system-in-turkey-j/16807895a0> [accessed 31 May 2023].

73 Law on Courts and Judges No. 6/2002.

74 Art. 63 (1) of the Constitution of the Czech Republic.

It is characteristic of each of the emerging states of the former Yugoslavia that, following their independence, they reformed their judicial systems in order to join the EU and set up judicial councils everywhere.⁷⁵ The foundations of Croatia's judicial system, including the Judicial Council, were established in 1993. The last significant changes were made with the new court law, which came into force on 1 January 2019.⁷⁶ The administration of the Croatian courts can be classified as a mixed administration system, while the powers related to the selection and disciplinary responsibility of judges were transferred to the Judicial Council with one exception,⁷⁷ the executive retained powers in other administrative matters of the courts. The State Judicial Council (SJC) is an independent and autonomous body within the meaning of Article 121 of the Constitution, which guarantees the independence and autonomy of the judiciary of the Republic of Croatia.⁷⁸ It decides independently on the appointment, promotion, transfer, dismissal of judges and court presidents (except the President of the Supreme Court), disciplinary proceedings and the further training of judges and members of the judiciary.⁷⁹ It consists of eleven members, seven of whom are judges, two professors of law and two Members of Parliament, elected for a four-year term subject to re-election on a single occasion. The presidents of the courts may not be members of the SJC. The president of the SJC is elected by the members from among their ranks.⁸⁰ All administrative matters which do not fall within the competence of the Council are the responsibility of the Ministry of Justice, which it carries out in cooperation with the President of the courts. In this context, the Minister of Justice has the right to terminate, repeal or annul any unlawful administrative provision (Section 71). The Minister adopts the Rules of Court, which set out the organization and administration of the courts and determines the number of judges presiding in each court. The Minister keeps a register of judges, s/he can ask for any information, s/he may also ask the sentencing judge for an explanation of certain lawsuits.

⁷⁵ For an analysis of the situation in the former Yugoslav countries, see: Mark K. Dietrich, 'A Comparative Review of Judicial Councils in the Former Yugoslavia,' *East West Management Institute*, (2008) p.11 <http://www.ewmi.org/sites/ewmi.org/files/files/programdocs/EWMIOPSJudicialCouncils.pdf#overlay-context=user/1> [accessed 31 May 2023].

⁷⁶ The objective of the legislator was to solve the problems related to the administration of large courts, as well as the difficulties related to small courts with comprising less than ten judges and therefore difficult to manage effectively.

⁷⁷ The President of the Supreme Court is elected by the Parliament on the proposal of the President of the Republic, after consulting the General Council of the Supreme Court and the competent committee of the Parliament.

⁷⁸ Ustav Republike Hrvatske. Pročišćeni tekst. Narodne novine 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14. <https://www.zakon.hr/z/94/Ustav-Republike-Hrvatske> [accessed 31 May 2023].

⁷⁹ Appointment of judges, appointment and dismissal of court presidents, transfer of judges, conducting disciplinary proceedings and deciding on disciplinary responsibility of judges, deciding on dismissal of judges, participation in training of judges and judicial officers, conducting the registration of candidates to the State School for Judicial Officials and the process of taking final exams, adoption of methodologies for evaluating judges, keeping records of judges, management and control of assets declarations of judges.

⁸⁰ Its composition is regulated in more detail in Section 4 of the latest amendment in force since 1 September 2018, prescribing that the members elected from among the judges are as follows: Two judges of the Supreme court, one judge of a higher court (one judge), three judges of county courts and one judge from a court of first instance (usually district court). Judges elected to the SJC have a reduced duty in their courts: 75% for the President of the Council and 20% for the members of the Council.

The establishment of the Slovenian judicial self-government was motivated by the transition to a constitutional democracy and, pragmatically, by admission to the Council of Europe, which was also strongly supported by the academic sphere.⁸¹ Self-government manifests itself in the mutual control of the three branches of power and their influence on the judicial power. The main feature of the system is that, in addition to the establishment of judicial self-government, the role of the executive branch (budget, preparation of legislation related to courts, etc.) cannot be neglected either. What is interesting, however, is that all Slovenian judges, on a proposal from the Judicial Council are appointed judges following a decision by Parliament. Subsequently, however (apart from the President of the Supreme Court), the Judicial Council decides on judicial promotions and the appointment of court presidents and vice-presidents. The Council for the Judiciary [Sodni svet] was established in 1990, immediately after independence. It consisted of 9 members: 5 judges, 3 respected lawyers and the Minister of Justice, who have yet to obtain their mandate from the Socialist Parliament. The Council possessed only a weakened role. The Constitution and the subsequent laws on the courts and those on the service of judges, already provided for the establishment of a strong judicial self-governing body, which already gives broader powers to the central judicial council. (There were proposals that would have extended the powers of the Council to the prosecutor's offices, but this was ultimately rejected by the political parties.) Article 131 of the Constitution provided for the establishment of a Judicial Council with a majority membership of judges. In addition to the 6 elected judges, 5 members are elected by Parliament on the proposal of the President of the Republic. In terms of its status, as confirmed by the Slovenian Constitutional Court, the Council is a sui generis body independent of other branches of power, which is also not a representative body of judges.⁸² In order to ensure the independence of judges, the Constitution lays down two guarantee provisions: a judge may be appointed and dismissed only on a proposal from the Council.⁸³ Although there have been initiatives to transfer the appointment of judges from Parliament to the President of the Republic, due to the risk of politicization and also due to the strong and independent powers of the Judicial Council and without the will of political parties, this initiative has become a moot point. The powers of the Council were strengthened in 2017, in a separate law⁸⁴ of the Judicial Council, in which 4 main competence groups were detailed: 1. Selection, appointment and removal of judges, court presidents and vice-presidents⁸⁵

81 D. Kosař, 'Perils of Judicial Self-Government in Transitional Societies. Comparative Constitutional Law and Policy,' (Cambridge University Press: Cambridge, 2016), p.488; See, for example, P. Guasti, B. Dobovšek, B. Ažman, 'Deficiencies in the Rule of Law in Slovenia in the Context of Central and Eastern Europe,' 14(2) *Journal of Criminal Justice and Security* (2013), pp.175-190.

82 Constitutional Court of Slovenia Case U-I-224/96, par. 11.

83 Constitution, Art. 130, 132.

84 Official Gazette of the Republic of Slovenia 23/17.

85 Art. 23/1 of the Judicial Council Act In this context, the Council shall have the right to make proposals to the person of the President of the Supreme Court and it shall also propose the identity of supreme court judges. It shall have the power to appoint all other presidents and vice-presidents of the court and also decides on all judicial promotions. It shall propose the appointment of new judges and Parliament decides on the appointment of judges. It shall deliver an opinion on the procedure for removing the President of the Supreme Court. Proposing the removal of judges shall also fall within its competence.

2. Other powers related to judicial human resources policy.⁸⁶ 3. The role of the Council in disciplinary matters. The Council shall set up a disciplinary committee, initiate disciplinary proceedings and ensure that disciplinary action is taken. The fourth group includes the competences that allow the implementation of the previous ones.⁸⁷ It shall, in consultation with the Minister for Justice, adopt the criteria for the selection of judges and the evaluation of judges already appointed. It shall create a code of ethics and integrity. The Minister of Justice shall consult the Council on the necessary number of judges and organizational issues.

Serbia is the only legal system among those analyzed that is merely seeking to join the EU. The European Commission's Strategy for the Western Balkans predicts this could happen in 2025 at the earliest, but in the meantime, several reforms are needed, including in the judiciary. Following the secession of Serbia and Montenegro and the simultaneous declaration of independence of Serbia, a national strategy for the transformation of the judiciary was adopted in 2006, leading to the adoption of the law laying the foundations for post-socialist Serbian administration of justice by 2010. The High Judicial Council was established, playing an important role in the selection, disciplinary matters, and dismissal of judges. A mixed system has been decided upon, as the administration of justice is jointly carried out by the Council and the Ministry of Justice. (Section 70). The latter oversees the administrative work of the courts, collects statistical and other data, maintains facilities, decides on budgetary matters, and oversees the financial activities of the High Judicial Council beyond the courts. The High Judicial Council (HJC) has an eleven-member body: the President of the Supreme Court, the Minister of Justice, and the Chair of the competent committee of the Parliament, with eight elected members. Such members are elected by Parliament: six judges (from the Autonomous Province of Vojvodina) and two prestigious lawyers with at least 15 years of work experience.⁸⁸ The Council has the right to elect and withdraw the judges once their appointments have been finalized.⁸⁹ As in Slovenia, efforts to establish mutual control between the branches of power were apparent. In addition to the Ministry and the Council, the legislature has been given significant powers to appoint judges and select members of the Council. It is the latter that was a critical element of the judiciary in the EU accession process as the legislature elected almost two-thirds of the members of the Council. In this way, Parliament had an indirect influence not only on the election of judges for a probationary period, but also on the appointment of all judges.

European integration efforts have prompted the Serbian government to change the situation, and it has initiated a constitutional amendment.⁹⁰ The draft ended

⁸⁶ Ibid. Art. 23/2 Conflicts of interest, promotions, the award of higher judicial titles, upgrading to a higher remuneration category are also included, and the Council ultimately decides on the negative assessment of judges and on complaints against judges, the transfer of judges and other matters relating to their status.

⁸⁷ Ibid, Art. 23/4.

⁸⁸ Zakon o Visokom savetu sudstva ("Sl. glasnik RS", br. 116/2008, 101/2010, 88/2011 i 106/2015) <https://vss.sud.rs/sites/default/files/attachments/Zakon%20o%20Visokom%20savetu%20sudstva%2001.01.2016.pdf> [accessed 31 May 2023].

⁸⁹ Zakon o Visokom savetu sudstva ("Sl. glasnik RS", br. 116/2008, 101/2010, 88/2011 i 106/2015) <https://vss.sud.rs/sites/default/files/attachments/Zakon%20o%20sudijama%2001.01.2016.pdf> [accessed 31 May 2023].

⁹⁰ EWB, 'Serbian parliament votes to trigger amending the Constitution in the field of the judiciary,' *European Western Balkans* (8 June 2021) <https://europeanwesternbalkans.com/2021/06/08/serbian-parliament-votes-to-trigger-amending-the-constitution-in-the-field-of-the-judiciary/> [accessed 31 May 2023].

up significantly limiting the role of the legislature. On 16 January 2022, Serbia held a referendum on the constitutional reform. The referendum confirmed the changes initiated by the government. The Council's powers have increased considerably. The composition of the Council has also been changed and judges elected by their peers now enjoy a majority in the body. Six judges out of 11 members are elected by their peers; four members are elected by the National Assembly from among "eminent jurists". The President of the Supreme Court is the seventh judge to sit on the panel. The justice minister will not be a member of the Council. The Constitutional Amendment guarantees that judges and prosecutors are elected without the direct involvement of the National Assembly. Judges and court presidents will be elected exclusively by the High Judicial Council.⁹¹ Additionally, the three-year probationary mandate for judges was also abolished. (Parliament will elect only the Supreme State Prosecutor and five out of 15 Constitutional Court judges.).⁹²

For comparability, the Figure below (see Table 1) summarizes the key features of the judicial councils of the countries under analysis.

III CHALLENGES OF POST-SOCIALIST JUDICIAL SYSTEMS. CONCLUSION

The pressing question across the EU and CoE institutions is how to achieve judicial independence in the Member States and how to secure the rule of law. One institutional mechanism to achieve this is the judicial council model. The ethos of the judicial council was to provide a safety zone which is impervious to political and other external influences.⁹³ As early as 1994 the Judicial Council was being touted as being a good vehicle for promoting judicial independence. With the increase of Member States joining, particularly with the 2004 wave, the CoE seized this as an opportunity to use the introduction of judicial councils more forcefully to be a pre-condition for joining.⁹⁴ In order for the judicial council model to work effectively, it is necessary for there to be self-government. The flaw with the judicial council model, and this is evident from the backsliding in both Poland & Hungary, is that these judicial councils can be captured.⁹⁵ Initially when Hungary established the Judicial Council Model it conformed to the requirements of the CoE, but in 2011 when there was a reform of the judiciary the powers of the council were transferred to the newly created National Judicial Office.⁹⁶ With the creation of this office it also conferred vast powers on the president which enabled them to appoint court leaders at will.⁹⁷ With the EU now tying

91 Prosecutors will be elected by the High Council of Prosecutors.

92 USTAV REPUBLIKE SRBIJE ("Sl. Glasnik RS", br. 98/2006 i 115/2021).

93 M. Bobek and D. Kosar, "Global solutions, local damages: A critical study in judicial councils in central and Eastern Europe," 15(07) *German Law Journal*, (2014), pp.1257–1292, p. 1257.

94 M. Bobek and D. Kosar, "Global solutions, local damages: A critical study in judicial councils in central and Eastern Europe," 15(07) *German Law Journal*, (2014), pp.1257–1292, p. 1261.

95 M. Bobek and D. Kosar, "Global solutions, local damages: A critical study in judicial councils in central and Eastern Europe," 15(07) *German Law Journal*, (2014), pp.1257–1292, p.1264.

96 M. Bobek and D. Kosar, "Global solutions, local damages: A critical study in judicial councils in central and Eastern Europe," 15(07) *German Law Journal*, (2014), pp.1257–1292, p. 1268.

97 Z. Szente, "Stepping Into the Same River Twice? Judicial Independence in Old and New Authoritarianism," 22, *German Law Journal*, (2022), pp.1316–1326, p.1323.

Table 1 Comparison of Judicial Councils in East-Central Europe (Attila Badó, 2021.)

QUESTIONS	HUNGARY	POLAND	ROMANIA	CROATIA	SLOVENIA	SERBIA	SLOVAKIA	CZECH REPUBLIC
Is there Judicial Council responsible for judicial administration?	✓	✓	✓	✓	✓	✓	✓	No (only with consultative role)
Type of administration	Administration by Council and Judicial Office	Council + Executive	Council + Executive	Council + Executive	Council + Executive (Parliament has special role in appointing judges)	Council + Executive	Council	Executive
Total number of members	15	25	19	11	11	11	18	X
Is there a possibility to be renewed as a member?	No	Yes. but no more than twice	No	Yes. but no more than twice	Yes. but not right after the former term	No	Yes. but not more than for 2 subsequent terms	X
Make up	1 - President of the Curia - delegated; 1 - judge from a Regional Court of Appeal; 5 Judges from Regional Courts; 7 judges from District Courts; 1 judge from and Administrative and Labour Court. The other 14 judge members are elected by- secret ballot with a simple majority.	15 judges elected by their peers; 1 representative of the President of Poland; 1 - the Minister of Justice; 6 members of Parliament; 1 - the President of the Supreme Court; The Supreme Administrative Court	14 magistrates (9 judges and 5 prosecutors) - elected by the general assemblies of magistrates; 2 lay members (elected by the Senate); 3 ex officio members (the President of the High Court of Cassation and Justice, the minister of justice, the general prosecutor of the Prosecutor's Office)	2 judges of the Supreme Court; 2 county court judges; 2 municipal court judges; 1 judge of the specialised court; 2 university professors of law; 2 members of Parliament - one of them from the opposition	6 judges - elected by their peers; 5 members elected by Parliament on the proposal of the President of the republic	1 - President of the Supreme Court of Cassation; 6 judges elected by their peers; 4 eminent lawyers nominated by Parliament	9 judges - elected by their peers; 3 members - elected by the Parliament; 3 members - appointed by the President; 3 members - appointed by the Government	X
Is there a majority of judges?	Yes	Yes (15 out of 25)	Yes (10 out of 19)	Yes (7 out of 11)	Yes (6 out of 11)	Yes (7 out of 11)	By law. at least 50%	X

(Contd.)

QUESTIONS	HUNGARY	POLAND	ROMANIA	CROATIA	SLOVENIA	SERBIA	SLOVAKIA	CZECH REPUBLIC
Is ultimately responsible for judicial appointment?	No - makes proposal to the President of the Republic	No - makes proposal to the President of the Republic	No - makes proposal to the President of the Republic	Yes	No - makes recommendation to Parliament	Yes	Yes	X
Is ultimately responsible for removing judges?	No (Judicial Office proposes for the President of the republic)	No (Disciplinary chamber at the Cassation Court of Poland)	No (Appeal before the High Court of Cassation is possible)	Yes	No - makes recommendation to Parliament	No (appeal to constitutional court is permitted)	Yes	X
Main competences	<ul style="list-style-type: none"> Gives opinion on the candidates of the President of the National Judicial Office and that of the Curia. Decides in the question of a renewed nomination of a President or a deputy President of the regional court of appeal, the tribunal, the administrative and labour court, and the local court. Nominates the President and the members of the official court. Coordinates Judicial training 	<ul style="list-style-type: none"> Consideration and evaluation of candidates to serve offices of judges and submission to the President of the Republic of motions for appointment of judges of the Supreme Court, the Supreme Administrative Court, common courts, provincial administrative courts and military courts; adoption of a catalogue of professional ethical rules of judges and monitoring of their observation. 	<ul style="list-style-type: none"> Appointment into leading positions, transfer, secondment, proposals for appointment into and the release from the leading positions within the High Court of Cassation and Justice, advice on the proposal of the minister of justice for the appointment into and release from leading positions within the Prosecutor's Office by the High Court of Cassation and Justice). Coordinates Judicial training 	<ul style="list-style-type: none"> Appoints judges; Appoints and dismisses of court Presidents; Decides on the immunity of judges; Reassess judges; Conducts disciplinary-proceedings and deciding on the disciplinary-liability of judges; Decides on the dismissal of judges; Decides on the transfer of judges; Participates in the training and professional development of judges and court staff 	<ul style="list-style-type: none"> Appoints judges based on opinion of the responsible person within the institution where the judge will be appointed; Appoints and dismisses Presidents of courts (except for the President of the supreme Court of Slovenia); Decides on promotion to higher judicial positions and on faster promotion within wage grades; Decides on the incompatibility of judicial office 	<ul style="list-style-type: none"> Appoints, selects judges, court presidents; Decides on the dismissal of judges pass the Code of Ethics determine the number of judges and lay judges for each court; perform affairs of the judicial administration within its remit; rule on issues of immunity of judges and Members of the Council 	<ul style="list-style-type: none"> Adopts opinion on adequacy- of candidates; Presents candidates for appointment and proposals to recall judges to the President; Decides on assignment and transfer of judges; Presents candidates to the Government who should act on behalf the country within international judicial bodies; Judicial training - determine the subject matters of judicial education, propose members of the pedagogical staff and examination committees 	

performance to rule of law, of which judicial independence is a significant precursor to the maintenance of a democratic society, Hungary does not seem to have flinched or to be flinching at the thought of funding being cut off, rather with the appointment of Chief Justice Varga they appear to be flaunting their illiberal democracy in the face of the EU. In his role as Chief Justice the office has taken aim at the NJC.⁹⁸ The Rule of law conditionality, which was adopted in 2020, is the first tool which attempts to bring about consequences which can be enforced against Member States.⁹⁹ Europe has been besieged by several crises which have been characterized by Pech and Scheppele as 'value crises'.¹⁰⁰ Each of these crises, Euro-crisis, refugees, Covid-19, and more recently the war in Ukraine, have lent themselves as opportunities to disguise the chipping away of rule of law values.¹⁰¹ The approach adopted by both Hungary and Poland is unique in that the measures taken by these illiberal governments have been beyond the scope of the traditional tools available to the Commission when protecting the rule of law. This is why it was concluded that a new mechanism was needed, and this is the Rule of Law Framework which was adopted in March 2014.¹⁰²

What is the best way to protect the sanctity of judicial independence? It is often argued that the best way to do this is through creating stronger institutional reforms and this is seen in the establishment of Judicial Councils. The judicial council is touted as being the best mechanism by which to keep out political influence.¹⁰³ However, judicial councils can only effectively protect judicial independence if a self-limiting legislature and government, in cooperation with the courts, can develop detailed rules that strike a balance between independence and accountability. Otherwise, councils can only give the appearance of independence.

Despite theoretical experimentation, although one cannot speak of a separate post-socialist legal family,¹⁰⁴ it is without doubt that East Central European post-socialist countries and, more precisely, the countries aspiring for EU membership have had to cope with similar problems since the 1990s. Among the challenges in transitioning from dictatorship to democracy, particular attention in Western countries has been and continues to be given to understanding the true nature of judicial independence and the methods to ensure it. This focus mostly manifests in constitutional courts and is expressed through both political and professional discourse, with the latter often receiving more emphasis. Independence from party politics or governmental authority plays an increasingly important role in East Central European countries, since the collusion of the single-party state and courts frequently resulted in

98 Á. Kovács, "Defective Judicial Appointments in Hungary: The Supreme Court is Once Again Embroiled in Scandal", *VerfBlog*, (27 September 2022), <https://verfassungsblog.de/defective-judicial-appointments-in-hungary/> [accessed 31 May 2023].

99 S. Priebus and L. H. Anders, "Fundamental Change Beneath the Surface: The Supranationalism of Rule of Law Protection in the European Union," *Journal of Common Market Studies* (2023), pp.1–18.

100 L. Pech and K. L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies* (2017), pp.3–47, p. 8.

101 L. Pech and K. L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies* (2017), pp.3–47, p.7.

102 L. Pech and K. L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies* (2017), pp.3–47, p.14.

103 M. B. and D. Kosar, "Global solutions, local damages: A critical study in judicial councils in central and Eastern Europe," *15(07) German Law Journal*, (2014), 1257–1292.

104 See, for example, B. Fekete, 'A modern jóösszehasonlítás paradigmái,' *Doktori értekezés*. Budapest (2010) *PPKE*, p.209.

tragic consequences during the Stalinist period.¹⁰⁵ (The later and milder phase of the dictatorship in some countries was not always associated with an unflinching prevalence of judicial independence either, although direct political pressure could not be detected in a considerable part of legal disputes.¹⁰⁶) In light of this saddening historical period, it is understandable that the chances of conflicts between political parties become more pronounced and noticeable than usual in post-socialist societies. Such fears are predominant in a narrow social stratum, since the system of East Central European political traditions, a weakened democratic legacy, and frail or malfunctioning autonomies result in an indifference towards institutional changes concerning judicial independence as well.

Despite the shared history in the Soviet bloc and the identical features of the subsequent regime change, the diversity of institutional solutions is what characterizes East Central European countries today. Apart from diversity, the most paramount identical feature may constitute the fact that, despite regularly occurring reforms, the relationship between independence and accountability¹⁰⁷ reveals inconsistencies and confusion in the judicial system.¹⁰⁸ One may conclude from the reforms that the settlement of the relationship between independence and accountability is omnipresent in disputes relating to the distribution of powers.¹⁰⁹ Constant reference to independence is often paired with lack of preparation, seclusion, increasing corporate elements, and lack of transparency in courts. Councils for the judiciary that were established following Western examples show significant differences in certain legal systems regarding both their composition and competences. In Hungary, a Council composed exclusively of judges controls a president elected by the legislature, who heads the Judicial Office. In Romania, Poland and Slovenia, the Council of a majority of judge members has taken over the administration of justice; the latter also provides an example of the importance of the legislature in the process of appointing judges. The same has been evidenced in the case of Serbia, which has so far seceded from the former Yugoslavia and has not yet joined the EU. Here, the legislature not only elected most of the members of the Council, but also played a decisive role in the appointment of judges. Until recently, a new constitutional amendment, proposed by the Venice Commission to facilitate the EU accession process, has given considerable support to the organizational independence of the judiciary.

The Slovak solution is characterized not only by a balance in the composition of the Council, but also by a division of responsibilities between the Council and the Ministry of Justice. As for the Czechia ministerial administration, it provides an example that even in a post-socialist country, the Austrian/German model may become palatable for the EU if this solution is acceptable to the domestic political elite.

¹⁰⁵ F. Kahler, *Joghalál Magyarországon* (Zrínyi Katonai Kiadó), 1993, at 291.; Hans Petter Graver, *Justice Against Justice: on Judges When the Rule of Law Is Under Attack* (Springer-Verlag, Berlin, Heidelberg) 2015, p.301.

¹⁰⁶ Z. Fleck, *Jogszolgáltató mechanizmusok az államszocializmusban* (Napvilág Kiadó: Budapest) 2001, at p/276.

¹⁰⁷ P. H. Solomon Jr, 'The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability,' in A. Seibert-Fohr, *Judicial Independence in Transition*, (Springer, Heidelberg, 2012), pp.909–937 p. 7.

¹⁰⁸ D. Piana, 'The Power Knocks at the Court's Back Door—Two Waves of Postcommunist Judicial Reforms,' 42(6) *Comparative Political Studies* (2009) 816–840.

¹⁰⁹ Z. Fleck, 'Bírósági szervezetek és alapjogok,' in A. Badó, *A bírói függetlenség, a tisztességes eljárás és a politika* (Gondolat Kiadó: Budapest, 2011) at p.33. ; Z. Fleck, *Judicial Independence in Hungary* in A. Seibert-Fohr, *Judicial Independence in Transition*, (Springer, Heidelberg, 2012), pp.793–835.

It is clear that most of the controversy in post-socialist Central European legal systems is in the area of judges' appointment, promotion and the selection of judges, although recently the issue of holding judges accountable has been hotly debated in some countries, prompting EU criticism about Romania and Poland. Of course, selection is not a specific problem which is limited to these countries, as a global search will reveal. However, the judicial culture rooted in the dictatorial past and the one-party system reinforces fears about the vulnerability of judicial independence.

In the 21st century, the legitimacy of the administration of justice comes from a deep conviction shared by the society that in bringing decisions the courts are not influenced by an inappropriate connection to external actors (e.g. political parties, government, lobbyists, judicial leaders or voters), but are founded exclusively on professional legal considerations and a legal sense of justice.¹¹⁰ The question of selecting judges and court management is a recurrent subject in disputes. The culture of relying heavily on social capital can be traced in every post-socialist country. This attitude of capitalizing on liaisons was necessarily strengthened everywhere by the shortage economy characteristic of Socialism, engulfing justice in the process as well. Where corruption does not prevail in deciding court cases (Hungary, Czechia, and Poland), it is more or less dominant in the selection of judges and court management. Similarly, to Romania, this is even traceable where in the framework based on the French example the introduction of a competitive examination is made mandatory in the case of judicial (and prosecutorial) appointments. The EU accession process played an unequivocally positive role in increasing merit-based elements. More objective forms of judicial selection appeared in various instances. Be that as it may, whether the discussion revolves around ministerial administration, a Central Council for the Judiciary, or the strengthened role of local judicial self-governments, the acceptable level of objectivity in the selection procedures is being questioned universally. Concerns are being raised about potential biases stemming either from party politics or from selection distortions within the judiciary itself. Where no nationwide and mandatory introduction of competitive examination takes place, the situation may be even bleaker.¹¹¹

It is in vain that fine worded requirements are included in the recommendations of various international organizations concerning judicial recruitment.¹¹² Without binding EU norms, Member States may easily divert the enforcement of merit-based elements in the selection of judges and court management. This unique situation is emphasized by Ramona Coman and Cristina Dallara in their work on Romanian judicial independence.¹¹³ Under such circumstances, beside the aforementioned

¹¹⁰ A. Badó, „Fair” Selection of Judges in a Modern Democracy in Attila Badó *Fair Trial and judicial independence. Hungarian Perspectives*, (Springer, New York, Dordrecht, London 2014) pp.27–58.

¹¹¹ M. Bobek, in his 2014 study on the Czech selection system according to which applying the competitive examination is only optional in the selection of candidates, he writes the following: “Today, the greatest problem still lies in the absence of any open, transparent and clear criteria according to which new candidates will be picked by the presidents of regional courts...” M. Bobek, 'Judicial Selection, Lay Participation, and Judicial Culture in the Czech Republic: A Study in a Central European (Non) Transformation,' in Sophie Turene *Fair Reflection of Society in Judicial Systems-A Comparative Study* (Springer 2015).

¹¹² See:Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, (23–25 June 2010 <https://www.osce.org/files/f/ documents/a/3/73487.pdf> [accessed 31 May 2023]).

¹¹³ D. R. Coman, Judicial Independence in Romania, in A. Seibert-Fohr, *Judicial Independence in Transition*, (Springer, Heidelberg, 2012), pp.835–855.

historical traditions, the judges may become more easily defenceless and opportunistic, which may give greater scope for internal or external attempts at influencing them.

COMPETING INTERESTS

The authors have no competing interests to declare.

AUTHOR AFFILIATIONS

Dr. Samantha Joy Cheesman  orcid.org/0000-0002-9890-1776

Institute of Comparative Law and Legal Theory, University of Szeged, Hungary

Prof. Dr. Attila Badó

Institute of Comparative Law and Legal Theory, University of Szeged, Hungary

TO CITE THIS ARTICLE:

Samantha Joy Cheesman and Attila Badó, 'Judicial Reforms and Challenges in Central and Eastern Europe' (2023) 14(2) *International Journal for Court Administration* 5. DOI: <https://doi.org/10.36745/ijca.532>

Published: 06 September 2023

COPYRIGHT:

© 2023 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.

International Journal for Court Administration is a peer-reviewed open access journal published by International Association for Court Administration.

