Judicial Reforms in Hungary and Romania
The Challenging Implementation of EU Rule of Law Standards

This study examines how the Hungarian and Romanian legal orders have implemented EU rule of law standards for judicial organization and what we can learn from these experiences for balancing the values of judicial independence and efficiency. Constitutional theory and contextual-comparative legal research are combined to show how classic rule of law and new public management-inspired values for judicial organization and judging combine at a conceptual level and how standards reflecting these values developed incrementally in the evolving European context. The theoretical framework emerging from this analysis is critically tested and refined through a study of experiences with implementing European standards in two selected post-communist EU member states. This study encompasses three in-depth case studies on judicial selections, case assignment methods, and the participation of the judiciary in the public debate concerning court reforms. The research provides conclusions and guidelines for academics, legislators and judges.

Printed by: Gildeprint

Judicial Reforms in Hungary and Romania
The Challenging Implementation of EU Rule of Law Standards

Justitiële hervormingen in Hongarije en Roemenië
De uitdagende implementatie van EU-beginselen van de rechtsstaat

Thesis

to obtain the degree of Doctor from the
Erasmus University Rotterdam
by command of the
rector magnificus

Prof.dr. R.C.M.E. Engels

and in accordance with the decision of the Doctorate Board.
The public defence shall be held on

12 December 2019 at 09:30 hrs

by

Petra Mária Gyöngyi
born in Oradea, Romania

Erasmus University Rotterdam

Doctoral Committee:

Promotor(s):	**Prof. dr. E. Mak**
	Prof. dr. F. Amtenbrink
Other members:	**Prof. dr. H.S. Taekema**
	Prof. dr. R. de Lange
	Assoc. Prof. dr. D. Kosař

Acknowledgements

This study is the product of years of professional and personal development. First and foremost, I would like to express my sincere gratitude to my supervisors, Elaine Mak and Fabian Amtenbrink for their continuous support and guidance. The two of you have worked wonderfully as a team. Elaine, thank you for being a relentless example of competence, kindness and professionalism. Without your trust and support and ever-critical eye, this book would not be the same. Fabian, thank you for aiming for nothing but the best in your guidance. I truly appreciate your constructive criticism and your readiness to ask global questions. Working with the two of you not only shaped my work, it shaped the researcher I am today.

I would like to extend my words of gratitude to the members of the reading committee, Sanne Taekema, Roel de Lange and David Kosař. Thank you for taking the time to read my work and for providing extremely insightful and helpful comments. Your criticism was instrumental in further improving this book and I very much look forward to your questions.

This research has benefitted from support from various institutions. I would like to thank my colleagues and friends at the Erasmus School of Law's departments of Theory, Sociology, Methodology, European and International Law, the Law and Economics Programme and the Erasmus Graduate School of Law; the Research Institute on Judicial Systems in Bologna, the PluriCourts research centre at the University of Oslo, the Public Law Department and European Law School of Maastricht University as well my wonderful team at the Judges Under Stress Project. I am beyond grateful for the opportunity to meet all of you and to learn from all you. I am equally indebted to the judges, scholars as well as the national and international experts who took the time to discuss my project and share their knowledge with me either through interviews or at international conferences.

Special thanks to my paranymphs, Alina Onțanu and Thomas Riesthuis for their continuous encouragement during the course of this research project and for their invaluable help in organizing my defence ceremony.

Above all, I would like to thank my extended family and my partner for their unconditional love and support. Zoli, thank you for always being my counter balance when needed!

TABLE OF CONTENTS

Acknowledgements **5**

List of tables ..... **VI**

List of Abbreviations ..... **VII**

Introduction: Two challenges for judicial reforms in new EU member states **1**

A. Balancing judicial independence and efficiency **3**
B. Implementing European standards **5**
C. Research question and methodological approach **7**
D. Structure of the study **12**

Part I. Theoretical framework: European Union requirements and recommendations for judicial organization **15**

1. Understanding the implementation of EU requirements: A Conceptual Typology **15**

A. Introduction: The need for analytical conceptualization of EU rule of law requirements for judicial organization **16**

B. Explaining the constitutive elements of the typology **18**
I. Unpacking the meaning and levels of protection of judicial independence 18
i. The meaning of judicial independence 18
ii. The institutional levels of guaranteeing judicial independence 20
II. The function of judicial independence: Guaranteeing input, throughput and output legitimacy 23
III. The importance of judicial independence: Upholding the rule of law 25
IV. The form of judicial independence as a transnational legal principle 26

C. Theoretical typology of EU rule of law requirements for judicial organization **27**

D. Conclusions **29**

2 Mapping EU standards for judicial input, throughput and output **31**

A. Introduction: Diverse sources of European legal requirements for judicial organization and their theoretical puzzles **31**

B. EU rule of law standards for judicial organization 34
I. Input standards 35
i. Legally binding requirements: manner and length of appointment; irremovability; remuneration; judicial participation in the public debate 35
ii. Legally non-binding recommendations: codification of judicial independence; role of judicial councils; objective, transparent, merit-based appointments 40
iii. Contribution to legitimacy and the rule of law 47
II. Throughput standards 51
i. Legally binding requirements: courts established by law; balancing decision-making independence and organizational efficiency 51
ii. Legally non-binding recommendations: specific case allocation methods; internal independence of judges; time- and quality management, role of judicial councils 53
iii. Contribution to legitimacy and the rule of law 60
III. Output standards 63
i. Legally binding requirements: factual independence, openness, obligation to give reasons; communication of judiciary with surroundings 63
ii. Legally non-binding recommendations: quality of judicial decisions; ethical codes; communication with the public; performance evaluation 67
iii. Contribution to legitimacy, the rule of law and possible risks 74

C. Conclusions: European standards for judicial organization as liberal-democratic requirements 77

Part II. Implementing EU standards for judicial organization in Hungary and Romania 81

3. Introducing the contextual comparative analysis 81

A. The constitutional frame of reference for judicial organization in Hungary and Romania 82
I. Conceptualization of rule of law values in the Constitution 82
i. Hungary 82
ii. Romania 87
II. Interpretation by the Constitutional Court 89
i. Hungary 90
ii. Romania 94
III. Main Structural Change: the emergence of national councils for the judiciary 97
i. Hungary 97
ii. Romania 99

B. Similarities and differences 101
I. National conceptions of rule of law values for judicial organization 101
II. Interpretation by the Constitutional Court 102
III. Councils for the judiciary 103

C. Conclusions 104

4. Quality of Judicial Input and Independence of Judges in Hungary and Romania: Assessing judicial selections 105

A. Introduction: Balancing questions of judicial selections 106

B. Comparing Judicial Selections in Hungary and Romania 107
I. Legal Basis and Context 107
i. Hungary 107
ii. Romania 114
iii. Similarities and differences 118
II. Experiences in practice 120
i. Hungary 120
ii. Romania 123
iii. Similarities and Differences 125

C. Assessing judicial selections in light of European rule of law requirements 126
I. Contribution to legitimacy of judicial input and the rule of law 126
i. Defining adequate professional qualifications of judges 126
ii. Guaranteeing objective and transparent judicial selection processes 128
II. Compliance with European standards 129
i. Binding requirements: specific statutory rules, irremovability of judges, no discrimination in judicial appointments 130
ii. Non-binding recommendations: clear, objective, transparent criteria; role of judicial councils; merit-based selections 130

D. Conclusions and suggestions 134
i. Suggestions for judicial selections in Hungary 134
ii. Suggestions for judicial selections in Romania: eliminating vagueness; continued efforts for legal training 135

5. Quality of Judicial Throughput and Independent Judicial Organization in Hungary and Romania: Assessing case assignment mechanisms 137

A. Introduction: Balancing questions of case allocation mechanisms 137

B. Comparing case allocation mechanisms in Hungary and Romania 138
I. Legal Basis and Context 139
i. Hungary 139
ii. Romania 144
iii. Similarities and differences 147
II. Experiences in practice 148
i. Hungary 149
ii. Romania 152
iii. Similarities and Differences 154

C. Assessing case allocation mechanisms in light of European standards 155
I. Contribution to legitimacy of judicial throughput and the rule of law 156

i. Guaranteeing independent and timely allocation of cases 156
ii. Guaranteeing the functional and safeguarded distribution of case allocation powers 157
II. Compliance with European standards 158
i. Binding core balance between independent decision-making and efficient organization 158
ii. Non-binding recommendations: courts system as organization, resource- and time-efficient organizational processes 159

D. Conclusions and suggestions 163
i. Suggestions for case allocation in Hungary: reconsidering extensive central competences and weak legal safeguards 163
ii. Suggestions for case allocation in Romania: enforcing the rule of law foundations 164

6. Quality of Judicial Output and Independence of the Judiciary in Hungary and Romania: Assessing judicial participation in public debate concerning reforms 167

A. Introduction: Balancing questions for judicial participation in public debate. 168

B. Judicial Participation in Public Debate in Hungary and Romania 168
I. Legal Mechanisms and their Context 169
i. Hungary 169
ii. Romania 174
iii. Similarities and differences 179
II. Experiences in practice 181
i. Hungary 181
ii. Romania 186
iii. Similarities and Differences 191

C. Assessing judicial communication mechanisms in light of European standards 192
I. Contribution to legitimacy of judicial output and the rule of law 192
i. Representation of rule of law values in public debate 192
ii. Establishment of core judicial values 193
II. Compliance with European standards 194
i. Binding requirement of guaranteeing judicial participation in public debate 194
ii. Non-binding recommendations: role of central judicial administration and ethical codes 195

D. Conclusions and suggestions 198
i. Improving the legal framework: reconsidering formal enforcement mechanisms and uncontrolled communication powers 198
ii. Improving normative communication mechanisms 199

Conclusions: The importance of observing core rule of law requirements and the context of judicial reforms 201

Annex A. Court System of Hungary 209

Annex B. Court System of Romania 210

Annex C. Primary and Secondary Sources on Judicial Functioning in Hungary 211

Annex D. Primary and Secondary Sources on Judicial Functioning in Romania 212

Annex E. Legal excerpts Hungary 213

Annex F. Legal excerpts Romania 215

Annex G. Content of Hungarian judicial code of ethics 218

Annex H. Content of the Romanian code of conduct for magistrates 220

Bibliography 221

Summary 251

Samenvatting 253

Curriculum vitae 257

List of tables

Table 1 Theoretical typology of EU rule of law requirements for judicial organization 28
Table 2 European input quality requirements and recommendations 46
Table 3 European throughput quality requirements and recommendations.....58
Table 4 European output quality requirements and recommendations 72
Table 5 The development of the Hungarian legal judicial selection mechanisms since 1997 109
Table 6 The development of the Romanian legal framework for judicial selection since 1992.....115
Table 7 Legal case allocation mechanisms in Hungary (1997-2011) 140
Table 8 Legal case allocation mechanisms in Romania (1992-2004).....145
Table 9 Legal communication mechanisms of the Hungarian Judiciary (1997-2011) 170
Table 10 Legal Communication Mechanisms of the Romanian Judiciary (1992-2004)....175

List of Abbreviations

AB – *Alkotmánybíróság* (The Constitutional Court of Hungary)

ABA CEELI – American Bar Association Central European and Eurasian Law Initiative

ABH – *Alkotmánybíróság Határozatai* (The Decisions of the Constitutional Court of Hungary)

AG – Advocate General of the Court of Justice of the EU

BL – Basic Law (Basic Law for the Federal Republic of Germany)

BVerfG – *Bundesverfassungsgericht* (German Federal Constitutional Court)

BVerfGE – *Entscheidungen des Bundesverfassungsgericht* (Decisions of the German Federal Constitutional Court)

CCJE – Consultative Council of European Judges

CCR – Constitutional Court of Romania

CFR – Charter of Fundamental Rights

CEPEJ – Committee for the Efficiency of Justice

CJEU – Court of Justice of the European Union

CM – Committee of Ministers

CVM – Cooperation and Verification Mechanism for Romania and Bulgaria

CUP – Cambridge University Press

EAJ – European Association of Judges

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR – European Court of Human Rights

ENCJ – European Network of Councils for the Judiciary

ENJT – European Network of Judicial Training

EP – European Parliament

EU – European Union

GC – Grand Chamber (European Court of Human Rights)

GEMME – Groupement des Magistrats pour la Médiation

HCCJ – High Court of Cassation and Justice (Romania)

MABIE – Magyar Bírói Egyesület (Hungarian Judicial Association)

MEDEL – Magistrats Européens pour la Démocratie et les Libertés

NIM – National Institute of Magistracy (Romania)

NJO – National Judicial Office (Hungary)

NJC – National Judicial Council (Hungary)

NvVR – Nederlandse Vereniging voor Rechtsspraak

OJ – Official Journal of the European Union

OSI – Open Society Institute

OUP – Oxford University Press

SCM – Superior Council of Magistracy (Romania)

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

UK – United Kingdom

US – United States

WRR – Wetenschappelijke Raad voor Regeringsbeleid

Introduction: Two challenges for judicial reforms in new EU member states

After the fall of communism in 1989, states in Central and Eastern Europe (CEE) aspired to become member states of the European Union (EU) as soon as possible. Inspired by the example of Western-European legal systems[1] and compelled by the conditions set for EU-accession,[2] these post-communist states began their transition to liberal-democracies, i.e. "states sharing the values of democracy, rule of law, protection of human rights and open government."[3] An important field of reform concerned the judiciaries, which were highly politicized under the communist regimes.[4]

As one of the main actors in the liberal-democratic balance of powers, the judiciary has to meet standards concerning the primary process of judging and standards related to the organization of this process. The classic liberal-democratic normative framework in this sense dates back to the famous values expressed by Montesquieu in the 18th century.[5] The implementation of these liberal-democratic requirements became mandatory for CEE states during the EU accession process that had to comply with the Council of Europe (CoE) framework.[6] However, the liberal-democratic normative framework for judicial organization faces two challenges in the contemporary societal and European setting. In a substantive sense, the classic rule of law framework built on the values of independence, impartiality, guaranteeing a lawful judge and giving reasons might not meet all the requirements of efficiency, effectiveness, transparency and client-oriented approach expected from the judicial branch. In order to address these contemporary expectations,[7] new values, inspired by the new public management movement, were incorporated in the classic normative framework. However, on occasion the incorporation of new values creates tensions with the foundational classic rule of law values. In these

[1] *See* e.g. Daniela Piana, *Judicial Accountabilities in New Europe* (Ashgate 2010). Cristina Dallara, *Uniunea Europeană şi Promovarea Statului de Drept în România, Ucraina şi Serbia (The European Union and the Promotion of the Rule of Law in Romania, Ukraine and Serbia)* (Iaşi ed 2009). Cristina Dallara, *Democracy and Judicial Reforms in South-East Europe: Between the EU and the Legacies of the Past* (Springer 2014).

[2] Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008). 264-266, 271-290. Frank Hoffmeister, 'Changing requirements for membership', Andrea Ott and Kirstyn Inglis, *Handbook on European Enlargement: A Commentary on the Enlargement Process* (Cambridge University Press 2002). 90,91.

[3] Thijmen Koopmans, *Courts and Political Institutions a Comparative View* (Cambridge University Press 2003). 7,8.

[4] *See* inter alia Peter H. Solomon, Jr., 'The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability' in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) 909-911. Renáta Uitz, 'Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?' (2007) XIII Juridica International. 50-52.

[5] Charles Louis de Secondat Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989). 157.

[6] Kochenov (n 2). 264-266, 271-290. Frank Hoffmeister, 'Changing requirements for membership', in Ott and Inglis (n 2). 90,91.

[7] *See* in general, Kate McLaughlin, Stephen P Osborne and Ferlie, *New Public Management: Current Trends and Future Prospects* (Routledge 2002). Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis - New Public Management, Governance, and the Neo-Weberian State* (3rd edn, Oxford University Press, USA 2011).

situations, efficiency-enhancing values need to be considered in light of classic rule of law values, resulting in a complex balancing act.[8]

At the same time, the classic normative framework for judicial organization also faces a procedural challenge in contemporary liberal-democracies. The classic normative framework envisions judicial reforms as an exercise of domestic public powers, emerging through the interplay between the three branches of government in liberal-democracies. However, this is not the case anymore in the contemporary European setting. Competences with respect to judicial reforms in EU and Council of Europe member states have shifted partially to the supranational level. However, the classic normative framework is not equipped to accommodate the increasing multi-level normative interaction in Europe.[9] As will emerge from the analysis hereafter, the liberal-democratic normative framework for judicial organization needs to be adjusted in the contemporary societal and European context regarding at least these two aspects.

Parts of the above-mentioned balancing questions have been explored before for Western democracies.[10] However, because of the well-established nature of rule of law values in Western democracies, no readily applicable guidance can be deduced for new EU member states, where rule of law and new public management values had to be integrated in the legal framework at the same time.[11]The present study aims to fill in this lacuna by comparing experiences between two selected CEE legal orders. Indeed, recent debates on the difficulties of implementing liberal-democratic values for judicial organization in CEE[12] add to the importance of exploring in detail these balancing questions in CEE member states. Against this background, the question arises: How have judicial reforms in CEE member states implemented EU requirements, and what insights do these experiences bring regarding the balancing of the values of judicial independence and efficiency in the normative framework for judicial organization?

---

[8] Héctor Fix Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing 2003). 91 *See* also Elaine Mak, 'The European Judicial Organisation in a New Paradigm: The Influence of Principles of "New Public Management" on the Organisation of the European Courts' 14 European Law Journal 718. 720-726. Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (Intersentia ; METRO, the Maastricht Institute for Transnational Legal Research 2007). 30-34. Daniela Piana (n 1). Chapter 1.

[9] *See* in general Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 Common Market Law Review 703. Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2008) 15 Columbia Journal of European Law 349. Franz Mayer, 'The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System' [2003] Jean Monnet Working Paper No.9/2003. Leonard FM Besselink, 'The Context of Public Law' (De Context van het Staatsrecht) Inaugural address Universiteit van Amsterdam 07 September 2012. Leonard Besselink, ' The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives' in Jakab A and Kochenov D, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017), 141-144.

[10] Koopmans (n 3). Chapter 1, 23-53. Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances*, (Intersentia 2007) 9-33. Piana (n 1). chapter 1.

[11] Adam W Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism* (Central European University Press 2005). 1-9.

[12] *See* inter alia Open Society Institute EU Accession Monitoring Programme, *Monitoring the EU Accession Process: Judicial Capacity* (OSI 2002), 20, http://www.opensocietyfoundations.org/sites/default/files/1judicialcapacityfull_20030101_0.pdf (accessed 16.09.2019). Venice Commission, CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Venice, 16-17 March 2012, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e (02.02.2017) 13,17, 29.

This study aims to add a new perspective to the scholarly debate relating to the translation of supra-national European values for judicial organization in the constitutional and legal framework of EU Member States.[13] It does so by addressing the two challenges of simultaneous incorporation of classic rule of law and new public management standards, and the translation of European standards for judicial organization into constitutional arrangements in the CEE region. The study shows that combining a constitutional-theoretical approach with a contextual-comparative analysis could shed new light on the assessment of judicial reforms in CEE legal systems. Firstly, it allows us to present a more structured overview of European requirements for judicial organization and judging. Secondly, the framework allows us to critically test the implementation of these standards in the context of domestic legal orders of CEE states, each containing specific substantive and procedural elements. Thirdly, the theoretical framework enables us to explore how the domestic constitutional frame of reference can accommodate the increasing multi-level normative interaction between European and national legal orders in this field.

The study will focus in detail on experiences in two selected CEE EU member states: Hungary and Romania. With respect to these two legal orders, it will be argued that the balance between rule of law and new public management values is easily disturbed and, ultimately, new public management values are abused to ignore rule of law quality. The main focus on formal rules and mechanisms at the level of European recommendations and at the national levels contributes to this problem. As such, the analysis also reveals theoretical implications with relevance beyond these two legal systems. One such insight is that the amendment of formal rules and structures are not enough to improve rule of law quality. The other insight is that European rule of law frameworks, focusing on the amendment of formal rules, are vulnerable in crucial respects to political manipulation. The following sections further explain the two challenges for judicial reforms in EU member states with new democracies and the general constitutional theoretical approach, methodology and structure of this study.

A. Balancing judicial independence and efficiency

First, in the contemporary legal and societal setting, judiciaries in liberal-democracies have to meet two sets of requirements. On the one hand, the judicial branch operating under the rule of law is expected to be independent and impartial and as a result judges are expected to deliver reasoned decisions based on the facts of the cases and the law.[14] Major concerns in this sense are the selection, appointment and training of judges, establishing the competences of courts by law, the hierarchy of the court system and the obligation to give reasons. On the other hand, judiciaries in contemporary societies are expected to function in an efficient, effective and transparent manner, as encapsulated in the requirements inspired by the new public management movement.[15] From this perspective,

[13] Seibert-Fohr (ed.) (n 4). Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 German Law Journal. 1257-1292.
[14] Montesquieu (n 5).157.
[15] *See* in general, Kate McLaughlin et al (eds.), *New Public Management. Current Trends and Future Prospects* (Routledge, 2002). Christopher Pollitt and Geert Bouckaert, *Public Management Reform: A Comparative Analysis*

major concerns are the timeliness, transparency and quality of judicial decisions, as well as the accountability of judges and of the judiciary at large.[16]

However, this fusion of classic rule of law and new public management values in the legal framework organizing the judicial branch and judging poses a challenge. While classic rule of law and new public management values mostly complement each other, at times they collide. For example, while increasing the transparency of conditions of judicial appointments might reinforce the independent status of judges; introducing new legal mechanisms for the timeliness of judicial processes or introducing more control mechanisms internal to the judiciary might create tension for guaranteeing the independent decision-making process of individual judges in the context of a specific trial. In these instances, the two set of values need balancing.[17] This study will focus on such instances of possible tensions between independence and efficiency.

The balancing of standards for judicial organization in Western democracies has already been explored through scholarly analysis. In these legal systems, classic rule of law standards have been developed since the 18th century and new public management standards were incorporated incrementally in the normative framework since the 1980's. Studies concern the trend-setting legal system of the US[18] and other Western legal systems, which followed the management-oriented trend.[19] These studies showed how tensions between classic rule of law and new public management values could be mitigated, by revealing that judicial independence remains the main point of reference guiding judicial reforms.[20] This insight aided reform discussions involving policy-makers, legislators and judiciaries.

However, with the reforms in post-communist states, a new dimension is added to the question of judicial organization and judging in liberal democracies. In the legal, political and societal context of new democracies[21] rule of law and new public management values had to be affirmed at the same time. Arguably, this simultaneous integration of the two types of standards leads to a different layout of the legal framework for judicial organization than the incremental development experienced in established democracies. In these conditions, the construction of basic structures for guaranteeing judicial independence and impartiality might get less attention in comparison with the search for efficient court

---

- *New Public Management, Governance, and the Neo-Weberian State* (3rd edn, Oxford University Press, USA 2011).

[16] *See* below Chapters 4,5,6.

[17] Elaine Mak, *De rechtspraak in balans. Een onderzoek naar de rol van klassiek-rechtsstatelijke beginselen en 'new public management'-beginselen in het kader van de rechterlijke organisatie in Nederland, Frankrijk en Duitsland*, (Wolf Legal Publishers 2007), Chapter 1, 23-53. Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances*, (Intersentia 2007) 9-33. Daniela Piana (n 1), chapter 1.

[18] Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 Journal of Empirical Legal Studies 459.

[19] Marco Fabri and Philip M Langbroek, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries' 1 *European Journal of Legal Studies* 2 (2007), 6. Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (Intersentia 2007), parts II, III, IV.

[20] Fierro (n 8). 91. *See also* Mak, 'The European Judicial Organisation in a New Paradigm: The Influence of Principles of "New Public Management" on the Organisation of the European Courts' (n 8). 720-726. Ng (n 8). 30-34. Piana (n 1). Chapter 1.

[21] It is possible to differentiate in this sense between challenges faced by democracies in transition, new democracies and established democracies. *See* Conclusion in Seibert-Fohr (n 4) (2012), 1291-1302, discussing challenges for new member states of the European Union and 1302-1317, discussing challenges experienced in established democracies.

management and the improvement of judicial expertise. If this is indeed the case, then our approaches towards understanding and explaining judicial reform processes in new liberal democracies within the EU legal order need to be refined. In this study, we will test this hypothesis.

Moreover, as part of the search of adequate organizational measures for judiciaries in new liberal-democracies, the matter of costs and capacities cannot be ignored. In this sense, the search for an adequate balance between judicial independence and efficiency also becomes a search for realistic organizational measures that can be implemented in practice and thus enhance the legitimacy of the judicial branch. The introduction of alternative dispute resolution mechanisms and establishing specialized courts cannot be a priority until the guarantee of judicial independence and the role of the judiciary in the liberal-democratic balance of powers becomes sufficiently established in the domestic legal order. Moreover, the choice of technically advanced organizational measures remains limited in conditions when there is an ongoing search for qualified human resources and adequate financing of courts.[22] The analysis hereinafter will consider these legal and factual conditions, specific to the context of judicial reforms in Central and Eastern European EU member states.

This substantive challenge of simultaneously balancing judicial independence and efficiency specific to new EU member states becomes even more complex in the context of multi-level governance in Europe.

B. Implementing European standards

The development of judicial reforms in European liberal-democracies is not restricted solely to constitutional possibilities within the national legal orders. The national legislative frameworks underpinning judicial reforms develop in the broader and evolving context of European law.[23] However, it remains unclear if and to what extent the liberal-democratic constitutional model for judicial organization can accommodate this multi-level normative interaction.[24]

Initially, Western European states started an exchange of experiences with judicial reforms in the context of the European Union and the Council of Europe and as part of bilateral exchange of experiences.[25] Implementing the emerging liberal-democratic model of judicial organization was obligatory for Central and Eastern European states wishing to accede to the European Union and comply with their obligations as Council of Europe Member States.[26] On their turn, these developments contributed to the evolving normative

[22] *See* below chapter 1.

[23] A. Seibert-Fohr, 'Judicial Independence in European Union Accessions: The emergence of a European basic principle. 2009 German Yearbook of International Law 52, 434-436. *See* also chapter 2.

[24] On the meaning of multi-level EU legal order in general *see* e.g. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (n 9). Pernice, 'The Treaty of Lisbon' (n 9). Mayer (n 9). Leonard FM Besselink, 'The Context of Public Law' (De Context van het Staatsrecht) Inaugural address Universiteit van Amsterdam 07 September 2012.

[25] Elaine Mak and Petra Gyöngyi, 'The Interaction of European Standards and Constitutional Arrangements for Judicial Management in the Netherlands, France, Hungary and Romania: Comparing Councils for the Judiciary', Paper presented at 2013 ISA/RCSL International Congress 3-6 September 2013 Toulouse (on file with author), 1-4.

[26] Kochenov (n 2). 264-266, 271-290. Frank Hoffmeister, 'Changing requirements for membership', in Ott and Inglis (n 2).90,91.

character of the core values underpinning the liberal-democratic organization model for judiciaries in the legal order of the European Union.[27]

These developments are not surprising since the EU requirements for judicial organization and judging not only have implications for the legal systems of Central and Eastern European member states, but also the reforms of the judiciaries in Central and Eastern Europe have implications for the system of judicial protection in the EU as a whole. Given the supremacy and direct effect of European Union law in Member States' legal systems, all national judges are potential judges of European Union law[28] and as such they are considered "decentralised European Union judges."[29] This status of the national courts as "linchpins of the European legal system"[30] justifies the importance, which is attributed by EU Member State's compliance with minimum standards regarding judicial organization. In this way, domestic judicial reforms in Central and Eastern European Member States are closely intertwined with the process of European integration.

The above-mentioned developments resulted in an increasing standard-setting activity in the field of judicial organization both in the context of the European Union and the Council of Europe and through judicial networks and other bi-lateral judicial interactions.[31] Accordingly, in the context of ongoing European integration process the activity of organizing judicial reforms has partially shifted to the transnational level. However, this development sits uncomfortably with the classic liberal-democratic normative framework underpinning judicial organization, and creates a possible procedural challenge. The challenge results from the fact that national legal orders traditionally envision judicial reform processes as a result of the interaction between the three branches of Government and enabled or limited by the formal rules contained in the constitutional frame of reference.[32] However, these national procedural rules do not offer guidance on how to accommodate the participation of European actors as part of national judicial reform processes.

---

[27] On the connection between crystalizing the core values of the European Union during the EU accession process and the codification of core values of the European Union in EU primary law *see* Anja Seibert-Fohr, 'Judicial Independence in European Union Accessions: The Emergence of the European Basic Principle' (2012) 52 German Yearbook of International Law (2009), 434-436. For a historical overview, *see* Ronald Janse, 'The evolution of the political criteria for accession to the European Community 1957-1973' (2018) 24 European Law Journal 57, 57-76. Ronald Janse, 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement' (2019) 17 International Journal of Constitutional Law 1, 43-65.

[28] Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006). Chapter 7.

[29] *See* in general Tobias Nowak, Fabian Amtenbrink, Mark Hertogh and Mark Wissink, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (Eleven International Publishing 2012). Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Brill 2014).

[30] Karen Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories in Legal Integration' in Anne Marie Slaughter, Alec Stone and Joseph Weiler, *The European Court of Justice and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998).

[31] *See* below chapter 1. *See* also M. Claes and M de Visser, 'Are You Networked Yet?: On Dialogues in European Judicial Networks', (2012) 8(2) *Utrecht Law Review* 100.

[32] Elaine Mak, *De Rechtspraak in Balans* (Wolf 2007). 105-110. Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (2013). 20-26.

Moreover, both previous[33] and current[34] evaluations of the judicial reforms in new CEE member states and candidate countries reveal specific difficulties with implementing liberal-democratic requirements. The Open Society Institute already in 2005 suggested different options to improve the assessment of judiciaries, including: the consistent application of EU standards in both candidate and member states, developing more comprehensive EU standards and the strengthened monitoring of member states' compliance with EU standards.[35] These improvements would be facilitated if a more refined framework of requirements for judicial organization, based on balancing rule of law and efficiency-enhancing values were taken into account. This is currently not the case. The present study aims to provide this framework.

C. Research question and methodological approach

The development of judicial reforms in Central and Eastern European member states since the fall of communism and taking place in an evolving European context has thus revealed complex challenges for judicial organization. How could a new balance of classic rule of law and new public management standards be struck? And how could the way the interaction between European and national legal orders shape the development of the national legal frameworks be better understood? Answering these questions is of crucial importance both for the constitutional developments in new liberal democracies within the EU, as well as for the successful continuation of the European integration project. Furthermore, the insight into the fundamental mechanisms involved in the organization of judiciaries will also be relevant for continued reform discussions in Western legal systems.

Against the background of what has been described above, the present study poses the central question:

How have judicial reforms in Hungary and Romania implemented EU requirements and recommendations for judicial organization and which lessons can be drawn from these experiences for balancing the values of judicial independence and efficiency in judicial organization?

In light of this research question, the study aims to clarify the influence of the evolving content of European legally-binding requirements and non-binding

[33] Open Society Institute EU Accession Monitoring Programme, *Monitoring the EU Accession Process: Judicial Capacity* (OSI 2002), 20, http://www.opensocietyfoundations.org/sites/default/files/1judicialcapacityfull_20030101_0.pdf (accessed 16.09.2019).

[34] *See* e.g. Venice Commission, CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Venice, 16-17 March 2012, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e (02.02.2017) 13,17, 29. *See* chapters 4,B,III; 5,B,III; 6,B,III.

[35] Open Society Institute EU Accession Monitoring Programme, *Monitoring the EU Accession Process: Judicial Capacity* (OSI 2002), 20, http://www.opensocietyfoundations.org/sites/default/files/1judicialcapacityfull_20030101_0.pdf (accessed 16.09.2019).

recommendations for judicial organization and judging – together referred to as "standards" throughout this study – on the development of the constitutional and legal frameworks for judicial organization in Central and Eastern European legal orders. In order to answer the central question, the study combines a constitutional theoretical approach with a contextual-comparative analysis. The constitutional theoretical approach[36] is adequate to address both the substantive and procedural cluster of the central problem of balancing judicial independence with efficiency. Following this approach means that the main focus of this study will be the development of the domestic normative frameworks – that is the constitutional frame of reference, the main legislative framework for judicial organization and status of judges as well as non-binding instruments – underpinning judicial organization. This normative framework is understood as containing legal rules and principles, which might represent competing values.[37]

Applied to the present study, this means that classic rule of law and new public management values might be reflected in legal principles and rules within the legal framework and they might represent competing values. In these instances, a constitutional balancing of these two values is required.[38] In legal orders where national Constitutional Courts operate and are the only courts with the mandate to interpret the Constitution, these courts play a key role in establishing this balance. However, the constitutional theoretical approach also accepts that the executive and legislative branches of government play a critical role in developing and interpreting the normative framework for judicial organization. In the context of multi-level normative interaction, it remains to be seen what role European institutions can have in developing the national normative framework. In addition, the constitutional-theoretical approach entails that in this study we will pay attention to the procedural constraints imposed by the constitutional frame of reference for incorporating European requirements at the national level.[39]

Finally, the constitutional-theoretical approach also rests on the understanding according to which the normative framework in a given legal system develops under the effects of the broader political and societal context. Even though liberal-democracies share core values for judicial organization, each legal order will contain substantive and procedural rules specific to their context. The contextual comparative analysis allows us to critically test the balance between judicial independence and efficiency in the normative framework underpinning judicial organization as shaped by factual conditions experienced in new EU member states. The study is constructed through two main steps, namely: a theoretical part, conceptualizing standards for judicial organization and mapping relevant European requirements and recommendations in this sense (EU, Council of Europe,

[36] A distinct approach applied for understanding the emerging requirements of efficiency for judicial organisation and judging emerges from the field of law and economy. *See* for e.g. Richard A Posner, 'An Economic Approach to Procedure and Judicial Administration' (1973) Journal of Legal Studies vol.II 399-451. On the distinction between a law and economics and legal theoretical approach for understanding this phenomenon *see* Fierro (n 8). 61-76, 81-95.

[37] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978). 40. *See* also chapter 2, A.

[38] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, USA 2010). 48.

[39] Constitutional (in)flexibility developed by Mak, *De Rechtspraak in Balans* (n 32). chapter 3, 95-115. *See* also Elaine Mak, 'Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (In-)Flexibility' (2011) 4 Erasmus Law Review. Mak, *Judicial Decision-Making in a Globalised World* (n 32). In general on the meaning of 'rigid' and 'flexible' constitutions *see* James Bryce, 'Flexible and Rigid Constitutions' in James Bryce, *Studies in History and Jurisprudence*, vol I (Oxford University Press 1901). 124-213.

European Network of Councils for the Judiciary) and a part comprising comparative case studies, which assess the implementation of European standards in Hungary and Romania.

The two legal orders have been selected for the following reasons. At the beginning of this research, Hungary was considered to be one of the most successful CEE countries in transitioning to liberal-democracy, which was also reflected in its court organization system.[40] At the same time, Romania was considered one of the "laggards"[41] of the democratic transition process and in anchoring judicial independence. The initial postponement of its EU accession, along with that of Bulgaria, illustrates this position. In addition, Romania as a Member State remained subject to EU oversight regarding fields of judicial reforms and fighting corruption through the Cooperation and Verification Mechanism.[42] This initial selection allowed us to compare two CEE legal orders, which were located on the two extremes, or ends, of the "successful" CEE judicial reform spectrum.[43] In the course of conducting this research, the Hungarian legal order underwent a "rule of law crisis."[44] These events, rather than upsetting the research design, added further urgency for including this case study in the analysis.

Apart from these differences in terms of performance during the EU accession process, the two studied legal orders differ in important ways. From a historical perspective, the Hungarian legal order developed under Habsburg influence and under the dual monarchy of Austria-Hungary created in 1867.[45] In contrast, the judiciary of Romania developed under partial Ottoman influence.[46] Moreover, although the two countries share the experience of communism characterised by the centralization of power, Romania experienced a particularly harsh totalitarian regime under the Ceaușescu rule from 1965 and

[40] A. Rácz, 'Judicial Independence in Eastern Europe with special reference to Hungary' in András Sajó (ed), *Judicial Integrity* (Brill Academic Publishers 2004). 253.

[41] Gergana Noutcheva and Dimitar Bechev, 'The Successful Laggards: Bulgaria and Romania's Accession to the EU' (2008) 22 East European Politics & Societies 114. 117-134. Milada Anna Vachudova and Aneta B Spendzharova, 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession' European Policy Analysis. 1-20.

[42] Conclusions of the Council of Ministers, 17 October 2006 (13339/06); Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, 13 December 2006 (C (2006) 6569 final). For a detailed overview of background information *see* chapter 3,A.

[43] The case selection followed the principle of "most different cases". John Stuart Mill, *A System of Logic, Ratiocinative and Inductive*, vol I (Cambridge University Press). 454. For an explanation of the importance of this inductive case selection method for comparative public law *see* Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (1 edition, Oxford University Press 2014). 253-256. *See also* Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 American Journal of Comparative Law.

[44] Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governmental Checklists Do Not Work' (2013) 26 Governance: An International Journal of Policy, Administration and Institutions 559. European Parliament, 'Resolution of 10 June on the Situation in Hungary' (2015/2700 RSP) 10 June 2015. Venice Commission, Opinion CDL-AD(2012)001.

[45] *See in general* Ferenc Hörcher and Thomas Lorman (eds), *A History of the Hungarian Constitution. Law Government and Political Culture in Hungary* (I.B. Tauris 2018).

[46] *See* Dallara (n 1), 60-62. Manuel Guțan, 'The Challenges of the Romanian Constitutional Tradition I. Between Ideological Transplant and Institutional Metamorphoses', (2013) 25 Journal of Constitutional History 223, 223-252.

in particular from 1974.[47] In a similar vein, the mode of the democratic transition process diferred between the two countries.[48]

Apart from these selected historical differences, further differences can be observed after democratic transition. Although both legal orders adopted a centralized constitutional review system, the Hungarian Constitutional Court was inspired by the German legal order,[49] whereas the Romania sought inspiration from the French legal system.[50] Moreover, albeit a central judicial administration body had been established, the constitutional role, membership and competences were different, ultimately leading to different main priorities.[51]

These differences, the Hungarian and Romanian legal orders exemplify two "most different" cases within the group of CEE EU member states. The fact that these two legal orders share the experience of integrating European standards for judicial organization but differ in crucial other specific respects of judicial organization and functioning, makes them useful test cases for studying the implementation of European judicial organization standards.

A specific aim for conducting the comparative analysis was to identify both legal and extra-legal factors influencing the integration of EU standards in the legal orders of Hungary and Romania.[52] Legal factors – such as the meaning of the principle of judicial independence; the extent of incorporation of new public management values in the legal framework; tensions between independence and efficiency in the legal framework; or the possibilities to modify the legal framework – remain essential for understanding the domestic implementation process of EU standards. However, extra-legal factors (i.e. political context, judicial corruption, technical and financial possibilities) can greatly inhibit the effective guarantee of, in particular, EU legally-binding requirements in practice. The lengthy transition process from a "law and order" to a "rule of law" tradition[53] of CEE EU member states – during which the guarantee of the rule of law (in practice) cannot be taken for granted – adds to the importance of the analysis of extra-legal factors.

In order to be able to identify both legal and extra-legal factors influencing the implementation of EU requirements in Hungary and Romania, we opted for a contextual-comparative analysis. The contextual-comparative analysis entails a combination of a classic doctrinal analysis[54] of the domestic normative framework for judicial organization

---

[47] *See* Cosmin Cercel, *Towards a Jurisprudence of State Communism. Law and the Failure of Revolution* (Routledge 2018), 151-199.

[48] *See e.g.* Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century (University of Oklahoma Press 1991).*

[49] *See e.g.* Allan F Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff 2013). 41-65.

[50] *See e.g. Bianca Selejan*-Guțan, 'The Constitutional Court and Others in Romanian Constitutionalism – 25 Years After' (2017) 11 Vienna Journal on International Constitutional Law 4, 566-569. *See further* chapter 3.

[51] For a detailed comparative overview of the development of judicial councils *see* David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016), 121-136. *See also* Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 American Journal of Comparative Law 103, Appendix. *See further* chapter 3.

[52] *See* in general, Maurice Adams and Dirk Heirbaut (eds), *The Method and Culture of Comparative Law. Essays in Honour of Mark van Hoecke* (Hart Publishing 2014).

[53] Anja Seibert-Fohr, "Judicial Independence – The Normativity of an Evolving Transnational Principle" in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012). 1287.

[54] Sanne Taekema, 'Relative Autonomy: A Characterization of the Discipline of Law' in Bart van Klink and Sanne Taekema, *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck 2011). 34-39.

and a 'contextual' analysis. The former is concerned with the specific content and development of the national legal framework. The latter is concerned with the preparation for and application of the legal framework in practice.[55] Relevant sources for the doctrinal analysis are the constitutional frame of reference, the main legislation on judicial organization and the status of judges as well as the interpretation of the emerging norms given by Constitutional Courts.

The sources considered for the contextual analysis include legislative preparatory documents, policy documents, annual reports as well as other domestic and European evaluation reports of judicial reform process. Moreover, additional information was obtained through five anonymous semi-structured interviews that were conducted in May-June 2012 with one academic and one legal expert at the highest court in Hungary, and in Romania with a court president at the level of a first instance courts, and appeal courts as well as a member of the judicial council.[56] The interviews lasted between one and two hours and they focused on two main topics: (1) the opinion of judges and experts concerning the tensions created by the combination of classic rule of law and new public management in the given legal order and (2) their experiences and opinions concerning the incorporation of European requirements and recommendations – including their possible personal involvement with European standard-setting. During the interviews, questions were formulated based on these two main lines of inquiry, while allowing for flexibility to accommodate the specific background and knowledge of the interview subjects. Specific goals of the interviews were to have conversations with judges at different levels of the court organization system as well as to have conversations with judges and experts located both at capital cities and in other towns.

The information emerging from interviews were only used in this study as background knowledge. Throughout the process of analysis this information was further substantiated with documentary evidence. Nevertheless, the interviews provided invaluable guidance for focusing and structuring the contextual-comparative analysis.

The contextual-comparative analysis is conducted through three in-depth case studies. The case studies pertain to all three levels of judicial organization: (1) the judicial branch,[57] (2) the judiciary as an organization[58] and (3) individual judges[59] and they also address the three legitimacy-aspects discussed in this study: input, throughput and output. The specific case studies are: communicating judicial (ethical) values in the public debate (judicial branch, output legitimacy), case allocation methods (judiciary as an organization, throughput legitimacy) and conditions for occupying the judicial office (judges, input legitimacy).

---

[55] ibid. 34-45.

[56] C.A.B. Warren, 'Qualitative Interviewing' in Jaber F Gubrium and James Holstein, *Handbook of Interview Research: Context and Method* (SAGE Publications, Inc 2001). 83. Jeanine Evers (ed), *Kwalitatief Interviewen: Kunst Én Kunde* (LEMMA 2007). 12 For experiences with and further methodological considerations for studying the transnational context of judicial decision-making *see* for example Urszula Jaremba and Elaine Mak, 'Interviewing Judges in the Transnational Context' (2014) Law and Method 05.

[57] *See* chapter 4.

[58] *See* chapter 5.

[59] *See* chapter 6.

The specific topics discussed in the case studies were selected as "most-likely" cases[60] for illustrating the combination of rule of law and new public management values, respectively the incorporation in the studied national legal orders of European judicial organization standards. The topics of: (1) legal mechanisms for the selection judges, (2) the allocation of cases to judges and (3) the communication of the judiciary with its surroundings represent most likely cases for three reasons. First, each topic presents a complex balancing question for guaranteeing judicial independence and efficiency on its own. Second, the specific context of new democracies presents additional challenges with respect to all three selected topics, which could undermine guaranteeing judicial independence. Third, all three selected topics are extensively discussed at the EU level. The analysis allows us to identify the substantive and procedural factors shaping the development of the legal framework for judicial functioning in Hungary and Romania in the context of the European Union.

In addition, the limitations of the present study must be noted. Firstly, the theoretical framework includes a selection of case law by the CJEU and the ECtHR, as well as a selection of non-binding instruments.[61] While this selection offers an overview of relevant standards for the quality of judicial input, throughput and output, ultimately, the framework should be put to test in light of the new case law and additional European instruments. Secondly, the in-depth analyses representing the core of this study extend to a limited number of two legal orders. The findings of these chapters confirm insights emerging from studies focusing on other CEE states.[62] Nevertheless, the discussion of this subject could benefit from an extended analysis including *inter alia*, a selection of further CEE Member States and EU Member States with established rule of law framework. Moreover, future research could more extensively rely on contextual analysis. For instance, the political context of judicial reforms could be more extensively discussed. In a similar vein, the historical traditions possibly intrinsically connected to ongoing judicial independence and rule of law challenges could be explored. Finally, in order to reveal the socio-legal context of judicial functioning in more detail, further interviews could be conducted with judges and experts in the field of judicial reforms.[63]

The research for this study was completed on the 31st of August 2018. Relevant legal developments and case law after this date are incorporated in the analysis. Nonetheless, developments after the indicated date do not constitute the main basis of the present research.

D. Structure of the study

The analysis is structured as follows. The first part of the study comprises two chapters. Chapter 1 provides conceptual clarifications for understanding the implementation

[60] John Gerring, 'Is There a (Viable) Crucial-Case Method?' (2007) 40 Comparative Political Studies 231. 237-238. John Gerring and Lee Cojocaru, 'Selecting Cases for Intensive Analysis: A Diversity of Goals and Methods' (2016) 45 Sociological Methods & Research 392. 404. *See* Introduction, C.

[61] *See* chapter 2,B.

[62] Seibert-Fohr (n 19). 1291-1302, David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016).

[63] *See* e.g. Urszula Jaremba and Elaine Mak, 'Interviewing Judges in the Transnational Context' [2014] Law and Method.

of EU requirements for judicial organization in domestic legal orders. This is followed by the mapping of relevant EU requirements for judicial organization in chapter 2. The second part of the study contains and introduction of the constitutional frame of reference underpinning judicial organization in Hungary and Romania in Chapter 3 as well as three in-depth case studies critically evaluating the implementation of European standards for judicial organization in the studied legal orders. Chapter 4 addresses challenges related to guaranteeing the independent status of judges through judicial selection conditions. Chapter 5 explores experiences related to guaranteeing transparent and objective case allocation systems. While chapter 6 explores challenges related to positioning the judicial branch in the public debate and developing ethical values in Hungary and Romania. Chapter 7 concludes this study, by showing that there are two main ways through which the simultaneous affirmation of rule of law and new public management values for judicial organization threatens judicial independence in Hungary and Romania: either by using new public management values as a guise for legal reforms meant to undermine judicial independence, or by shifting the focus of judicial reforms to new public management values with detrimental effects for judicial independence.

Part I. Theoretical framework: European Union requirements and recommendations for judicial organization

The theoretical framework of this study focuses on the development of requirements for judicial organization and judging in the evolving European context. With regard to this topic, several questions arise: To what extent is it possible to identify a common core of European requirements for judicial organization and judging shared by Member States of the European Union and the Council of Europe? In addition, to what extent do European requirements reflect the balance established between judicial independence and efficiency in liberal-democracies? We will build the theoretical framework of this study by answering these questions. The aim of this part is to establish a general typology and a structured overview of European quality requirements. This typology and overview will be used as a frame of reference when exploring the implementation of EU requirements as part of judicial reform processes in Hungary and Romania in Part II of the study.

1. Understanding the implementation of EU requirements: A Conceptual Typology

As a first step in answering the questions posed above we will provide the necessary conceptual clarifications for understanding the main legal phenomenon discussed in this study: the implementation of EU requirements for judicial organization in the Hungarian and Romanian legal orders. Our main focus will be on the principle of judicial independence as a fundamental legal principle for judicial organization, shared by all EU Member States; and which remains essential for the legitimacy of judicial functioning and upholding the rule of law in liberal-democracies. We will conceptualize judicial independence as a contemporary, developing, transnational principle.[1] Our aim in this chapter is to provide a legal-theoretical typology[2] of EU requirements for judicial organization that helps us better understand the two challenges addressed in this study, that is: (1) the contemporary balancing between judicial independence and efficiency; (2) the national implementation of transnational (EU) principles for judicial organization. For these purposes, we will rely upon legal conceptualizations but also theoretical insights from the relevant political science literature. The typology will allow us to map specific EU requirements for judicial organization in the second chapter.

[1] cf. Anja Seibert-Fohr, 'Judicial Independence: The Normativity of an Evolving Transnational Principle' in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012), 1279-1373.

[2] cf. Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governmental Checklists Do Not Work' (2013) 26 Governance: An International Journal of Policy, Administration and Institutions 559, 562 (emphasizing the importance of contextualization of the ideal of the rule of law; highlighting the shortcomings of relying solely on a rigid indicators for assessing the functioning of national legal orders).

A. Introduction: The need for analytical conceptualization of EU rule of law requirements for judicial organization

The two central values for judicial organization in the liberal-democratic constitutional tradition, the rule of law and judicial independence,[3] are also central values of the European Union. The rule of law, as incorporated in Article 2 of the Treaty on European Union (TEU), is a fundamental value of the shared by all Member States.[4] In addition, EU Member States explicitly committed through Article 47 of the Charter of Fundamental Rights, to guaranteeing the right to an effective remedy and the right to a fair trial in the application of EU law; and, according to Article 6(3) TEU, more generally, to the obligations emerging from the European Convention on Human Rights System.[5] Although organizing the activity of the judicial branch remains the primary responsibility of Member States, these formal EU commitments remain an important legal basis for the establishment of common requirements for EU Member States concerning judicial organization. However, because of diverse, context-specific domestic interpretations, before mapping the relevant European requirements and recommendations,[6] the fundamental notions of judicial independence and the rule of law require conceptual unpacking.[7]

Consider first, the ideal of the rule of law. Although it is accepted as a fundamental value shared by all Member States; the rule of law retains different meaning in different Member States. Well-known differences exist between the conceptions of *Rechsstaat* in Germany (State rule through law), *État de droit* in France (vindicating fundamental rights through courts), or the rule of law (sovereign limited by law) in the United Kingdom.[8] The specific conceptualization of the rule of law ideal is intertwined with the historical, cultural and legal contexts of the domestic legal orders.[9] For instance, the contemporary German notion of *Rechtsstaat* includes important procedural (formal) guarantees for the rule of law (i.e. legality, right to a fair trial, non-retroactive application of criminal punishments), but also a "thick" substantive meaning through a strong commitment to fundamental rights and in particular to the constitutional right to dignity.[10] In contrast, the Dutch notion of *rechtsstaat* delivers a solid rule of law foundation by

[3] *See* Introduction, A.
[4] Article 2 TEU. On the incremental normativity and codification of the rule of law value in the EU legal order *see* Anja Seibert-Fohr, 'Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle' (2009) 52 German Yearbook of International Law 405. 419-430.
[5] Article 47 Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326 26 October 2012. Article 6(3) TEU. For a further discussion *see* chapter 2.
[6] The mapping of European requirements and recommendations in contained in chapter 2.
[7] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University Of Chicago Press 1986).125. Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence', *Spreading Democracy and the Rule of Law? The impact of EU Enlargement on Democracy, the Rule of Law and Constitutionalism in Post-Communist Legal Orders* (Springer 2006). Sanford Levison, 'Identifying "Independence"' [2006] Boston University Law Review 1297,1298.
[8] Dimitry Kochenov, 'The EU Rule of Law: Cutting Paths Through Confusion' (2009) 2 Erasmus Law Review 1. 15,14. Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' 74 California Law Review. 1318, 1329.
[9] Brian Tamanaha, *On the Rule of Law* (Cambridge University Press 2004). 7-91.
[10] ibid. 108.

mainly focusing on formal guarantees and fundamental rights.[11] However, differences also exist among Central European legal orders for which the German notion of *Rechtsstaat* served as an important source of inspiration after the fall of communism.[12] For example, the Hungarian conception primarily emphasizes the formal dimensions of the rule of law (i.e. separation of powers, limited government, legality of public administration, independence of the judiciary), with particular reference to legal certainty. [13] However, substantive aspects, including fundamental rights (i.e. the right to access to justice) and the right to dignity also form part of the Hungarian rule of law conceptualization.[14] In contrast, the Polish conception of *Rechtsstaat* relies on a combination of formal guarantees (i.e. supremacy of statutes over government decrees, prohibition of retroactive laws, the requirement of precision in drafting legislation, separation of powers) and substantive guarantees through fundamental rights (i.e. the protection of vested rights, right to access to justice), with particular reference to the principle of legality.[15]

Closely related to the apparent conceptual indeterminacy of the rule of law is the varying meaning of the principle of judicial independence in the legal orders of EU Member States. What might constitute an unacceptable breach of judicial independence in one Member State might be accepted as a normatively sound legal mechanism in another Member State.[16] For instance, in Bulgaria, Hungary or Romania, the Supreme Courts have a competence to issue so-called "uniformity decisions." Essentially, in circumstances foreseen by law, through these decisions the Supreme Courts have the power to determine the meaning of a specific legal provision. All judges at hierarchically inferior courts are bound by the interpretation of the Supreme Court when applying the legal provision in question in individual cases. In these national legal orders, because of the primacy of legal certainty, the existence of such legal mechanism is not considered to be in breach of the guarantee independent decision-making of judges.[17] But, for example, in Germany or the Netherlands, such legal mechanism would appear to give direct instructions to judges, and therefore would be incompatible with the independence and decision-making autonomy of individual judges.[18] In this latter group of legal orders, the uniform interpretation of the laws and legal certainty are achieved in a different manner. For instance, the Supreme

---

[11] *See* Wetenschapelijk Raad voor het Regeringsbeleid (WRR), 'De toekomst van de nationale Rechtsstaat' (The future of the national Rule of Law), The Hague, 2002. 42-57. M. Scheltema, 'De Rechsstaat' in Johannes Wilhelmus Maria Engels, *De Rechsstaat Herdacht* (WEJ Tjeenk Willink). 11-25.

[12] Allan F Tatham, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff 2013). 41-65.

[13] *See* e.g. Nóra Chronowski and Márton Varju, 'Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law' 8 The Hague Journal on the Rule of Law. 272-277. *See* further chapter 3.

[14] *See* e.g. László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press 2000). 118-138. Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart 2003). 65-157.

[15] *See* e.g. Tatham (n 11). 182-186. Mark F Brzezinski and Leszek Garlicki, 'Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat' (1995) 31 Stanford Journal of International Law 13. 35-45.

[16] For the dependence of the specific meaning of judicial independence on its historical and cultural context through examples concerning Spain and Sweden *see* John Bell, 'Judicial Cultures and Judicial Independence' (2001) 4 The Cambridge Yearbook of European Legal Studies.

[17] Constitution of the Republic of Bulgaria, Art. 124,126. Fundamental Law of Hungary, Art. 25. Act CLXI on the organisation and administration of courts, para. 25. Constitution of Romania, Art. 126(3). Law no. 304 of 2004 on the organisation of courts, Art. 18(2).

[18] Grundgesetz (Basic Law of Germany), Art. 97. Ethical code of the Dutch Association of Magistrates, par. 2.2.

Court of the Netherlands (*Hoge Raad der Nederlanden*) also has a legal duty to guarantee the uniform interpretation of the laws. However, this role is assured through the status of the Supreme Court's decisions as 'informal precedents'; which judges at lower courts follow.[19]

Against this background, the question arises how to conceptualize EU rule of law requirements for judicial organization, having judicial independence at their basis, and in a way, which accommodates the context-specific conceptual differences among Member States, illustrated above?

B. Explaining the constitutive elements of the typology

Below we will explain the constitutive elements of our theoretical typology of EU requirements for judicial organization, having the principle of judicial independence as its main foundation. First, we will unpack the meaning of judicial independence as a contemporary principle and explain the different levels of judicial organization where it needs to be guaranteed; but also how it needs to be guaranteed. Then, we will explain the function of balancing the principle of judicial independence and contemporary values for legitimizing the functioning of domestic courts; the importance of judicial independence for upholding the rule of law; and the specific legal form of EU requirements for judicial independence and efficiency and its procedural implications.

I. Unpacking the meaning and levels of protection of judicial independence

i. The meaning of judicial independence

Notwithstanding definitional differences, recent scholarship converges on the content and meaning of the principle of judicial independence. According to this common understanding, we can delineate different dimensions of judicial independence, such as collective, institutional, decisional (substantive, functional), or personal dimensions of judicial independence.[20] Each of these dimensions is essential for understanding the complex contemporary notion of judicial independence. Of particular importance for our analysis, within each of these dimensions there are specific tensions between classic

[19] Elaine Mak, 'Why Do Dutch and UK Judges Cite Foreign Law?' (2011) 70 The Cambridge Law Journal 420. 445, fn 112.

[20] *See* e.g. Elaine Mak, *De Rechtspraak in Balans* (Wolf 2007), 121-128. Daniela Piana, *Judicial Accountabilities in New Europe* (Ashgate 2010). Chapter 1. Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances*, (Intersentia 2007) 9-33. Michal Bobek, 'Fortress of Judicial Independence and Mental Transitions of the Central European Judiciary' (2008) 14 European Public Law. 102-111. Kim Lane Scheppele, 'Declarations of Independence: Judicial Reactions to Political Pressures' in Stephen B Burbank and Barry Friedman, *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (SAGE 2002).
Hendrik Franken, *Onafhankelijk en verantwoordelijk: een paradox in de positie van de rechter?* (Gouda Quint 1997). 10-28. P.H. Russel, 'Towards a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press 2001). 1-23. S. Shetreet, 'Judicial Independence: New Conceptual Dimensions and Challenges' in Shimon Shetreet, *Judicial Independence:The Contemporary Debate* (1 edition, Springer 1985). 590-681.

elements of judicial independence and efficiency- or accountability-oriented considerations.[21] Below we will summarize the content of the fundamental principle of judicial independence through four interconnected dimensions: constitutional (institutional, collective), personal (statutory), functional (substantive, decisional) and factual independence.

We can refer to constitutional or collective independence as the first dimension. This dimension concerns the relation of the judicial branch with the executive and legislative branches of Government. At a fundamental level, constitutional independence entails that the judicial branch fulfils its function without the influence of the political institutions of the state. This dimension is directly related to the separation of powers doctrine, at the heart of the ideal of the rule of law.[22]

The second dimension of the principle of judicial independence concerns personal or statutory independence. This dimension focuses on individual judges and it refers to formal guarantees necessary for fulfilling the judicial function in an independent manner, such as: the selection and appointment of judges, rules of incompatibility or the irremovability of judges during their guaranteed term of office as well as the financial independence of the Judiciary. This dimension is central for shielding the judiciary from (1) politically-motivated appointments or (2) from creating a judicial branch, which is only representative of a very restricted, elite part of society, resembling an "old boys club."[23]

The third dimension of judicial independence is functional or decision-making independence, also referred to as substantive independence. This dimension focuses on the decision-making activity of judges and refers to the specific mandate of judges within a national legal order to decide legal disputes. A related requirement for domestic legal orders is to clearly establish this specific function of the judicial branch at large, and that of judges, at the highest level of the normative framework.[24] In fulfilling this function judges should be independent, that is, they should be subject to nothing but the law.[25]

In addition to the above-mentioned three overlapping dimensions of judicial independence, it is possible to delineate a fourth dimension of judicial independence: factual independence. This additional layer of judicial independence is also concerned with judicial decision-making of individual judges, similar to functional independence. But its focus is different. Namely, factual independence is concerned with the relation between judges and participants in a specific trial. This aspect of judicial independence requires that parties in a trial perceive judges as independent and impartial[26] – that is, it requires judges not only to decide cases based solely on the applicable legal framework and the facts of a given case, but also to be perceived as doing so.[27]

---

[21] Mak, *De Rechtspraak in Balans* (n 20) 23-52. Ng (n 20). 9-33. Piana (n 20). Chapter 1.
[22] Mak, *De Rechtspraak in Balans* (n 20). 126. Ng (n 20). 13-15. Montesquieu (n 5). 168.
[23] Mak, *De Rechtspraak in Balans* (n 20). 134,135. Ng (n 19). 13.
[24] Mak, *De Rechtspraak in Balans* (n 20). 125,126, 128-132. Marco Fabri and Philip M Langbroek, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries' (2007) 1 European Journal of Legal Studies. 6.
[25] Martin Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Wolf Legal 2004). 176. Sramek v Austria para. 71, "the Judiciary must fulfill its function on the basis of the rule of law and after proceedings conducted in a prescribed manner."
[26] See ibid. 309-366.
[27] Kim Lane Scheppele, 'Declarations of Independence: Judicial Reactions to Political Pressures' in Burbank and Friedman (n 20). 4-14. Franken (n 20). 28.

But in the contemporary legal and societal setting, adjusting the principle of judicial independence towards legitimate expectations for timely, transparent and accountable functioning of courts creates tensions.[28] A salient tension, for instance, appears between functional independence and expectations of judicial accountability. These latter expectations can materialize through specific legal mechanisms evaluating the performance of courts. For instance, in Austria there is a computerised personnel information system, determining the number of judges at courts; in France the 2001 budgetary law required the Ministry of Justice to connect its judicial budget submission to missions and objectives; in the Netherlands the central judicial managerial body established in 2002 received a competence to connect the performance of the courts with the budget allocated to courts.[29] But with the implementation of these performance-monitoring mechanisms, tensions surfaced with respect to the independent decision-making process of judges. For instance, in the Netherlands in 2015 seven hundred judges signed a manifesto criticising the increasing company-like structure of the judiciary, with too much emphasis placed on performance and output. Judges raised the concern that this "pressure to produce" had negative consequences for the quality of the rendered decisions.[30] Further tensions between judicial independence and accountability or efficiency become visible when we conceptualize judicial independence from an institutional perspective.

ii. The institutional levels of guaranteeing judicial independence

Contemporary judicial organization operates on three different levels: the level of the judiciary viewed as an institution; the level of the judiciary functioning as an organization and the level of individual judges. The principle of judicial independence needs to be realized on all three levels of judicial organization. But, every level poses challenges of different nature for judicial independence and from different actors; which grants usefulness for the conceptualization of judicial independence from this perspective. Perhaps the usefulness of this delimitation for addressing the balance between judicial independence and efficiency is best illustrated by the direct connection between the emergence of the middle level of judicial organization and the incorporation of contemporary values.[31]

Firstly, the independence of the judicial branch, also referred to as "institutional independence", concerns the independence of the judiciary vis-à-vis the executive and legislative branches of Government. The requirement to protect the independence of the judiciary at this institutional level corresponds with the constitutional independence of the judiciary. A shared experience in several European states after the Second World War was the expansion of the judicial power vis-à-vis the political branches of Government.[32] For instance, in Germany, France, Poland, the Czech Republic and Hungary Constitutional

---

[28] *See* Introduction, A.

[29] Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' 3 Utrecht Law Review. 33-43.

[30] E.g. Manifest van Leeuwarden (Leeuwarden manifesto), https://www.recht.nl/55844/raadsheren-trekken-aan-bel-om-hoge-werkdruk (accessed 16.09.2019) (available in Dutch).

[31] Ng (n 20). 48,49. Mak, *De Rechtspraak in Balans* (n 20). 126-128.

[32] *See* Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

Courts have been established with a specific legal mandate to strike down unconstitutional legislation.[33] The activity of these Constitutional Courts has had a strong impact on the balance of powers in the domestic legal orders.[34] In other European legal orders the traditional balance of public powers had been affected by extending the judicial power in another way. Consider, for example, the Netherlands where through the inclusion of administrative courts in the court system, the judicial branch received a specific legal competence to review the decisions of the Executive branch.[35] On the one hand, the resulting complex interaction between the three branches of Government called for more accountability of the judiciary towards the political branches of Government and more public scrutiny.[36] But, on the other hand, the interaction between the two sets of values reinforced the importance of the fundamental rule of law principle of judicial neutrality.[37]

The second level refers to the judiciary functioning as an organization and it concerns the independence of courts and judges from the central administration of the judiciary. This level has emerged relatively recently and it is connected to the phenomenon of increasing *"*professionalization and bureaucratization*"* of judiciaries in contemporary liberal-democracies.[38] In some European legal orders this phenomenon materialized through shifting organizational and financial competences from the Executive to the Judiciary, for example, through the creation of a judicial self-governing body.[39] For instance, currently judicial councils operate *inter alia* in France (1946), Italy (1947), Greece (1988), Spain (1978), Portugal (1970), the Netherlands (2002), Belgium (1999), Denmark (1999), Poland (1989), Estonia (2002), Lithuania (2002), Slovakia (2002), Slovenia (1997), Bulgaria (1991), Romania (2005) and Hungary (1997).[40]

---

[33] *See* e.g. Basic Law for the Federal Republic of Germany, Art. 93,94. Constitution of France, Art. 56-63. Constitution of the Czech Republic, Art. 65, 87. Constitution of the Republic of Poland Art. 79.1, 122.3, 133.2, 186, 188,189. Fundamental Law of Hungary, Art. 24. *See in general* John Bell, 'Reflections on Continental European Supreme Courts' (2004) 24 Legal Studies 156. Maartje de. Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart 2014).chapter 5.

[34] *See* e.g. French Constitutional Council, Decision of 16 July 1971. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 16 January 1957 ("Elfes" decision). [BVerfGE] 32-45. BVerfG, January 15, 1958, 7 BVerfGE 198-230. ("Luth" decision). Czech Constitutional Court, Pl. ÚS.19/93. Available in English at http://www.usoud.cz/en/decisions/19931221-pl-us-1993-lawlessness-1/ (accessed 16.09.2019). For detailed overviews *see* Lech Garlicki, 'Constitutional Courts versus Supreme Courts' (2007) 5 International Journal of Constitutional Law 44. Uitz (n 4). 52-59.

[35] For a more detailed description *see* Mak, *De Rechtspraak in Balans* (n 19). 139-146. Hirschl, *Towards Juristocracy* (n 32). 100-149.

[36] Contini and Mohr (n 29). 27-43. Giuseppe di Federico, 'Judicial Accountability and Conduct' in Seibert-Fohr (ed) (n 1). 87-121. Piana (n 20). Chapter 1. For the theoretical delimitation between accountability as a principle and accountability mechanisms, relevant for these discussions *see* Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal. 447-468.

[37] Héctor Fix Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing 2003). 91. Mak, *De Rechtspraak in Balans* (n 20).132-137.

[38] *See* Fierro (n 37).147-158. Ng (n 19) 3,4. The phenomena of professionalization and bureaucratization encapsulate on the one hand, the increasing formal training and work autonomy of judges in civil law jurisdictions; on the other hand, the introduction of efficiency-enhancing organisational mechanisms such as case management techniques adopted for the timely disposition of cases.

[39] *See* David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016). 121-126. Wim Voermans and Pim Albers, 'Councils for the Judiciary in EU Countries' http://www.drb.de/fileadmin/docs/sv_councils_for_the_judiciary_voermans_albers_2003.pdf. 10-52, 64-70. *See* chapter 3,B,II.

[40] *See* e.g. Roel de Lange, 'Judicial Independence in the Netherlands' in Seibert-Fohr (ed) (n 1). 235-240. Antoine Garapon and Harold Epineuse, 'Judicial Independence in France' in ibid. 276-281. Benoit Allemeersch, Anre Alen

The above-mentioned judicial councils were established at different times[41] and vary in terms of aims, competences and composition.[42] Notwithstanding these differences, all judicial councils represent a shift of administrative competences from the Executive to autonomous judicial bodies. This shift gives rise to tensions within the judiciary for the independent status or decision-making of individual judges.[43] Most salient tensions concern the competences of judicial councils with respect to selection, promotion, salary bonuses, case assignment (generally overseeing case assignment, establishing case assignment criteria, deciding on reassignment), or performance evaluation of judges.[44] Adding more complexity to these internal judicial tensions, some of the above-mentioned managerial competences might be shared between the central self-governing bodies and court presidents. These latter participants in judicial organization might also have significant managerial competences at the de-centralized level of courts.[45]

Ultimately, new judicial management mechanisms must ensure the classic rule of law principles of a lawful judge, an independent and impartial judicial decision-making process and observe the procedural requirements of the right to a fair trial.[46] Referring back to the different dimensions of judicial independence presented above, this "organizational aspect" of judicial independence is not guaranteed explicitly in the liberal-democratic normative framework. However, parts of the statutory and functional dimensions of judicial independence become applicable in this sense.[47]

Finally, the third level of protecting judicial independence from an institutional perspective refers to individual judges. This level relates to the relation of judges with parties to a specific trial and covers guarantees for the functional, statutory or factual independence of judges. Guaranteeing the independence of judges at this level has an internal and external aspect. From an external point of view, when judges decide specific cases, their decision cannot be influenced neither by the Executive or Legislative powers

---

and Benjamin Dalle, 'Judicial Independence in Belgium' in ibid. 311-317. Giuseppe di Federico, 'Judicial Independence in Italy' in ibid. 359-365. Adam Bodnar and Lukasz Bojarski, 'Judicial Independence in Poland' in ibid. 669-679. Timo Ligi, 'Judicial Independence in Estonia' in ibid. 739. Zoltán Fleck, 'Judicial Independence in Hungary' in ibid. 793. Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 835.

[41] Kosař (n 39). 121-122.

[42] *See* Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 American Journal of Comparative Law 103. Figure 2.

[43] Kosař (n 39). 124. Károly Bárd, 'Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics' in András Sajó (ed) *Judicial Integrity* (Brill Academic Publishers 2004). 265-313, 287,288. Arguing that the establishment of the judicial council in Hungary in 1997 increased the administrative burden on judges. *See* also Piana (n 20). Chapter 1.

[44] For critical assessments concerning Hungary, Romania and Slovakia *see* Károly Bárd, 'Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics' in Sajó (ed) (n 43). 265. Zoltán Fleck, 'Judicial Independence and Its Environment in Hungary' in Jiří Přibáň and Pauline Roberts, *Systems of Justice in Transition: Central European Experiences since 1989* (Ashgate 2003). Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 1). 793 Cristina Parau, 'The Drive for Judicial Supremacy' in ibid. 619. Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 835. Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law?* (Springer-Verlag 2006). 313.

[45] Kosař (n 39). 390-398. (illustrating powers of court presidents in the Czech Republic and Slovakia in light of the broader Central European and Western European contexts). Piana (n 20). Chapter 1, tables 1.7. and 1.8. (comparing powers of court presidents in the Czech Republic, Poland, Hungary, Bulgaria and Romania).

[46] Marco Fabri and Langbroek (n 24). 6-10; 19-23. Mak, *De Rechtspraak in Balans* (n 20). 137,138. Fierro (n 37). 33.

[47] Mak, *De Rechtspraak in Balans* (n 20). 127. *See* further chapters 3 and 5.

within the state, nor by society at large. Specific tensions for judicial independence here can relate to media reporting or the Executive branch expressing its opinion concerning a specific case.[48] From an internal point of view, decisions of individual judges cannot be influenced by the opinions of their colleagues, the management for the judiciary, or the personal values of judges.[49] For instance, internal guidelines within the Judiciary or regional meetings among judges organised for the purposes of discussing the development of certain areas of law might create tensions for the independent and autonomous decision-making process of judges. The tensions created by these specific legal mechanisms have been subject to debate in the Netherlands. In that context, guidance provided in the normative framework by the specific function of judges came to the forefront for reconciling these tensions. Specifically, it has been established that decision-making guidance might be offered to judges. But ultimately judges have the autonomy and responsibility to decide whether following the guidelines is in the best interest of fulfilling the judicial function in a particular case.[50]

With the presentation of the third level of judicial organization the conceptualization of the contemporary notion of judicial independence is complete. We illustrated so far how the content and levels of protection of contemporary principle of judicial independence evolves, while at the same time maintaining its classic rule of law foundations. The overall function of incorporating novel values for judicial organization helps us further understand the complex balancing act between judicial independence and efficiency taking place in EU Member States.

II. The function of judicial independence: Guaranteeing input, throughput and output legitimacy

In contemporary liberal-democracies, incorporating new normative values for judicial organization and the subsequent balancing between independence and novel values serves the function of enhancing judicial legitimacy – understood as "the justification for the position and functioning of the courts or the judiciary as a whole both for the parties involved, the citizens or society at large."[51] We can indicate with more precision the connection between dimensions of judicial independence and domestic judicial legitimacy by further delineating the initial definition based on the literature concerning the legitimacy of EU Institutions.[52]

In line with the relevant EU political science literature, legitimacy of institutions of Government can be conceptualized as entailing three "facets". Originally, the

[48] For an illustration of legitimate expectations for publicity and inherent tensions between judicial independence and democratic accountability *see* Mauro Cappelletti, '"Who Watches the Watchmen?"" A Comparative Study on Judicial Responsibility' (1983) 31 The American Journal of Comparative Law 1, 29-33. *See* further chapter 3, B, III.

[49] Bobek (n 20), 107-111.

[50] Ethical code of the Dutch Association of Magistrates, par. 2.2.

[51] Marc Loth, 'Courts in Quest of Legitimacy: A Comparative Approach' in Marijke Malsch and Niels van Manen (eds), *De Begrijpelijkheid van de Rechtspraak* (Boom Juridische Uitgevers),16.

[52],. Bokhorst, A.M. and Witteveen, W.J. (2013) ' Als gezag verdiend moet worden…' in Dennis Broeders and others (eds), *Speelruimte Voor Transparentere Rechtspraak* (Amsterdam University Press), 129-133.

conceptualization of legitimacy focused on the input side, referring to the justification for the existence and functioning of an Institution through its mandate; and the output side, referring to the justification gained through the results of public institutions.[53] More recent conceptualisations add the element of throughput legitimacy, referring to appropriate organizational processes connecting the input and output sides. In this sense, processes, or in other words the 'throughput' of an Institution, also need to meet quality conditions – encompassing mainly independence, control, transparency and accountability – in order to contribute to overall legitimacy.[54]

By combining the analytical insights concerning judicial independence and legitimacy of judicial functioning, we can devise the conceptual framework of quality of judicial input, throughput and output. Quality here refers to the normatively and factually sound balance between judicial independence and new public management values, enhancing the legitimacy of judicial functioning. For the remainder of the study:

- *Quality of judicial input* refers to the constitutional, statutory and institutional guarantees for the independence of the judiciary and judges as well as adequate professional qualifications.

- *Quality of judicial throughput* entails the conditions for swift, objective and transparent organizational processes, enabling an independent decision-making process salient for the functional independence of judges.

- Finally, *quality of judicial output* refers to the conditions for delivering correct, legitimate and timely decisions and the transparency of the communication of the judicial branch; connected to factual independence of judges and constitutional independence of the judiciary.

This structure and these definitions become central for our subsequent analysis. We will rely on this structure and definitions to map EU requirements for judicial organization and test their implementation in Hungary and Romania. But we will also rely on these definitions to evaluate in a theoretical sense the extent to which judicial reforms in Hungary and Romania contribute to enhancing the legitimacy of national judiciaries. However, recent controversies concerning the rule of law in EU member states,[55] requires us to clarify the broader connection between realizing judicial independence through judicial organization and upholding the ideal of the rule of law.

[53] Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, USA 1999). 7-60. *See* also Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 European Law Journal 5. 20-25.

[54] Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* 'Throughput'' (2013) 61 Political Studies 2, 14–19.

[55] *See* in general Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016). *See* Introduction.

III. The importance of judicial independence: Upholding the rule of law

In the liberal-democratic constitutional framework, realizing judicial independence and related constitutional guarantees bear a fundamental importance for upholding the rule of law.[56] However, in order to enable an effective role of the judiciary in upholding the rule of law as a neutral arbiter of legal disputes, the contemporary normative framework for judicial organization must meet fundamental rule of law requirements. We can indicate more specific ways in which balancing judicial independence and efficiency in the legal frame of reference adheres to the rule of law, by combining legal theoretical insights concerning judicial independence and legal philosophical insights concerning the rule of law. This connection helps us better understand the fundamental importance of realizing judicial independence in liberal-democracies and the EU legal order. In doing so, we must conceptualize the ideal of the rule of law, which by its very nature of being an ideal dispose of definitional indeterminacy.

Our main goal is not to identify a specific list of elements of the rule of law ideal shared by EU member states,[57] reflecting either the widely known and debated formal or substantive conceptualizations of this ideal.[58] Rather, our purpose is to identify a core definition, which would allow for a flexible implementation of the rule of law ideal among EU member states. This latter approach also reflects the nature of the EU rule of law as a fundamental, core value. For this 'law in context' approach adopted by the present study[59] the contribution of Selznick and Krygier in defining the rule of law is particularly fitting.[60]

Krygier's conceptualization of the rule of law is primarily concerned with the main purpose that the rule of law is ultimately meant to achieve.[61] In light of this main concern, Krygier has defined as the "core" of the rule of law ideal as "the reduction of the possibility of the arbitrary exercise of power by those in a position to wield significant power." [62] According to the conceptualization shared by Selznick and Krygier, the realization of this core notion of the rule of law depends on the specific context that the national legal order presents. They specifically highlight the importance of social and historical conditions in a given legal order, since different social or historical experiences

---

[56] *See* Introduction, A.

[57] For an extensive analysis of the structural relations between the real (positive) and ideal (normative) of the rule of law from the perspective of constitutionalism, *see* Maurice Adams, Ernst Hirsch Ballin and Anne Meuwese, 'The Ideal and the Real in the Realm of Constitutionalism and the Rule of Law: An Introduction' in Maurice Adams, Anne Meuwese, Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (2017 Cambridge University Press), 3-33.

[58] *See* Brian Tamanaha, *On the Rule of Law* (Cambridge University Press 2004). 91-113. Legal theoretical accounts traditionally differentiate between "formal" and "substantive" conceptions of the rule of law. The former conceptualization mainly focuses on certain qualities of the legal framework such as generality, clarity or certainty. The latter conception also incorporates individual rights. With respect to both main categories it is possible to differentiate between "thin" and "thick" conceptions, depending on the extent of considerations involved. However, both conceptualizations remain prone to salient criticism.

[59] Introduction, C.

[60] Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' [2016] Hague Journal on the Rule of Law. 2-6.

[61] Martin Krygier, 'The Rule of Law. Legality, Teleology, Sociology' in Gianluigi Palombella (ed), 'The Rule of Law. Legality, Teleology, Sociology', *Relocating the Rule of Law* (Hart Publishing 2009).

[62] Martin Krygier, 'Four Puzzles About the Rule of Law: Why? What? Where? And Who Cares?' in Fleming (ed), 'Four Puzzles About the Rule of Law: Why? What? Where? And Who Cares?', *Getting to the Rule of Law* (New York University Press 2011). 78.

might give rise to different rule of law concerns in a specific legal order.[63] Adding further importance for our analysis, this approach towards the rule of law constituted a significant part of socio-legal academic discussions surrounding the democratic transition of Central and Eastern European States, as well as the accession process to the European Union.[64]

Taking into account the more restrictive goal of reducing the arbitrary exercise of power when developing and applying the legal framework for judicial organization, we can delineate three more specific aspects of the rule of law:[65] the realization of a clear connection in the legal and normative framework between classic rule of law and new public management values (1);[66] the existence of clear safeguards against the arbitrary use of judicial organizational powers – derived either from the principle of judicial independence[67] or from specific legal control mechanisms[68] (2); and the realization of the internal independence and autonomy of judges[69] as a way to soften the tensions created by the increase of managerial mechanisms in the contemporary legal and societal setting (3)[70] – which might materialize in the participation of judges in developing the normative framework. These three elements do not represent an exhaustive list of the manner in which legal mechanisms related to judicial organization and judging contribute to curbing the arbitrary use of public power. However, these three aspects represent three priority areas for incorporating in the national normative framework both classic rule of law and contemporary requirements for judicial organization.

The connection between judicial independence and upholding the rule of law will serve as an additional critical angle for our study when assessing judicial reforms in Hungary and Romania from a theoretical perspective. But completing our theoretical typology of judicial independence as a European Union principle requires a final procedural step. Namely, explaining the legal form of EU requirements for judicial organization.

IV. The form of judicial independence as a transnational legal principle

European Union requirements for judicial organization have a specific legal form. Namely, they consist of a legally binding core – which materializes under the form of binding Treaty Obligations or obligations emerging from the case law of EU courts or the

[63] Philip Selznick, '"Law in Context" Revisited' (2003) 33 Journal of Law and Society 177. 179. Martin Krygier, 'The Rule of Law. Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009). 69,70.

[64] For e.g. Philip Selznick, 'Legal Cultures and the Rule of Law' in Czarnota, Krygier and Sadurski (eds) (n 11). 21-38. Martin Krygier, 'The Rule of Law. An Abuser's Guide', in Andras Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Publishing 2006), 3-24. Martin Krygier, 'The Rule of Law. Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009), 45-69. Martin Krygier, 'Four Puzzles About the Rule of Law: Why? What? Where? And Who Cares?' in James E Fleming, *Getting to the Rule of Law: NOMOS L* (NYU Press 2011), 64-104.

[65] This delimitation is based on Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' (2016) Hague Journal on the Rule of Law, 5,6.

[66] As a procedural element related to the quality of the legal framework similar to: Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edition, Oxford University Press 2009). 214.

[67] cf. Mak, *De Rechtspraak in Balans* (n 19), 132-137. Fierro (n 36), 91

[68] As a separation-of-powers element *see* Tamanaha (n 56), 122-126.

[69] As an additional separation-of-powers element ibid. cf. Bobek (n 19), 107-111.

[70] cf. Mak, *De Rechtspraak in Balans* (n 19), 185-223. Kosař (n 38), 121-145. Ng (n 19), 359-379.

ECtHR – and non-binding, soft law recommendations – understood as "rules of conduct which in principle have no binding force nevertheless may have practical effects".[71] This specific form of EU standards for judicial organization is essential for maintaining the flexibility of the EU legal order – meaning the ability to connect a diverse number of national legal orders. The flexibility materializes in the above-described "asymmetry" of recommendations, [72] which becomes important for the context-specific domestic implementation of EU requirements.[73] But this specific form of EU requirements poses a challenge for their implementation in national legal orders.

While binding requirements remain mandatory for national legal orders to implement;[74] the implementation of non-binding recommendations remains at the latitude of national legal orders and might depend on existing legal or extra-legal conditions in the domestic setting. Important legal conditions can be the specific conceptualization of the rule of law and related principles or mechanisms for judicial organization; the procedural possibilities to modify the constitutional and legal framework; the possibility and content of constitutional review or the role accorded to transnational law.[75] Important extra-legal conditions can be the specific political or societal context of ongoing judicial reforms; or other factual conditions such as the economic possibilities or judicial corruption.[76] In this context, the question emerges, how to conceptualize EU requirements in a way to reflect this specific form and flexibility as well as the underlying national sovereignty, which domestic participants maintain when deciding about judicial organization.

In order to illustrate this specific procedural element of EU requirements for judicial organization, we will differentiate in our theoretical typology between "mandatory" EU requirements – depicting the legally binding obligations – and "optional" requirements – the implementation of which remains at the latitude of national participants in judicial reforms.[77] Ultimately, the theoretical typology for our analysis is built by combining the substantive structure of input-throughput-output legitimacy conditions, and the procedural structure of mandatory-optional requirements.

C. Theoretical typology of EU rule of law requirements for judicial organization

The notions of judicial independence, legitimacy of judicial organization, the rule of law and the legal form of European requirements for judicial organization provide the

---

[71] Francis Snyder, 'Soft Law and Institutional Practice in the European Community', *S. Martin (ed), The Construction of Europe* (Kluwer 1994). 198. Oana Stefan, *Soft Law in Court - Competition Law, State Aid, and the Court of Justice of the European Union* (Kluwer Law International 2012), Chapter 1. *See* further chapter 2.

[72] *See* e.g. Jo Shaw, 'Constitutionalism and Flexibility in the EU: Developing a Relational approach' in Grainne De Burca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing 2000).

[73] Anja Seibert-Fohr, 'Judicial Independence – The Normativity of an Evolving Transnational Principle' in Seibert-Fohr (ed) (n 1), 1279-1333.

[74] Article 288 TFEU.

[75] cf. Elaine Mak, 'Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (In-)Flexibility' (2011) 4 Erasmus Law Review. 196-202.

[76] cf. Cristina Dallara, *Democracy and Judicial Reforms in South-East Europe: Between the EU and the Legacies of the Past* (Springer 2014). 1-25. Daniela Piana (n 19), Chapters 1,5.

[77] Frederick Schauer, 'Authority and Authorities' (2008) 94 Virginia Law Review 1931, 1952-1960.

theoretical foundations for our analysis. The insights presented above – based on literature review of rule of law theories and comparative judicial organization studies – can be summarized in a typology of the conceptual elements that EU rule of law requirements and recommendations for judicial organization can theoretically be expected to have. This enumeration is not exhaustive, it is meant to illustrate the conceptual elements for which we aim to identify corresponding legal requirements when analyzing European legal sources in chapter 2.[78]

Table 1 Theoretical typology of EU rule of law standards for judicial organization

Content / Form	Input (judicial branch, judges; constitutional, statutory independence)	Throughput (organization; functional, factual independence)	Output (judicial branch, judges; constitutional, factual independence)
Mandatory core values (Formal)	- Principle of judicial neutrality (constitutional independence) - Guarantee of independent status of judges - Principle of irremovability	- Principle of 'courts established by law' - Principle of decision-making independence of judges - Principle of internal independence of judges - Values of timeliness and transparency of judicial proceedings	- Principle of 'giving reasons' - Value of 'openness' (Publicity of decisions) - Value of participation in public debate (operationalizes neutrality and constitutional independence) - Control mechanisms for the quality of judgments (i.e. hierarchical organization)
Optional recommendations (Formal/informal)	-Requirement of adequate professional qualifications of judges - The value of 'merit'-based selections - The value of a professional judicial training system - the role of central judicial management for guaranteeing the quality of judicial input, i.e. judicial selections	- The value- and extent of organizational transparency - Existence of (central) managerial control and oversight mechanisms - Computerized case allocation mechanisms - Organizational autonomy of courts	-Communication with the media and public (transparency) - Judicial code of ethics -Computerized case publication systems -Performance evaluation mechanisms - Central managerial role for guaranteeing quality of output

The typology delineates contemporary guarantees for judicial independence across two main axes: the form or authority of EU requirements (that are either mandatory or optional for EU Member States to implement) and the content of EU requirements (input-throughput-output legitimacy conditions); with six resulting main types of EU rule of law guarantees for judicial organization. On the one hand, the typology illustrates rule of law conditions for the independence and quality of (1) judicial input, (2) throughput, and (3) output that are mandatory for EU Member States to incorporate in their legal orders. These are core rule of law requirements, such as guarantees for the independent status,

[78] *See* further chapter 2,B, I;II;III.

irremovability, neutrality of judges, the right to a lawful judge, independent judicial decision-making, or timeliness of judicial proceedings. But core rule of law guarantees also appear through the obligation to give reasons, the openness of judicial proceedings and the existence of legal mechanisms for guaranteeing the quality of judgments (i.e. appeal system established by law).[79]

On the other hand, the typology illustrates optional legal mechanisms for the independence and quality of judicial (4) input, (5) throughput, and (6) output. The implementation of these mechanisms depends on the legal, political, historical or economic context of Member States. As examples of such conditions, we can mention the establishment of special training programmes for judges, adopting computerized systems for the allocation of cases at courts or, for instance, adopting special mechanisms for the communication of the judiciary with the media (i.e. courts spokespersons, websites for courts).[80]

It remains to be seen in the next chapter how and to what extent European requirements for judicial organization address the different elements of realizing contemporary rule of law requirements for judicial organization. We expect to find at least a partial overlap between the mandatory conditions for input, throughput and output quality and binding EU requirements. Moreover, we expect to find optional mechanisms mainly among the group of non-binding EU recommendations.

D. Conclusions

In this chapter we built a theoretical typology of EU requirements for judicial organization. At the heart of this typology is the principle of judicial independence, which remains a fundamental and evolving principle for judicial organization in liberal democracies. Judicial independence remains central for enhancing the legitimacy of the judicial branch, but also for upholding the rule of law. Our theoretical typology illustrates a way to conceptualize judicial independence; legitimacy and the legal authority of EU requirements in a way to theoretically explain the way EU requirements operate. The procedural conditions explaining the implementation of EU requirements in the domestic legal order complete our general theoretical model. For the remainder of the study, we will rely on the definitions and clarifications delivered above.

[79] *See* e.g. Mak, *De Rechtspraak in Balans* (n 19), 23-115. Marco Fabri and Langbroek (n 24), 6,7. Ng (n 20), 9-15.

[80] *See* e.g. Piana (n 20), Chapters 1,2. Francesco Contini and Davide Carnivali, 'The quality of justice: from conflicts to politics' in Ramona Coman and Cristina Dallara, *Handbook on Judicial Politics* (Editura Institutul European Iasi 2010), 157-195. Marco Velicogna, 'ICT in European judicial administrations' in ibid, 195-236. Daniela Piana, 'A new triad: media, justice and politics in political science' 259-279.

2 Mapping EU standards for judicial input, throughput and output

The second step of the theoretical framework critically maps EU rule of law requirements for judicial organization. The structure of this analysis follows the conceptual typology developed in chapter 1. This chapter has two main aims. On the one hand, we intend to map specific input, throughput and output EU requirements for judicial organization. On the other hand, we seek to evaluate the extent to which EU requirements for judicial organization resemble liberal-democratic requirements emerging from established democracies within the EU, as set out in the previous chapter. First, we will clarify the sources of European legally binding requirements and non-binding recommendations for judicial organization (A). This will be followed by the mapping of specific European requirements and recommendations for the quality of judicial input, throughput and output (B). The analysis of each of the three studied quality-aspects will comprise of a presentation of legally binding requirements, non-binding recommendations and a brief comparison. This will be followed by the theoretical explanation of how the specific European standards that will constitute the object of the case studies contribute to the legitimacy of judicial functioning and the rule of law. A summary of our findings concerning European standards will conclude this chapter (C).

A. Introduction: Diverse sources of European legal requirements for judicial organization and their theoretical puzzles

European requirements and recommendations for judicial organization do not originate from one coherent legally binding source, but rather from multiple sources with different legal authority (binding, non-binding). Primarily, EU Member States are obliged to comply with legally binding requirements emerging from the Treaty on European Union, the Treaty on Functioning of the European Union, the European Convention on Human Rights, as well as the case law of the Court of Justice of the European Union and the European Court of Human Rights. Relevant binding EU sources for judicial organization are: the common value of the rule of law expressed through Article 2 TEU[1] as well as Article 47 of the Charter of Fundamental Rights, guaranteeing the right to an effective remedy and the right to a fair trial in the application of EU law.[2] In addition, a particularly important source is the case law of the CJEU, establishing the meaning of a "court" for the

[1] Article 2 TEU, Official Journal of the European Union C 326, 26 October 2012. On rule of law enforcement within the EU *see* e.g. Carlos Closa, Dimitry Kochenov and JHH Weiler, 'Reinforcing the Rule of Law Oversight in the European Union' RSCAS 2014/25 Robert Schuman Centre for Advanced Studies Global Governance Programme- 87. Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012). 413,414.

[2] Article 47 Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326 26 October 2012 (with the applicable limitations contained in Art. 52(3) CFR). For a general overview *see* Giangiuseppe Sana, 'Article 47 of the EU Charter of Fundamental Rights and its Impact on Judicial Cooperation in Civil and Commercial Matters' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011). 161-177. Rene Barents, 'EU Procedural Law and Effective Legal Protection' (2014) 51 Common Market Law Review. 1438-1445.

purposes of Article 267 TFEU, on the preliminary reference procedure.[3] Furthermore, under Article 6(3) TEU, EU Member States also have an explicit Treaty obligation to comply with requirements emerging from the European Convention on Human Rights (ECHR).[4]

In the Council of Europe framework, relevant obligations for judicial organization are traditionally expressed through Article 6 ECHR[5] guaranteeing the right to a fair trial to individuals and the corresponding case law of the ECtHR.[6] However, the ECtHR has also addressed questions related to judicial organization under other ECHR rights. For instance, the ECtHR also discussed obligations for judicial organization derived from the right to freedom of expression, guaranteed by Article 10 ECHR.[7]

Next to the above-mentioned binding sources, domestic participants in judicial reform processes (legislature, executive, policy-makers, judges) in EU Member States, receive recommendations through an increasing number of non-binding sources. Although these recommendations do not have a formally binding force, nonetheless their consideration is particularly relevant for judicial organization in CEE States, given the legal effects which these sources have produced in this region. EU instruments of particular relevance in this sense [8] were the European Commission's country-specific recommendations for judicial organization, delivered to CEE states during the EU-

[3] *See* Article 267 Treaty on the Functioning of the European Union, Official Journal C 326 12 October 2012. *See* in general Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6 edition, Oxford University Press 2015), chapter 13. Stephen Weatherill, *Cases & Materials on EU Law* (12 edition, Oxford University Press 2016), chapter 7.

[4] Article 6(3) TEU specifies "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as they result from the constitutional traditions common to all Member States shall constitute general principles of Union's law." In general on the dialogue between the two Courts, *see* Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 Common Market Law Review 629. 631-652. *See also* Federico Fabbrini and Joris Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) Yearbook of European Law 1. 3-15. *For a more global overview, see* Christina Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019), Chapter 6, 185-221.

[5] *See* Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No.5. *See* in general David Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Third edition, OUP Oxford 2014), chapter 9.

[6] *See* Martin Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Wolf Legal 2004), 171-382.

[7] E.g. Baka v Hungary, App no 20261/12 (ECtHR, 27 May 2014) [Grand Chamber Judgment] 23 June 2016. Other extensions might include freedom of religion (Art.11 ECHR) or respect for private and family life (Art. 8 ECHR) *see* David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts' 109 The American Journal of International Law 713. 750.

[8] These are authoritative non-binding sources discussed in the literature. *See* e.g. Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008). 227-296. Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 German Law Journal, 1261-1274. Lydia F Müller, 'Judicial Independence as a Council of Europe Standard' (2009) 52 German Yearbook of International Law 461. In addition, the selected non-binding sources were explicitly mentioned during background interviews conducted for this research. For methodological clarifications *see* Introduction, C. On the relevance of non-binding sources due to their legal effects, *see* Francis Snyder, 'Soft Law and Institutional Practice in the European Community', *S. Martin (ed), The Construction of Europe* (Kluwer 1994). 198. Oana Stefan, *Soft Law in Court - Competition Law, State Aid, and the Court of Justice of the European Union* (Kluwer Law International 2012). Chapter 1.

accession process through monitoring reports (1998-2004/2007).[9] In addition, Bulgaria and Romania continue to receive recommendations from the European Commission concerning ongoing judicial reform processes under the so-called Cooperation and Verification Mechanism (2007).[10] Moreover, within the Council of Europe framework several expert bodies deliver recommendations for domestic judicial organization. The most relevant instrument in this context is the Recommendation on judicial independence, efficiency and responsibility adopted by the Committee of Ministers of the Council of Europe (2010).[11] Further recommendations are delivered by, for instance: the Venice Commission, specialized in constitutional law;[12] the Committee on the Efficiency of Justice (CEPEJ), specialized in the efficiency and quality of judicial organization;[13] or the Consultative Council of European Judges (CCJE), representing the observations of national judges from CoE Member States on relevant topics of judicial organization.[14] In addition to these expert bodies within the EU and Council of Europe framework, the European Network of Councils for the Judiciary (ENCJ) issues opinions on various important topics of judicial organization.[15] On the one hand, the extended number of European instruments addressing judicial organization and their diverse legal authority call for a systemic mapping.

---

[9] Legal basis: Article 49 TEU. Mandate: Luxembourg European Council, 12,13 December 1997, Presidency Conclusions, SN 400/97, 5.

[10] Commission of the European Communities, Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reforms and fight against corruption, C (2006) 6569 final, http://ec.europa.eu/enlargement/pdf/romania/ro_accompanying_measures_1206_en.pdf (accessed 16.09.2019). *See* in general Martina Spernbauer, 'Benchmarking, Safeguard Clauses and Verification Mechanisms - What's In a Name? Recent Developements in Pre- and Post-Accession Conditionality and Compliance with EU Law' (2008) 3 Croatian Yearbook of European Law and Policy 273, 280. Gergana Noutcheva and Dimitar Bechev, 'The Successful Laggards: Bulgaria and Romania's Accession to the EU' (2008) 22 East European Politics & Societies 114, 132-136.

[11] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency, responsibility, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, https://wcd.coe.int/ViewDoc.jsp?id=1707137 (accessed 16.09.2019). Explanatory memorandum of the Committee of Ministers' Recommendation on judicial independence, efficiency and responsibility http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2010)12E_%20judges.pdf (accessed16.09.2019).

[12] Venice Commission Statute, Art.3.2. *See* in general Sergio Bartole, 'Final Remarks: The Role of the Venice Commission' (2000) 26 Review of Central and East European Law 351.

[13] Objectives of CEPEJ, http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp (accessed16.09.2019). European Commission for the Efficiency of Justice, Committee of Ministers of the Council of Europe, Resolution Res (2002)12, 18 September 2002, Art. 1-4. https://wcd.coe.int/ViewDoc.jsp?Ref=Res(2002)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (accessed16.09.2019).

[14] CCJE, http://www.coe.int/t/dghl/cooperation/CCJE/presentation/ccje_depliant_en.pdf (accessed 16.09.2019). Members of the CCJE are representatives of the 47 CoE member states (where possible appointed through a consultation with the judicial councils) as well as observers, such as the European Association of Judges (EAJ), the association "Magistrats européens pour la démocratie et les libertés" (MEDEL), the European Federation of Administrative Judges, the "Groupement des Magistrats pour la Médiation" (GEMME), the European Network of Judicial Training (ENJT) and the European Network of Councils for the Judiciary (ENCJ), http://www.coe.int/t/dghl/cooperation/ccje/presentation/MembresCCJE.asp (accessed16.09.2019).

[15] ENCJ, http://www.encj.eu/ (accessed 16.09.2019). The ENCJ was formally established in 2004 and it is an international not-for-profit association under Belgian Law, *see* http://www.encj.eu/index.php?option=com_content&view=article&id=81&Itemid=242&lang=en (accessed

On the other hand, the developing content of EU requirements also presents theoretical puzzles. Firstly, the EU rhetoric places significant emphasis on the existence of core values shared by all Member States, with particular reference to the context of judicial reforms in Central and Eastern Europe.[16] However, the specific meaning of core EU rule of law values and in particular the common meaning of the principle of judicial independence appears contested.[17] Secondly, the connection between the content of non-binding recommendations for judicial organization, and the content of binding obligations, through the CJEU and the ECtHR case law, remains underexplored.[18] Considering the incremental development of the non-binding "dimension" of EU requirements[19] and the significant contact between national participants of domestic judicial reforms and supranational expert bodies,[20] this aspect also deserves further scrutiny. Bridging these theoretical gaps, we aim to identify a core of legally binding EU requirements, with particular reference to a possible "European" balance between judicial independence and efficiency in accordance with the liberal-democratic normative framework explained in chapter 1.[21] In addition, we will explore whether and to what extent non-binding recommendations are connected to this potential legally binding core through "family-resemblance," in the sense of displaying loose connections with partially overlapping content rather than adopting the same exact definition.[22]

B. EU rule of law standards for judicial organization

In this section we will map and evaluate European standards for the quality of judicial (I) input, (II) throughput and (III) output. First, our overview analyses legally binding European requirements. This part has EU and Council of Europe Treaty obligations

---

21.02.2017). *See* in general, Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100, 107, 108.

[16] E.g. Article 2 TEU refers to the "common values shared by all Member States"; Article 6 TEU refers to the "common constitutional traditions of Member States"; European Commission'pre-accession judicial reform-evaluation mandate in CEE explicitly stated that the evaluation "takes place on an equal footing and on the basis of the same criteria." Luxembourg European Council, 12,13 December 1997, Presidency Conclusions, SN 400/97, 3. *See* Dimitry Kochenov, 'The EU Rule of Law: Cutting Paths Through Confusion' (2009) 2 Erasmus Law Review 1, 15-24. Anja Seibert-Fohr, 'Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle' (2009) 52 German Yearbook of International Law 405, 407-412.

[17] For arguments against the existence of a common core of judicial independence, *see* Daniel Smilov, 'EU Enlargement and the Principle of Judicial Independence' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law?* (Springer-Verlag 2006), 317, 318. Christopher Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 American Journal of Comparative Law, 605-626. *See contra:* Anja Seibert-Fohr, 'Judicial Independence – The Normativity of an Evolving Transnational Principle' in Seibert-Fohr (ed), *Judicial Independence in Transition* (n 1). 1279-1281. For the argument on the "emptiness of the EU rule of law principle" *see* Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), Conclusions.

[18] For notable exceptions *see* Müller (n 8), 432-485. Anja Seibert-Fohr, 'European Standards for the Rule of Law and Independent Courts' (2012) Journal für Rechtspolitik 161, 1612-169.

[19] cf. Müller (n 8). Seibert-Fohr, 'European Standards for the Rule of Law and Independent Courts' (n 18).

[20] *See* e.g. Claes and Visser (n 15). Cristina Dallara and Daniela Piana, *Networking the Rule of Law: How Change Agents Reshape Judicial Governance in the EU* (Routledge 2016). 135-157.

[21] Introduction, B.

[22] Ludwig Wittgenstein, Hacker and Schulte, *Philosophical Investigations* (Wiley-Blackwell 2009), § 65-71.

at its basis and further presents the interpretation of these obligations by the Court of Justice of the European Union and the European Court of Human Rights. Second, our overview analyses European non-binding recommendations, derived from the EU pre-accession instruments concerning CEE member states and the Cooperation and Verification Mechanism, as well as Council of Europe Instruments by the Committee of Ministers, Venice Commission, Committee for the Efficiency of Justice and Consultative Council of European Judges. The presentations of the content of binding and non-binding recommendations for the quality of judicial input, throughput and output are followed by a critical assessment in light of the liberal-democratic normative framework presented in chapter 1.

I. Input standards

Input standards assessed in this section will refer to: constitutional, statutory or institutional conditions for the independence of the judiciary and judges as well as adequate professional qualifications.[23]

i. Legally binding requirements: manner and length of appointment; irremovability; remuneration; judicial participation in the public debate

Both the Court of Justice of the European Union and the European Court of Human Rights establish legally binding conditions for guaranteeing the quality of judicial input. First, the CJEU had traditionally established conditions for judicial input on the basis of the definition of what constitutes an "independent tribunal," mandated to address a question to the CJEU on the application or validity of EU law pursuant to Article 267 TFEU laying down the preliminary reference procedure.

The CJEU considers judicial independence an "inherent element of adjudication"[24] – not only required at the EU law but also at the level of Member States[25] – and sets as a main requirement that courts act as a "third party in relation to the authority which adopted the contested decision."[26] According to the CJEU more specific conditions for a court to be considered independent are: the existence of specific rules concerning the special status of judges, the composition of the judicial body, judicial appointments, and length of service or grounds for abstention, rejection and dismissal of its members.[27] Apart from these conditions mainly addressing the independent status of judges, the CJEU also explicitly

[23] *See* above chapter 1,B,II.

[24] Case C-506/04 Wilson EU:C:2006:587, para. 49. Case C-685/15, Online Games and Others EU:C:2017:452, para. 60. C-403/16 El Hassani, para. 40.

[25] Case C-64/16, Associação Sindical dos Juízes Portugueses, para.42

[26] Case C-24/92 Corbiau [1993] ECR I-1277, para. 15. Case C-516/99 Schmid [2002] ECR I-4573, para. 36. Case C 216/18 PPU, para. 63.

[27] Case C 506/04 Wilson v Ordre des avocats du bureau de Luxemburg, [2006] ECR I8613, paras. 50-53. Case C 517/09 RTL Belgium [2010] ECR I14093, paragraph 39. These notions are established with reference to the established case law of the ECtHR in particular Campbell v Fell, para 51. Case C-222/13 TDC, para. 32, Case C-216/18 PPU LM, para. 66.

clarified that these conditions are met provided that express legislative provisions determine *inter alia* the rules pertaining to the dismissal of judges.[28]

According to the CJEU it is of fundamental importance for independence that the judiciary is protected against outside pressures; with particular reference to the political branches of Government. The CJEU refers to this condition as the "external aspect" of judicial independence and it expects from courts to exercise their functions "wholly autonomously", entailing the lack of any hierarchical constraint or any subordination to another body and without receiving any orders or instructions from other sources.[29] The CJEU also requires for "certain guarantees" to be in place, such as the statutory *guarantee against removal from office*[30] and calls for the receipt by judges of "a *level of remuneration commensurate* with the importance of the functions that they carry out."[31] Both of these elements have been subject to subsequent clarification by the Court.

In the *ASJP* case, the CJEU had to decide whether the temporary salary reductions addressed to certain public office holders in Portugal in the overall effort to comply with EU budgetary austerity measures violated the principle of judicial independence enshrined in Art. 47 of the Charter of Fundamental Rights and the second sub-paragraph of Art. 19(1) TEU, guaranteeing the right to effective judicial remedy.[32] The CJEU's judgment mainly focused on the alleged violation of Art. 19(1) TEU and established an explicit connection between judicial independence, Art. 19(1) TEU, the values enshrined in Article 2 TEU and the principle of loyal cooperation foreseen by Art. 4(3) TEU.[33] The Court clarified that the

> "very existence of effective judicial review designed to ensure compliance with EU law is the essence of the rule of law. It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection."[34]

These conceptual clarifications could be all the more important considering that Art. 19(1) TEU relates to "fields covered by EU law" thus it is not bound by the limitation of Art. 47 of the Charter requiring to the implementation of EU law.[35] In light of the specific circumstances of the case, consisting of a measure of a temporary nature, which was proportional and addressed to a wide group of public office holders, the CJEU did not

[28] Case C-222/13 TDC, para. 32, Case C-216/18 PPU, para. 66.
[29] Case C-64/16, Associação Sindical dos Juízes Portugueses, para 44. Case C-216/18 PPU, para. 64.
[30] Case C 54/96 Dorsch Consult Ingernieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH, [1997] ECR I-4961, para. 36. Cases C 9/97 and 118/97 Jokela and Pitkaranta 1998 ECR I-6267 para 20 (pointing to the importance of guarantees against removal from office). Case C53/03 Syfait and Others [2005] ECR I4609, paragraph 29. Case C196/09 Miles and Others [2011] ECR I5105, para 37.
[31] Case C 216/18 PPU, para 64. Case C64/16 Associação Sindical dos Juízes Portugueses, para 45.
[32] Case C-64/16, Associação Sindical dos Juízes Portugueses, para. 18.
[33] ibid. paras. 36-45.
[34] ibid. paras. 36, 37.
[35] Opinion of Advocate General Saugmandsgaard Øe delivered on 17 May 2017 Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas, para 37,38 and 43.

find a violation.[36] Nonetheless, the *ASJP* case remains notable for extending the scope of protection of judicial independence in the EU.[37]

In the *LM* case, these conceptual elements of judicial independence and the rule of law have been incorporated in the case law concerning Art. 47 of the Charter – albeit, with due regard to the specific legal regime and limitations applicable to the Charter.[38] In that case an Irish court referred questions to the CJEU concerning the execution of the European Arrest Warrant. In particular, the referring court asked whether the existence of doubts with respect to the independence of the requesting Member State's judiciary – such as in case of Poland the Commission's reasoned proposal in accordance with Art. 7(1) TEU – could give rise to the exceptional possibility not to execute the European Arrest Warrant following the two-stage test of the *Aranyosi and Căldăraru* case.[39]

The CJEU held that both parts of the *Aranyosi and Căldăraru* test would be applicable for the assessment of the systemic lack of independence of the requesting Member State's courts. Specifically, national courts would have to establish in abstract that there is a real risk of systemic deficiency with regard to judicial independence in the requesting Member State. For this assessment the existence of a reasoned proposal is important but not sufficient. Member State's court would have to request further supporting evidence in this sense.[40] Moreover, the executing member state's courts would have to establish in concrete that the individual concerned by the European Arrest Warrant would be specifically affected by the lack of independence.[41] As such, Member State courts would have the possibility and responsibility to establish a systemic violation of judicial independence that would in turn specifically affect the individual concerned by a European Arrest Warrant.

The above-explained guarantees appear to be reiterated also with respect to the protection against removal from office of judges in Poland. On 24 September 2018, the European Commission referred Poland to the CJEU concerning the violation of the independent status of judges by the new Polish Law on the Supreme Court – with particular reference to the lowering of the retirement age of judges. The Commission claimed a violation of Art. 19(1) and also asked the CJEU to expedite the proceedings and "order interim measures restoring Poland's Supreme Court to its situation before 3 April 2018, when the contested new laws were adopted." On 9 October 2018 the CJEU provisionally granted the Commission's requests and ordered Poland to suspend the legal provisions lowering the retirement age of Supreme Court judges and to take all necessary measures to reinstate the judges affected by that provision.[42] The Advocate General considered that the "sudden and unforeseen" removal of judges violated the principle of *irremovability* of

[36] Case C-64/16, Associação Sindical dos Juízes Portugueses, paras. 46-52.
[37] Matteo Bonelli, Monica Claes, 'Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary', 14 European Constitutional Law Review 2018, 622,623. Laurent Pech and Sébastien Platon, 'Judicial Independence under threat: The Court of Justice to the rescue in the *ASJP* case', 55 Common Market Law Review 2018, 1832,1833.
[38] Case C-216/18 PPU, Minister of Justice and Equality v LM (Deficiencies in the System of Justice), para. 51-53. Michał Krajewski, 'Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges' 14 European Constitutional Law Review 2018, 792-813.
[39] ibid. para. 33,34.
[40] ibid. para 60,61.
[41] ibid. 68.
[42] Case C-619/18 R, Commission v Poland. EU:C:2018:852.

judges, which is part of the requirements of effective judicial protection under the second sub-paragraph of Art. 19(1) TEU.[43]

This case represents the second possibility for the CJEU to decide on the retroactive modification of the retirement age of judges in a Member State. In 2012, the CJEU addressed the introduction of a new reduced mandatory retirement age for judges in Hungary.[44] On that occasion, the CJEU found a violation based on the European Equal Treatment Directive with only the AG Opinion explaining the implications of the legal measures for the personal independence of Hungarian judges.[45] In contrast, the recent case against Poland seems to build on the conceptualization of judicial independence, which has evolved since 2018.

Second, the European Court of Human Rights defines core elements of judicial independence for the purposes of guaranteeing to individual applicants the right to a fair trial under Article 6 ECHR. According to the ECtHR:

> "in order to establish whether a body can be considered "independent" regard must be had *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence."[46]

The first element (manner of appointment and term of office) of this general definition becomes relevant for input quality by referring to statutory guarantees of judges.[47] The ECtHR elaborated upon the meaning of this condition in its established case law. In doing so, the Court maintained minimum requirements, thus allowing for flexible implementation mechanisms among Member States.[48] For instance, concerning the *manner of appointment*, the ECtHR did not set a fixed rule on the composition of the body for the selection of judges.[49] However, the Court specified that no discrimination could take place in judicial appointments.[50] In a similar vein, the Court did not set a specific requirement for the competent body appointing judges. For example, according to the Court appointments by the Executive are permissible. But the ECtHR set the condition that appointees must be free from influence or pressure when carrying out their decision-making functions.[51] The

[43] Opinion of Advocate General Tanchev delivered on 11 April 2019, Case C-619-18 European Commission v Republic of Poland, para. 52-60, 61-64, 72-

[44] Case C-286/12 Commission v Hungary.

[45] View of Advocate General Kokott of 2 October 2012, Case C-286/12 European Commission v Hungary, ECLI:EU:C:2012:602, para. 48-59.

[46] Campbell and Fell v UK, App no. 7819/77, 7878/77 (ECtHR, 28 June 1984) para. 78. *See* Martin Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Wolf Legal 2004), 212–297. Müller (n 8), 462-474.

[47] See chapter 1, B, II. The second element (existence against outside pressures) refers to functional independence; the third element (appearance of independence) to factual idependence. See further chapter 2, B, II and III.

[48] See Seibert-Fohr, 'European Standards for the Rule of Law and Independent Courts' (n 18), 163. Kosař and Lixinski (n 7), 739.

[49] Belilos v. Switzerland, App no 10328/83 (ECtHR, 29 April 1988) para.55.

[50] Sramek v Austria, App no 8790/79 (ECtHR, 22 October 1984) para. 41-42.

[51] Campbell and Fell v UK, App no. 7819/77, 7878/77 (ECtHR, 28 June 1984), para. 79. Flux v Moldova no.2, Appl. No. 31001/03, 3 July 2007, para. 27.

latter condition encapsulates the decision-making independence of judges, respectively it refers to the connection between the independent status and decision-making of judges.[52]

Similarly, the established case law of the ECtHR sets minimum guarantees for the condition of *judicial term of office*. For instance, the ECtHR does not require a specific appointment period from Member States. However, the Court requires as a core rule of law guarantee that judges are *irremovable*.[53] The Court has consistently emphasized this core statutory guarantee in its subsequent case law. For instance, the ECtHR explicitly reiterated that the "irremovability of judges by the Executive during their term of office must be considered a corollary of their independence."[54] In addition, the Court also found a breach of the irremovability of judges in the circumstances when the Ministry of Justice could remove judges at any time during their term of office, and there were no adequate guarantees against the arbitrary exercise of power by the Executive.[55] Through this continued emphasis, irremovability became a "key element" in the case law of the Court concerning the independent status of individual judges.[56]

However, in its recent case law, the ECtHR also connected the irremovability of judges in leadership positions to the independence of the Judiciary, with particular reference to judges having formal central administrative responsibilities. Consider, for instance the Baka v Hungary case, confirmed by the Grand Chamber. This case concerned the premature termination of the appointment of the President of the Hungarian Supreme Court through legislative and constitutional modifications. Judge Baka complained that he was removed from office on account of his public criticism concerning the proposed judicial reforms. This criticism was expressed in fulfilment of his professional obligation to represent the Judiciary in public debate. In contrast, the Hungarian Government claimed that the premature termination of judge Baka's mandate was connected to and justified by the general reorganization of the supreme judicial authority of Hungary taking place in 2012 as part of overarching judicial reforms. In particular, the Government claimed that the re-structuring of the Supreme Court's competences required the reformulation of the professional qualifications of its President.[57]

The Court found that judge Baka's removal from office was a political repercussion for his public statements on the legislative reforms. These legal actions were in violation of judge Baka's right to freedom of expression. In its findings, the ECtHR specifically emphasized that:

---

[52] *See* chapter 1,B,I and II.

[53]Campbell and Fell v UK, App no. 7819/77, 7878/77 (ECtHR, 28 June 1984) para.80. Hauschildt v. Denmark, 24 May 1989, para 48, Series A no. 154; Thorgeir Thorgeirson v. Iceland, 25 June 1992, para 51, Series A no. 239; Incal v. Turkey, 9 June 1998, para 71, Reports of Judgments and Decisions 1998-IV. Brudnicka v Poland, 2005-II Eur. Ct. H.R. 153. Luka v Romania, App. No. 34197/02 (ECtHR, 21 July 2009). Henryk Urban and Ryszard Urban v Poland, App. No. 23614/08, paras. 49-53 30 November 2010. Fruni v Slovakia, Appl. No. 8014/07, 21 June 2011, para. 145. For a critical assessment of the case law *see* Kosař and Lixinski (n 7). 739-741.

[54] Fruni v. Slovakia, App. No. 8014/07, para. 145, 21 June 2011. Henryk Urban and Ryszard Urban v. Poland, App. No. 23614/08, para. 53, 30 November 2010.

[55] id. For the critical assessment of the extensive reading of the meaning of a 'court' protected by judicial independence guarantees *see* David Kosař, 'Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design' (2017) 13 Utrecht Law Review.

[56] Baka v Hungary [GC] judgement, para. 172.

[57] Baka v Hungary, App no 20261/2012 (ECtHR [GC], 23 June 2016) para. 1-37, 126-135.

> "the facts and sequence of events in their entirety corroborate the applicant's version of events, namely that the early termination of his mandate as President of the Supreme Court was not the result of a justified restructuring of the supreme judicial authority in Hungary, but in fact was set up on account of the views and criticisms that he had publicly expressed in his professional capacity on the legislative reforms concerned."[58]

However, the findings of the Court regarding the breach of judge Baka's right to freedom of expression also contained an explicit discussion of judicial independence. Namely, in the Grand Chamber decision, the Court highlighted that judge Baka's removal from office was contrary to the independence of the Judicial branch and the irremovability of judges. The Court emphasized the importance of this guarantee by recalling that it is a "key element" in the case law of the Court and international and European instruments.[59]

For the purposes of our analysis, this decision receives particular importance for (1) emphasizing the salience of the core statutory guarantee of irremovability of judges, and (2) acknowledging that the removal from office of a judge in a leadership position can constitute a breach of the independence of the Judiciary (3) explicitly revealing the possibility to abuse legitimate economic considerations for judicial reorganization by the political branches of Government to the detriment of the independent status of judges.[60] We will consider below how non-binding European recommendations relate to these core legally binding rule of law requirements.

ii. Legally non-binding recommendations: codification of judicial independence; role of judicial councils; objective, transparent, merit-based appointments

Non-binding European recommendations for the quality of judicial input emerge from two main sources. A first set of recommendations can be derived form EU accession instruments consisting of Composite Papers, country-specific evaluation reports and Accession Partnerships. A second set of recommendations emerges from Council of Europe instruments adopted by the Committee of Ministers, the Venice Commission and the Consultative Council of European Judges.

a) EU recommendations

When discussing the quality of judicial input in the pre-accession evaluation reports of Central and Eastern European states, the European Commission emphasized the importance of guaranteeing certain factual preconditions, such as: adequate financing,

---

[58] Baka v Hungary, App no 20261/2012 (ECtHR, 27 May 2014) para. 96.
[59] Baka v Hungary [GC] judgement, para. 172.
[60] *See* above chapter 1, B, II and III. *See* also David Kosař, Katarína Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the rule of law' 2018 Hague Journal on the Rule of Law 1-28.

fighting corruption[61] and anchoring a rule of law culture.[62] In particular, the European Commission paid attention in its assessment reports to the adequate budget reserved for the judicial branch,[63] as well as an adequate level of salary of judges that could enable an independent and impartial professional activity.[64]

In terms of conditions within the national legal framework guaranteeing independence, impartiality and professional qualifications of judges, the European Commission explicitly emphasized the importance of guaranteeing the independence of judges and the Judiciary at the *highest level of the normative framework*, that is: the level of domestic constitutional norms.[65] In addition, the European Commission assessed the existence of adequate guarantees for the *status of judges*. For instance, frequently assessed conditions were the existence of *transparent and objective rules* on the appointment, promotion and service of judges[66] as well as *irremovability* of judges and their *appointment for life*.[67] For instance, with respect to the former condition, the European Commission criticised Romania when several court presidents and vice-presidents were transferred without giving reasons.[68]

However, the European Commission also placed a significant emphasis on the *adequate training of judges*.[69] The training requirements covered both the existence of specific initial training programmes for incoming judges[70] and specialized training in the field of EU law.[71] To several candidate countries at the time, the European Commission suggested the establishment of an independent central training institution for fulfilling this task and, in particular, monitored the financial autonomy of the institutions.[72]

Of particular importance for our analysis, the European Commission connected these guarantees for the independent status and professional qualifications of judges to specific *institutional guarantees*. Namely, the Commission suggested to several Central and Eastern European candidate states to either establish or strengthen the *judicial self-*

---

[61] For e.g. Composite paper (1998), 4.
[62] Composite paper (1998), 3.
[63] Kochenov, *EU Enlargement and the Failure of Conditionality* (n 8) 257, 275, 276. Increasing the annual budget for the judiciary was monitored every year by the European Commission in each candidate country and expressly mentioned in the Regular Reports.
[64] ibid.
[65] E.g. Composite paper (1999), 13. Composite Paper (2000), 56. Composite Paper (2001), 12, 61, 65. Composite Paper (2002) 74.
[66] Kochenov, *EU Enlargement and the Failure of Conditionality* (n 8) 271, footnote 259. Mentioned for e.g. in the 2nd Accession Partnership with Romania, 6. 3rd Accession Partnership with Romania, 13.
[67] ibid. 268.
[68] 2001 Romania Report, 20. *See* further chapter 6,C.
[69] E.g. Composite paper (1998), 3, 16. Composite paper (1999), 41 (Hungary), 44 (Latvia), 45 (Estonia) (Lithuania). Composite paper (2000), 39 (Estonia), 41 (Hungary), 46 (Lithuania). Composite paper (2001), 25, 43 (Estonia), 46 (Hungary), 53 (Lithuania), 59 (Poland). Strategy paper (2002), 44 (Czech Republic), 47 (Estonia), 66 (Poland). Composite paper (2003), 42 (Slovakia).
[70] For e.g. 2002 Poland Report 26. 2002 Estonia Report 24. 2002 Latvia Report 23. For criticism concerning the inconsistency of this requirement, with particular reference to the Czech Republic *see* David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016). Kochenov, *EU Enlargement and the Failure of Conditionality* (n 8), 276-284.
[71] E.g. Allan F Tatham, 'The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary' (2012) 18 European Law Journal 577. 583-594. Kochenov (n 8), 282.
[72] E.g. 2002 Poland Report 26. 2002 Latvia Report 23. 2002 Estonia Report 24.

governance body – a so-called council for the judiciary.[73] Bulgaria and Romania were the two states, which received the most detailed recommendations.[74] For instance, the European Commission advised to the Bulgarian and Romanian councils for the judiciary to organise and supervise judicial appointments and promotions as well as the centralized training of judges.[75] In addition, judicial councils were advised to participate in establishing an adequate yearly budget for the judiciary during parliamentary negotiations.[76]

On their turn, the proposed councils for the judiciary in CEE were also subject to a number of conditions, aimed at guaranteeing their independence and neutrality. Among these conditions were: the judicial council being composed at least half of judges[77] as well as transparency with respect to the selection of its members.[78] These additional conditions appear useful for controlling the activity of the judicial councils and subsequently guaranteeing that they abide by the rule of law.[79] So far, the institutional recommendations by the European Commission appear more detailed than the legally binding requirements for the quality of judicial input. Although the accession requirements are not directly applicable in the EU beyond accession, nonetheless, the content of these requirements serves as an indication of the conception of the rule of law and judicial independence within the EU. We will consider below whether non-binding Council of Europe instruments formulate conditions for the quality of judicial input in a similar manner.

---

[73] E.g. Composite paper (2002), 47 (Estonia), 51 (Hungary), 74 (Slovakia). Central and Eastern European countries opting for centralized judicial administration through a council for the judiciary include: Bulgaria, Estonia, Hungary, Lithuania, Poland, Romania, Slovakia, Slovenia. For a detailed assessment see Open Society on the councils for the judiciary Open Society Institute, 'Monitoring the EU accession process: Judicial Independence '(2001), https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf (accessed16.09.2019), 69-472. For a critique of the "Euro-model" of judicial councils see Bobek and Kosař (n 8), 1257, 1269-1274.

[74] *See* Kosař (n 50), 122,123.

[75] *See* Kochenov (n 8). 260-268, 283-287. *See* e.g. 2001 Romania 25,26. 2001 Bulgaria Report 17-19. 2002 Bulgaria Report 25.

[76] ibid. 275, 276. 2001 Bulgaria Report 18. 2002 Bulgaria Report 24.

[77] E.g. 2001 Romania Report, 20 (criticizing that only 1/3 of the council is appointed by the judiciary). Romania 2002 Report, 25. 2002 Bulgaria Report, 24 (criticizing the mixed membership of the council consisting of judges, prosecutors, investigators and members elected by the Parliament as a challenge for the effective "professional management of judges and the court system"). *See* also Kochenov (n 4) 261-262, for further references ibid footnotes 205, 206, 209, 212.

[78] Romania Report (2002) 25. (criticizing the lack of transparency in selecting members and assessing as positive increasing the number of judge-members). Romania Report (2003) (assessing positively changes made to the appointment process, criticizing the overall weak position of the council for the judiciary). Romania Report (2003), 20 (length of members' mandate, changes to composition, the position of the Ministry of Justice in the Council). Romania Report (2004), 19 (describing changes to the competence of the judicial council through legislative reforms, assessing the elimination of the direct appointment of council for the judiciary members by the Executive as a positive development). Romania Report (2005), 11 (mentioning competences, including discipline; marking the formal transfer of power from the Executive to the council for the judiciary as positive, suggesting the formal transfer of budgetary powers from the Executive to the judicial council). For a critique of the inconsistency of the conditions set by the European Commission *see* Kochenov (n 8) 264-268. For an overview of the evolution of requirements after the 2007 accessions *see* Seibert-Fohr, 'European Standards for the Rule of Law and Independent Courts' (n 18).

[79] *See* chapter 1.

b) Council of Europe recommendations

Council of Europe recommendations discuss in detail the input conditions for the independence, impartiality and adequate professional qualifications of judges. Specifically, these recommendations underline the importance of guaranteeing the independence of judges and the Judiciary at the highest level of the legislative framework (Constitutional level) with more specific guarantees codified in subsequent legislation.[80] In addition, Council of Europe instruments specifically highlight that the independence of individual judges is also guaranteed by the independence of the judiciary and therefore it becomes essential for the rule of law.[81]

Moreover, *statutory guarantees* occupy an important position among the Council of Europe recommendations for the quality of judicial input. For instance, the Recommendation of the Committee of Ministers explicitly lists *guaranteed tenure until retirement* and the *irremovability*[82] of judges among its classic rule of law conditions for the independent status of judges. In addition, the Venice Commission offers a more detailed account of the geographical aspect of irremovability, prohibiting the unjustified *transfer of judges*. The Venice Commission specifies that judicial transfers in principle should not be made without the consent of the judge, provided there are no exceptional circumstances enabling such measures.[83] Next to these legal conditions, the Magna Carta, developed by judges and the Recommendation of the Committee of Ministers draw attention to the importance of *factual conditions* such as: adequate human, financial and material conditions and remuneration.[84]

An additional group of specific Council of Europe recommendations concerns the *conditions for judicial selections*. For instance, several instruments emphasize that the selection and career decisions affecting judges should be based on *objective and pre-established* criteria. Moreover, the subsequent decisions should be *merit-based*.[85] According to the Recommendation of the Council of Europe Committee of Ministers, this latter notion refers to the necessary skills, qualifications and capacity to fulfil judges' adjudicatory functions.[86] Adding to these conditions, several instruments highlight that decisions affecting the career of judges leave no room for discrimination of any nature.[87]

Furthermore, Council of Europe instruments also give recommendations with respect to the *judicial selection process*. For instance, the Recommendation emphasizes the importance of having an *independent selection authority*, meaning free from pressure from the Executive and Legislative branches. In order to realize this condition, the Recommendation suggests having *at least half of the selection or examination board*

[80] Recommendation CM/Rec(2010)12, para. 7. Venice Commission, 'Judicial Appointments', CDL-AD(2007)028-e, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e (accessed16.09.2019). para.22.
[81] Recommendation CM/Rec(2010)12. para.4.
[82] ibid. para. 49. Venice Commission, 'Judicial Appointments', CDL-AD(2007)028-e, para. 43.
[83] Venice Commission, 'Judicial Appointments', CDL-AD(2007)028-e, para. 39-45. All paragraphs on transfers.
[84] Magna Carta. para. 7. Recommendation CM/Rec(2010)12, para. 33-38.
[85] Recommendation CM/Rec(2010)12. para. 44. Venice Commission, 'Judicial Appointments', CDL-AD(2007)028-e, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e (accessed 16.09.2019). para. 27. CCJE, Magna Carta of Judges, para.10.
[86] Recommendation CM/Rec(2010)12. para. 44.
[87] ibid. para. 45.

consisting of judge-members.[88] But for instance, the Magna Carta specifically recommends establishing a so-called "Council for the Judiciary" with "broad competences" concerning the status of judges.[89] The Recommendation defines these bodies as "independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system."[90]

Finally, Council of Europe instruments dedicate attention to the *division of competences between the Judiciary and the Executive and Legislative branches* of Government in ensuring the quality of judicial input. A first recommendation concerns *judicial appointments*. The Recommendation of the Committee of Ministers' of the Council of Europe accepts judicial appointments by the Executive or Legislative branches as a legitimate national choice. However, it advises for a consultative body composed at least half of judges to make recommendations.[91] Moreover, recommendations compiled by judges in Council of Europe Member States recommend consulting and involving judges and the judiciary in the preparation of legislation concerning the status of judges and the functioning of the judicial system;[92] but also the budget allocated to the judiciary.[93]

Overall, our survey of Council of Europe recommendations for the quality of judicial input indicates the existence of detailed requirements for the status and selection of judges. Moreover, Council of Europe instruments also suggest specific institutional guarantees for achieving the specific input quality goals. Below, we will compare these recommendations to legally binding European requirements as well as the recommendations by the European Commission. We will also evaluate European input quality requirements on the basis of the normative framework of liberal-democratic requirements, identified in Chapter 1.

Our overview indicated the existence of an extensive set of non-binding EU and Council of Europe recommendations for the quality and legitimacy of judicial input. As a main similarity, European recommendations from both sources explicitly emphasize the rule of law values of irremovability and independent status of judges, contained in the binding case law of the CJEU and the ECtHR. In addition, the majority of non-binding instruments give more detailed recommendations, such as: codification of judicial independence at the highest level of the domestic legal framework, having objective and pre-established judicial selection rules in place, or enabling 'merit-based' judicial selection processes. Although the recommendations might differ on points of detail, through the explicit reference to core rule of law values, non-binding recommendations maintain family-resemblance with binding European requirements. Similar to binding requirements, the optional recommendations mainly engage with the statutory dimension of judicial independence.[94]

However, the studied non-binding European recommendations move beyond the discussion of personal or statutory dimensions of judicial independence. The recommendations by the European Commission and Council of Europe advisory bodies

[88] ibid. para. 46.
[89] Magna Carta, para. 13.
[90] ibid. para. 26.
[91] ibid. para. 47.
[92] CCJE, Opinion no. 3 of 2002, para. 34. Magna Carta, para. 9.
[93] Recommendation CM/Rec(2010)12, para. 40.
[94] id.

suggest the establishment of a central judicial administrative body, a so-called council for the judiciary, with a role to guarantee inter alia the independent status of judges. Furthermore, non-binding instruments suggest for judicial councils to receive a specific role in supervising the proposed judicial selection mechanisms. In doing so, non-binding recommendations engage with the institutional (or organizational) dimension of judicial independence.[95] The general ambition to propose specific legal mechanisms to Member States, shared by the European Commission and Council of Europe advisory bodies, appears to explain this similarity.

The European Commission and several Council of Europe instruments (i.e. Recommendation by the Committee of Ministers' and Magna Carta) also propose a specific model of councils for the judiciary. The recommendations mainly boil down to the composition, at least half of which should be judges, and extensive competences of judicial councils. This latter set of recommendations is a very specific one, leaving the least room for context-specific domestic implementation.[96] The theoretical requirements of the liberal-democratic normative framework do not explicitly require this model. A notable exception within the Council of Europe framework constitutes the Venice Commission. The Opinion of the Venice Commission on judicial appointments acknowledges the variance in terms of specific models of councils for the judiciary, or central judicial administration in Member States. The main focus of the Venice Commission on constitutional values for the independent status of judges appears to explain its accommodation of different judicial institutional designs among Member States.

Finally, we must also highlight that when comparing EU and Council of Europe recommendations, the former appear more technical and more geared towards specific mechanisms or institutional guarantees (i.e. training of judges in EU law, establishing a centralized and financially autonomous training institution, a council for the judiciary supervising judicial selections). In contrast, Council of Europe recommendations elaborate in more detail upon the connection between specific mechanisms and rule of law values (i.e. the focus of the Venice Commission on the geographical irremovability of judges). A possible explanation for these differences could be that the main focus of the European Commission during the EU pre-accession process was to guarantee the institutional, factual and legal preconditions of national courts functioning as EU law courts within a short period of time, and informed more by the EU's economic value orientation.[97] However, this focus remains inconsistent with the overall goals of "establishing a rule of law culture" explicitly emphasized by the European Commission. Consequently, with respect to the quality of judicial input at the level of the analysed instruments, the European Commission did not deliver the rule of law values to which it referred.[98]

The above-outlined mandatory and optional legal requirements for the quality of judicial input can be summarized in the comparative table below.

[95] id.
[96] cf. Bobek and Kosař (n 8). 1269-1274.
[97] Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Brill 2014). 47-112.
[98] cf. Kochenov (n 8). 304-307.

Table 2 European input quality requirements and recommendations

Legal nature / Content	Requirements	Sources
Binding core	Objective selection and appointment processes;	CJEU art 267 TFEU case law; ECtHR Campbell and Fell v UK
	Irremovability of judges	CJEU, Commission v Poland; ECtHR Campbell and Fell v UK
	Adequate remuneration	CJEU, ASJP
	Retirement age	CJEU Commission v Poland, Commission v Hungary
Optional requirements	Codifying judicial independence at highest level of legal framework	CoE Comm Min Rec, Venice Commission, European Commission, Magna Carta
	Objective and pre-established judicial selection rules	CoE Comm Min Rec, Venice Commission, European Commission, Magna Carta
	Merit-based appointments	CoE Comm Min Rec, Magna Carta
	Irremovability of judges	European Commission, CoE Comm Min Rec, Venice Commission, Magna Carta
	Involvement of judicial self-governance body in judicial selections/ half of the selection board composed of judges	European Commission, Magna Carta, Venice Commission, ENCJ; Southern European model (both judicial independence and managerial tasks) European Commission, Magna Carta
	Guaranteeing adequate resources, with emphasis on adequate salary	European Commission, Comm Min Rec, Magna Carta
	Training	European Commission

When compared to the conceptual framework presented in the previous chapter, the binding requirements established by the CJEU and ECtHR correspond to the core binding elements of external and personal independence of judges as well as the irremovability of judges.[99] It must be noted that the ECtHR has relied more extensively on the principle of irremovability of judges than the CJEU, albeit as a core guarantee irremovability is present in the case law of both courts. Furthermore, an interesting development constitutes the incipient balancing by the CJEU in the *AJSP* case of the adequate remuneration and related financial independence of judges, on the one hand, and the necessity to establish rational national budgets, on the other hand.

A similar correspondence can be established between the optional conceptual elements for the quality of judicial input and the content of the analysed non-binding European recommendations. In particular, we can refer here to merit-based appointments, suggestions for specific training systems (i.e. comprehensive training system as part of the selection process and specialised training for judges) and notably the suggestion regarding the involvement of councils for the judiciary in order to guarantee effective selection processes and adequate training. In this sense, these standards align with the new public management expectations of effectiveness and EU judicial specialisation and they provide a specific set of optional recommendations that are available to Member States.[100]

iii. Contribution to legitimacy and the rule of law

In what follows, we will focus on the specific input-quality requirement selected as the subject of the first case study – judicial selection conditions and mechanisms – and explain how the underlying values and related mechanisms contribute to the legitimacy of judicial input and upholding the rule of law in a substantive and procedural sense.

a) Clarifying the meaning of adequate professional qualifications of judges

Firstly, judicial selection mechanisms contribute to the legitimacy of judicial input and upholding the rule of law by clearly defining what constitutes in a legal order the adequate professional qualification of candidates applying for the judicial office. This function relates to the personal dimension of judicial independence[101] and it entails three conditions: (1) the existence of predetermined mechanisms; (2) the incorporation of classic rule of law and new public management values and (3) the realization of a normatively sound balance between the two set of values – that is, maintaining rule of law values as a main point of reference. The first condition of pre-established mechanisms[102] holds a rule of law guarantee for the predictability of judicial selection rules.[103] Two important means of fulfilling these conditions can be: (a) the existence of established conventions governing the

[99] *See* above Table 1 Theoretical typology of European rule of law requirements for judicial organisation, Mandatory – Input requirements.
[100] *See* above Table 1, Optional – input recommendations.
[101] *See* above, chapter,1, B, I.
[102] Seibert-Fohr (ed) (n 1), 1291-1302.
[103] *See* chapter 1, B, III.

selection of judges or (b) the explicit incorporation of judicial selection rules in the legal framework. For example, in the Netherlands judicial selections are conducted based on pre-established conventions, which form part of the normative framework.[104] At the same time, in France, Italy, Romania and Hungary conditions for occupying the judicial office are explicitly incorporated in the legal framework.[105]

The second condition relates to the necessity to incorporate in the content of judicial selection mechanisms both rule of law and contemporary values. As mentioned above, an important rule of law guarantee is the merit-based nature of judicial selections. [106] This condition requires the clarification of specific expectations concerning the (general) legal knowledge – with reference to the specific nature and length of legal education – the expected professional experience, and general judicial skills and abilities of candidates.[107] For example, notwithstanding differences in the specific system of selecting judges,[108] an important requirement in EU legal orders for occupying the judicial office is the successful completion of the legal education system.[109] In addition, some domestic legal orders explicitly require existing professional experience from candidates. For example, the Austrian legal order requires a mandatory court practice of nine months as a condition.[110] A similar condition is incorporated in the Hungarian legal order, which requires one year of legal professional experience (mainly as a clerk).[111] In other legal orders, obtaining adequate qualifications requires the completion of specialized training for judges. For example, in France, candidates for the judicial office need to complete a specialized training for judges.[112] In Italy, gaining admission to the judicial profession explicitly entails a mandatory initial training programme; without a prior professional experience requirement.[113] A similar condition is applicable in Romania and Bulgaria.[114] Whereas, the Netherlands employs a mixed system offering a specialized training programme for candidates with at least two years of relevant professional experience while also admitting legal professionals with approximately eight years of professional experience (with a shorter specialized training programme).[115] The specialized judicial training may also focus

[104] Roel de Lange, 'Judicial Independence in the Netherlands' in Seibert-Fohr (ed) (n 1). 241.
[105] Zoltán Fleck, 'Judicial Independence in Hungary' in ibid. 801-803. Antoine Garapon and Harold Epineuse, 'Judicial Independence in France' in ibid. 284. Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 847-850.
[106] *See* chapter 1,C.
[107] Graham Gee, 'The Persistent Politics of Judicial Selections' in Seibert-Fohr (ed) (n 1). 123-130.
[108] For an explanation of the bureaucratic and professional models of judiciaries see Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (CA Thomas ed, Oxford University Press 2002). 66-67. But *see* also Seibert-Fohr, 'Judicial Independence: The increasing normativity of an evolving transnational legal principle' in Seibert-Fohr (ed) (n 1), demonstrating the increasing formalization of conditions in established democracies irrespective of the model for judicial organisation.
[109] Graham Gee, 'The Persistent Politics of Judicial Selections' in Seibert-Fohr (ed) (n 1). 123-130.
[110] Georg Stawa, 'Recruitment Professional Evaluation and Career of Judges in Austria' in Giuseppe di Federico *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain* (2005). 5-7.
[111] Act CLXII of 2011 on the status and remuneration of judges, Art.4.
[112] Antoine Garapon and Harold Epineuse, 'Judicial Independence in France' in Seibert-Fohr (ed) (n 1). 281-284.
[113] Giuseppe di Federico, 'Judicial Independence in Italy' in ibid. 367-370.
[114] Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 847-850.
[115] Zoltan Fleck, 'Judicial Independence in Hungary' in ibid. 801-803. Roel de Lange, 'Judicial Independence in the Netherlands' in ibid. 240. Georg Stawa, 'Recruitment Professional Evaluation and Career of Judges in Austria' in Giuseppe di Federico *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain* (2005). 5-7.

on the general judicial decision-making skills. Consider the French legal system, where the initial training of candidates includes a component focusing on the role of judges and the judiciary in society.[116] For example, in Bulgaria and Romania, the training part of the judicial selection process includes an ethical training component.[117]

Relevant contemporary conditions for judicial selections can be the existence of specialized legal knowledge or managerial and communication skills expected of contemporary judges. With reference to specialized knowledge in the fields of EU and European human rights law, in several legal orders, such as the Netherlands, France, Italy, Hungary the condition of successfully completing general legal education implies this requirement.[118] Whereas, in other legal orders, where the quality of EU law qualifications appeared questionable, such as Romania and Bulgaria, EU law and European human rights subjects are included in the judicial training curriculum.[119] In the Hungarian legal order, specialized legal knowledge is implicit in the general legal studies and professional experience and for example, professional experience in European institutions is accepted.[120] With reference to contemporary managerial skills, for instance, the Hungarian legal framework explicitly refers to the necessity to assess the "communication, problem-solving and organizational skills of candidates for the judicial office."[121] In the Netherlands, the conditions include an assessment of the ability to "work with speed and diligence."[122] While in Germany, judicial selection processes consider *inter alia* "the ability of candidates to cope with the workload; ability to communicate; to deal with conflicts and to work in a team."[123] The fulfillment of this condition is important for meeting the contemporary expectations of overall quality of judicial input. Moreover, from a rule of law perspective, this condition is important for the clarity of the legal framework.[124]

The third condition refers to striking an adequate balance between the independent status and adequate professional qualifications of judges – that is maintaining the personal independence and merit-based selection of judges as a main point of reference. This condition is of central importance for achieving the legitimacy of judicial input because it secures both the personal independence and professionalism of judges.[125] An important means of fulfilling this condition can be the explicit incorporation of the principle of personal independence of judges in the legal framework. In addition, legislative preparatory documents introducing legal reforms can clearly indicate the fundamental nature of the merit-based selections and statutory independence of judges, respectively the role of contemporary considerations to enhance the classic rule of law foundations.

---

[116] Antoine Garapon and Harold Epineuse, 'Judicial Independence in France' in Seibert-Fohr (ed) (n 1). 284.
[117] Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 847-850.
[118] Roel de Lange, 'Judicial Independence in the Netherlands' in ibid. 241.
[119] Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 848.
[120] Zoltan Fleck, 'Judicial Independence in Hungary' in ibid. 801-803.
[121] Annex 5 to Act CLXII of 2011 on the status and remuneration of judges.
[122] Roel de Lange, 'Judicial Independence in the Netherlands' in Seibert-Fohr (ed) (n 1). 241.
[123] Anja Seibert-Fohr, 'Judicial Independence in Germany' in ibid. 468.
[124] *See* chapter 1,B,III.
[125] *See* chapter 1,B,II.

b) Guaranteeing independent and transparent judicial selection processes

A second function through which judicial selection mechanisms contribute to the quality of judicial input is by guaranteeing pre-established, objective and transparent selection processes. This function relates to the organizational independence of judges.[126] The first condition of pre-established procedural rules for selection processes[127] holds an important rule of law guarantee for the predictability of these processes.[128] In terms of content, pre-established rules must clarify two important aspects. One aspect is the existence of specific procedural steps of the selection process. Another aspect is the specific role of every participant in the selection process. Respectively, the checks and guarantees for the independence of the selection body, such as: the mixed-composition of the selection committee, independence of the members, existence of specific revision or review powers during the selection stage, and rule of law conventions.

Furthermore, the requirement of objectivity secures the rule of law value of merit-based selections. There are several means of fulfilling this condition. For example, the normative and legal rules may explicitly oblige the participants in the selection processes to rely on the pre-established legal conditions as part of the evaluation of candidates. Moreover, legal or normative rules can clarify the specific way of applying the selection criteria, i.e. by establishing the importance or establishing specific scores. An additional means of securing the objectivity of selection processes can be the empowerment of an independent body with the selection of judges. For example, in France, the judicial council is mainly responsible for the selection of candidates for the judicial office.[129] In a similar vein, in Italy and Romania, the judicial council has a main competence to organise and supervise judicial selections.[130] For example, the selection commission in the Netherlands is composed of judges and members from outside of the judiciary.[131]

Finally, the third condition of transparency of selection processes connects to the contemporary and liberal value of publicity and it enhances the legitimacy of judicial input by reinforcing the objectivity of selection processes.[132] An important means of fulfilling this condition is by publishing openings for judicial positions. For example, in the Netherlands, Hungary and Germany judicial vacancies at courts are published.[133] A further important means can be transparency regarding the assessment of the conditions for occupying the judicial office. For instance, in the Netherlands the specific interview method and part of the questions are also made public.[134]

---

[126] *See* chapter 1,B,I.
[127] Seibert-Fohr (ed) (n 1). 1291-1302.
[128] *See* chapter 1,B,III.
[129] Antoine Garapon and Harold Epineuse, 'Judicial Independence in France' in Seibert-Fohr (ed) (n 1). 284.
[130] Giuseppe di Federico, 'Judicial Independence in Italy' in ibid. 367-370. Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 850-853.
[131] Roel de Lange, 'Judicial Independence in the Netherlands' in Seibert-Fohr (ed) (n 1), 241.
[132] *See* chapter 1.
[133] Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 1). 803-805. Roel de Lange, 'Judicial Independence in the Netherlands' in ibid. 241. Anja Seibert-Fohr, 'Judicial Independence in Germany' in ibid. 466-471.
[134] Roel de Lange, 'Judicial Independence in the Netherlands' in Seibert-Fohr (ed) (n 1), 241.

II. Throughput standards

European standards for the quality of judicial throughput include: conditions for swift, objective and transparent organizational processes, enabling an independent decision-making process salient for the functional (decision-making) independence of judges.[135]

i. Legally binding requirements: courts established by law; balancing decision-making independence and organizational efficiency

First, as a foundation for guaranteeing the quality of judicial throughput, the case law by the CJEU and the ECtHR refers to the classic rule of law notion of *courts established by law*. The CJEU explicitly mentions the rule of law requirement of courts being established by law, referring to codification of competences. This reference can be found in the CJEU's definition of national legal authorities that constitute "courts"; mandated to address questions to EU courts. Other requirements are: possessing compulsory and permanent jurisdiction, conducting *inter partes* proceedings, applying legal rules, as well as independence and impartiality.[136]

In a similar vein, the rule of law requirement of "courts established by law" is an explicit requirement of Article 6 ECHR based on which it is determined whether individuals have been granted a right to a fair trial. According to the European Court of Human Rights, this condition is aimed at the elimination of external pressure from the Executive by relying on a system codified in a statutory framework.[137] However, the requirement of courts established by law does not only entail the exclusion of executive or legislative influence on the competence of courts. This guarantee also prevents the Judiciary from having full discretion to decide in organizational matters. This condition is applicable even in circumstances when the underlying principles and rules are codified. Nevertheless, this does not mean that judges do not have room to interpret the relevant national legislation.[138]

In addition, both European courts emphasize the importance of the rule of law guarantee of *functional independence* of judges.[139] According to the conceptualization of the CJEU, decision-making independence has two main aspects. The first is the external aspect, which "presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgement of its members as regards proceedings before them."[140] The second is the internal aspect, which is meant to serve a level playing

---

[135] *See* chapter 1,B,II.

[136] Case C-54/96 Dorsch Consult [1997] ECR I-4961, para. 23; Case C-53/03 Syfait and Others [2005] ECR I-4609, para.29; Case C-196/09 Miles and Others [2011] ECR I-5105, para.37. Case 14/86 Pretore di Salo v Persons Unknown [1987] ECR 2545, para.7. Case 338/85 Pardini [1988] ECR 2041, para. 9. Case C-17/00 De Coster [2001] ECR I-9445, para. 17.

[137] Zand v. Austria, App no 7360/76, Commission Report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70, 80.

[138] Coëme and Others v. Belgium, App nos 32492/96, 32547/96, 33209/96, para. 98.

[139] *See* chapter 1,B,I.

[140] Case C-103/97 Kollensperger and Atzwanger [1999] ECR I-551, para. 21. Case C-407/98 Abrahamson and Anderson [2000] ECR I-5539, para. 36. Case C-503/15 Margarit Panicello, para. 37. Case C-64/16 ASJP, para, 44. Case C-216/18 PPU, para. 63,64.

field for the parties to the litigation as well as the impartiality of judges.[141] This condition requires "objectivity and the absence of any interest in the outcome of the case, apart from the strict application of the rule of law."[142]

In the case law of the ECtHR, functional independence is included under the condition of "existence against outside pressure." This is one of the conditions used in the determination of the independence of a body in accordance with Article 6 ECHR.[143] In defining this notion, on the one hand, the ECtHR focuses on the interaction between judges and State public powers. In this sense, the ECtHR explicitly clarified that neither the Executive, nor the Legislative branch is allowed to influence judicial decision-making.[144] On the other hand, when defining functional independence, the ECtHR focuses on the internal aspect of this guarantee. Namely, the ECtHR addressed the potential interference with the decision-making independence of judges originating from *within* the judiciary. In this sense the Court underlined that "internal judicial independence requires that judges be free from directives or pressures from fellow judges or those who have administrative responsibilities in a court, such as, for example, the president of the court."[145] The Court not only emphasized the importance of internal independence, but also specifically stated that the absence of sufficient guarantees against internal pressures might be considered a breach of the right of individuals to an independent judge.[146]

In addition to the above-mentioned core rule of law guarantees, Article 6 ECHR and the subsequent case law of the European Court of Human Rights also explicitly emphasize the contemporary value of delivering judgements within a *reasonable time*. The ECtHR developed several aspects that must be taken into account when assessing the timeliness of judicial proceedings, such as: the complexity of the case, the conduct of the applicant, and the conduct of domestic judicial authorities.[147] Overall, these conditions yield a minimal and flexible, case-by-case approach of the Court when deciding on the timeliness of judicial proceedings.[148] However, through the last condition (conduct of domestic judicial authorities) the ECtHR set an important requirement for domestic judicial functioning when the Court clarified that it expects "a proactive attitude from the judge."[149]

Finally, the recent case law of the ECtHR engages more directly with the internal organization and functioning, or throughput, of domestic courts. For instance, in the case of *DMD v Slovakia* the ECtHR explicitly discussed the allocation of cases at courts, with particular reference to the normative balance that needs to be struck between the *efficient*

---

[141] Case C506/04 Wilson v Ordre des avocats du bureau de Luxemburg, [2006] ECR I8613, para 52. Case C-216/18 PPU, para, 65,66.
[142] Case C-407/98 Abrahamsson and Anderson v Fogelqvist [2000] ECR I-5539 para. 32.
[143] Campbell and Fell v UK, App no. 7819/77, 7878/77 (ECtHR, 28 June 1984) para. 78.
[144] Piersack v Belgium, App no. 8692/79 (ECtHR, 1 October 1982) para. 27. Stran Greek Refineries and Stratis Andreadis v Greece, Appl. No. 301-13, 9 December 1994, para. 49.
[145] Agrokompleks v Ukraine, App no 23465/03 (ECtHR, 6 October 2011) para. 137. Parlov-Tkalcic v Croatia, App no 24810/06, 22 December 2009, para. 86. Moiseyev v Russia, para. 182.
[146] Parlov-Tkalcic v Croatia, App no 24810/06 (ECtHR, 22 December 2009) para. 86. Agrokompleks v Ukraine, App no 23465/03 (ECtHR, 6 October 2011) para. 137. Moiseyev v Russia, para. 184. Daktaras v Lithuania, App.No. 42095/98, paras. 36,38.
[147] The case law is assessed in more detail in Martin Kuijer, 'The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings' (2013) 13 Human Rights Law Review 777. 781-783.
[148] *See* ibid. 782.
[149] Cuscani v UK, App no 32771/96 (ECtHR, 24 September 2002) para. 39.

allocation of cases as an organizational aim and the *independent decision-making* of individual judges. According to the Court, court presidents are allowed to reallocate cases within a court. However, this competence should be used in a transparent manner and cannot result in giving instructions to judges, and consequently influencing the independent decision-making of individual judges.[150] In the particular circumstances of the *DMD v Slovakia* case, it was established that the court president – fulfilling a managerial position, acting as an agent of the Ministry of Justice – could not reallocate a case without giving proper reasons, and, at the same time, take part in the decision-making process of the same case.[151] Specifically, the ECtHR calls for "particular clarity" of the rules based on which cases are assigned; "clear safeguards" for guaranteeing transparency and objectivity in the allocation of cases and the necessity to avoid "any form of arbitrariness" in the allocation of cases to judges.[152]

In sum, on the one hand, we can see more specific rules concerning the allocation of cases in the recent case law by the ECtHR. On the other hand, the ECtHR expressed in a number of cases that these rules concerning the allocation of cases remain minimum in nature. For instance, in a case concerning Germany, the Court explicitly highlighted that in national legal orders a higher level of protection may be realised than the one expected by the ECHR.[153] In this sense, the developing case law of the ECtHR appears to be committed to establishing core requirements.

At the same time it must be observed that in comparison with the CEJU case law, the case law by the ECtHR appeared more detailed by: (1) establishing requirements for the timeliness of judicial proceedings and (2) by establishing a core balance between efficient court management and independent judicial decision-making, having the functional independence of judges as a main anchor. However, despite these differences, all legally binding requirements maintain rule of law values as a main point of reference.[154] In the following section we will consider how non-binding European recommendations relate to these core obligations.

ii. Legally non-binding recommendations: specific case allocation methods; internal independence of judges; time- and quality management, role of judicial councils

Non-binding European recommendations for the quality of judicial throughput can be found in EU accession instruments (Composite Papers, specific recommendations through the country evaluation reports) and the Cooperation and Verification Mechanism. Further relevant recommendations are made by the Committee of Ministers of Council of

[150] Agrokompleks v Ukraine, App no 23465/03 (ECtHR, 6 October 2011) paras. 137, 138,139.
[151] DMD Group, A.S. v Slovakia, App no 19334/03 (ECtHR, 5 October 2010) paras. 65-70.
[152] ibid. para. 66 and also para. 70. *See* also Daktaras v Lithuania, App no 42095/98, 15 July 2010, paras. 35-38. Bochan v Ukraine, App no 7577/02, 3 May 2007, para. 74.
[153] Lindner v Germany, App no 32813/96 (ECtHR, 9 March 1999). *See* in particular Elaine Mak, 'Annotatie: EHRM 5 Oktober 2010, Nr. 19334/03, DMD Group, A.s.t. Slowakije' [2011] European Human Rights Cases 23. 23-32. part 3.
[154] cf Héctor Fix Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing 2003). 91.

Europe Member States, the Venice Commission, the Committee for the Efficiency of Justice, and the Consultative Council of European Judges.

a) EU recommendations

During the accession process the European Commission gave detailed recommendations to CEE states in terms of enhancing the quality of judicial throughput. The main premises for the European Commission's pre-accession recommendations were the significant backlog observed in CEE courts as well as the heavy workload of judges and lengthy judicial proceedings.[155] For instance, in 2002 the European Commission noted that the average workload of a judge at tribunals and courts of appeal in Romania was 550 cases per year. The Commission considered this an example of "heavy workload."[156] Similarly, the 2002 Bulgarian report noted that civil cases "could routinely take 5-8 years" and labour disputes could suffer 3-4 years delay at the time.[157]

In order to overcome these difficulties, to some CEE states, the European Commission recommended *re-structuring their court system*.[158] For instance, the European Commission recommended to Bulgaria and Hungary the introduction of an additional level of courts of appeal.[159] Concerning the Czech Republic, the European Commission discussed the establishment of administrative courts.[160] But the European Commission also made structural suggestions with respect to the establishment or revision of competences of highest courts. For example, the evaluation reports by the European Commission discussed the establishment of a High Administrative Court in Bulgaria and the revision of competences of the Constitutional Court of Poland.[161]

Another main category of throughput quality suggestions by the European Commission concerned court management. In particular, the European Commission discussed in detail in several monitoring reports the *allocation of cases at courts*.[162] For example, the European Commission considered a positive development when the *transparency* related to case assignment was increased in Slovakia and Hungary.[163] But, for instance, to Bulgaria and Romania, the European Commission specifically suggested the introduction of *computerized systems for case allocation*. Furthermore, these computer

[155] On balancing the workload of courts *see* e.g. 2001 Romania Report 21, pointing out that the workload of judges remained "heavy". 2002 Romania Report 26, pointing out that "the workload of courts of appeal and tribunals remained heavy and has negative consequences for the quality of judgments." 2003 Romania Report 19. The heavy workload of courts is connected in the reports to the lack of qualified human resources in Romania. 1999 Hungary Report 12.

[156] On balancing the workload of courts *see* e.g. 2001 Romania Report 21, pointing out that the workload of judges remained "heavy". 2002 Romania Report 26, pointing out that "the workload of courts of appeal and tribunals remained heavy and has negative consequences for the quality of judgments." 2003 Romania Report 19. The heavy workload of courts is connected in the reports to the lack of qualified human resources in Romania. 1999 Hungary Report 12 (commenting that criminal cases at the Supreme Court take more than one year).

[157] 2002 Bulgaria Report, 24. *See* also 2002 Latvia Report 23. 2002 Lithuania Report 23.

[158] E.g. Composite Paper (2002), p. 51, 55.

[159] European Commission, Monitoring Report Hungary, 2002, 24. 1998 Bulgaria Report, 8.

[160] 1998 Czech Report, 9.

[161] Kochenov (n 8). 249-252. E.g. 1998 Bulgarian Report 8. 2002 Czech Republic Report 23.

[162] *See* in general ibid. 287-296. E.g. 1998 Polish Report 10. 1998 Bulgarian Report 8.

[163] E.g. 2002 Hungary Report, 24. 2002 Slovak Report, 24. *See* Kochenov (n 4) 296, footnote 449.

systems were suggested to operate based on *random case assignment methods*.[164] As an additional organizational suggestion, the European Commission recommended for example to Bulgaria, Estonia, Poland and Romania to appoint court administrators, overseeing the adequate management of courts.[165]

Finally, the European Commission offered suggestions for enhancing the *timeliness* of judicial proceedings. These suggestions specifically concerned the improvement of the legal procedural timeframes for litigations. For instance, to Bulgaria and Romania these requirements materialized in a lengthy and complex revision process of the procedural codes.[166]

Overall, it can be observed that the European Commission approached the quality of judicial throughput by explicitly emphasizing contemporary values related to the functioning of courts and by suggesting or commenting on specific legal mechanisms targeting these values. In the next section, we will consider the values and approach adopted by Council of Europe instruments in addressing the quality of judicial throughput.

b) Council of Europe recommendations

As a rule of law foundation for the quality of judicial throughput, several Council of Europe recommendations highlight the importance of *functional independence* of judges. For instance, the Recommendation of the Committee of Ministers defines decision-making independence as "unfettered freedom for judges to decide cases impartially, in accordance with the law and their interpretation of the facts and judicial selections."[167] In their conceptualization of functional independence of judges, Council of Europe instruments also draw attention to possible threats for fulfilling the judicial function. These instruments acknowledge that threats might emerge from *outside as well as inside the Judiciary*. For example, the Recommendation of the Committee of Ministers' specifies that judges should be "independent and impartial and able to act without any restrictions, improper influence, pressure, threat of interference, direct or indirect from any authority, including authorities internal to the judiciary."[168] Of importance for internal independence, the Recommendation also specifically emphasizes that, "[h]ierarchical judicial organization should not undermine individual independence."[169] In addition, in its Report on judicial independence

[164] 2001 Romania Report 21. 2004 Romania Report 21. 2005 Romania Report 11, acknowledging the implementation of computerized case allocation methods overseen by 'leading boards within courts' as a positive development.

[165] On introducing court administrators *see* e.g. 2002 Romania Report 26 (pointing out that there was limited progress in improving court management). 2002 Bulgaria Report, 24. *See* also 2002 Estonia Report, 24. Poland 2002 Report, 25.

[166] E.g. 2005 Romania Report 12. 2010 July Report Romania 4. 2011 Romania Report 3 (concluding that "celerity, quality and consistency of the judicial process" could be improved by the revision of procedural codes and facilitated by a newly elected Superior Council for Magistracy, which could act as an effective intermediate between judges and political actors). 2012 July Romania Report 22 suggesting introducing "across the court system clear best practice guidelines sentencing, case management and the consideration of evidence in criminal trials." But also Latvia 2002 Report (expediting court proceedings through the criminal procedural code) 22. Poland 2002 Report, 25.

[167] Recommendation CM/Rec(2010)12. para. 5.

[168] Recommendation CM/Rec(2010)12, para. 22

[169] id.

the Venice Commission highlighted that a specific legal guarantee for internal judicial independence is the constitutional principle of *judges being subject only to the law*.[170]

Complementing the above-mentioned legal guarantees, Council of Europe instruments also call for factual guarantees securing the internal independence of judges. For example, the Recommendation of the Committee of Ministers' and the Magna Carta specifically emphasize the importance of freedom of judges both to form and to become members of national or international *professional associations*. These instruments explain that the objective of judicial associations is to defend "the mission of the judiciary in the society" [171] or, put differently, to safeguard judicial independence and to protect the professional interest of judges and the rule of law.[172]

As another main group of guarantees for the quality of judicial throughput, Council of Europe recommendations dedicate special attention to the *allocation of cases.* Relevant instruments emphasize that case allocation should follow *objective* and *pre-established* criteria and safeguard the right to an *independent and impartial* judge. These instruments also clarify that the allocation of cases should not be influenced by the wishes of a party to a case or by any person with an interest in the outcome of a case.[173]

As an additional clarification, the Venice Commission specifically addressed the connection between the *allocation of cases* and the rule of law constitutional principle of the '*right to a lawful judge*'.[174] The Venice Commission recalls that the principle of a lawful judge has two implications for case allocation. One implication concerns the establishment the competence of courts by law. The other implication is to guarantee the independence of individual judges. With respect to this latter aspect, the Venice Commission draws attention to the possibility that in legal orders where court presidents have the competence to allocate cases, these might misuse this power and influence the independent decision-making of judges. Specifically, the Venice Commission underlines the possibility of "putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases."[175] The Venice Commission also warns Member States about the possibility of assigning politically sensitive cases to certain judges and to avoid allocating them to others.[176]

Finally, *timeliness* of judicial proceeding and the broader goal of *(organizational) efficiency* appear important contemporary considerations in Council of Europe instruments. For example, the Recommendation of the Committee of Ministers has a special chapter

---

[170] *See* Venice Commission, 'Report on the Independence of the Judicial System, Part I: The Independence of Judges' CDL-AD(2010)004, http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx (accessed 16.09.2019), para. 68-72.
[171] Magna Carta, para. 12.
[172] Recommendation CM/Rec(2010)12, para. 25.
[173] Recommendation CM/Rec(2010)12. para. 22-25. Venice Commission, 'Report on the Independence of the Judicial System, Part I: The Independence of Judges' CDL-AD(2010)004, http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx (accessed 16.09.2019), para.80. CCJE, Magna Carta, para. 10. Magna Carta recommendations were compiled based on e.g. CCJE Opinion no.2 (2002) on the Funding and Management of Courts, Opinion no. 3 (2002) on ethics and liability of judges. Opinion no. 6 (2004) on Fair Trial within a Reasonable Time. Opinion no. 10 (2007) on Councils for the Judiciary in the Service of Society.
[174] ibid. para. 73-81.
[175] ibid. para.79
[176] ibid.

dedicated to the "independence, efficiency, and resources".[177] This instrument defines efficiency as the "delivery of quality decision within a *reasonable time*, following a fair consideration of issues" and explicitly highlights the need to guarantee these values.[178] The Recommendation specifically places the responsibility to achieve these values with domestic authorities in charge of judicial administration. The Venice Commission also signals commitment to the values of timeliness and organizational efficiency, but maintains a more flexible approach. It recommends the introduction of adequate organizational measures in order to ensure a "*reasonable*" time of judicial proceedings.[179]

Moreover, in the Council of Europe framework there is also more detailed technical guidance available. For example, the CEPEJ through its SATURN guidelines compiles the state-of-art technical standards in Europe concerning *time management.*[180] For instance, as specific means, the guidelines discuss the establishment and oversight of judicial timeframes and their communication to court users.[181] Furthermore, the CEPEJ also advises *court administrators* and the *central administration of the judiciary* to be involved with the collection and assessment of available data on time management.[182] Overall, the above-discussed European standards for the quality of judicial throughput can be summarized in the comparative table below.

[177] Recommendation CM/Rec(2010)12, paras. 30-43.
[178] Recommendation CM/Rec(2010)12, para. 31.
[179] Venice Commission CDL-AD(2006)036rev, 'Remedies to Excessive Length of Proceedings', http://www.venice.coe.int/webforms/documents/CDL-AD(2006)036rev.aspx (accessed 16.09.2019) 36-45. The Venice Commission specifically recommends " introducing adequate organisational measures ensures the 'reasonableness' of judicial proceedings".
[180] CEPEJ (2014)16, Revised Saturn Guidelines for Judicial Time Management CEPEJ, 12 December 2014, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2008)8Rev&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6 (accessed 16.09.2019). *See* also, CEPEJ Saturn Guidelines for Judicial Time Management, Comments and Implementation Examples (2012), http://www.coe.int/t/dghl/cooperation/cepej/Delais/Saturn_15_Guidelines_Plus_IRSIG_draft_121214_en.pdf (accessed 16.09.2019).
[181] CEPEJ (2014), A. Setting and overseeing timeframes and communicating them to users.
[182] ibid. C,1.

Table 3 European throughput quality requirements and recommendations

Legal nature / Content	Requirements	Sources
Legally binding requirements	Courts established by law	ECtHR, Zand v Austria CJEU, PPU LM, ASJP
	Functional independence	CJEU, Wilson, PPU LM, ASJP ECtHR, Agrokompleks v Ukraine
	Objective, transparent, pre-established criteria for case allocation	ECtHR, DMD v Slovakia
	No pressure from inside or outside of the judiciary	ECtHR, DMD v Slovakia; ECtHR, Agrokompleks v Ukraine CJEU, Wilson, PPU, ASJP
Legally non-binding recommendations	No pressure from within the judicial hierarchy	Comm Min Rec, Venice Commission, Magna Carta
	Objective, pre-established and transparent criteria for organizational measures (especially case allocation)	Comm Min Rec, Magna Carta, ENCJ, CEPEJ, European Commission
	Computerized case allocation methods	European Commission, CEPEJ
	Actively considering timeliness, collecting data	CEPEJ
	Making court organization transparent	CEPEJ
	Freedom to join judicial associations	Magna Carta

In comparison with the conceptual elements of guaranteeing the quality of judicial throughput identified in the previous chapter, there is a correspondence between the legally binding requirements by the CJEU and the ECtHR and the core conceptual guarantees of courts established by law and functional independence of judges – including the requirements of lack of pressure both external and internal to the judiciary.[183] In contrast, non-binding European recommendations only partially correspond with the conceptual elements identified in chapter 1.[184] This observation can be further qualified. First, despite the partial overlap, it must be noted that non-binding recommendations maintain the legally binding core (functional independence, courts established by law) as their basis. In this sense, they address the functional and organizational dimensions of judicial independence. As an additional similarity, recommendations further expand upon the meaning of core legal requirements. For instance, non-binding recommendations offer a more detailed overview of mechanisms for guaranteeing the timeliness of judicial proceedings, as well as case allocation and court administration.

Second, in terms of content it is possible to note a significant difference between the recommendations by the European Commission and Council of Europe consultative bodies. EU recommendations are of a predominantly technical nature and contain solely implicit reference to rule of law values.[185] For instance, the European Commission discussed and imposed the structure of the court system in CEE states. However, this can be considered only an implicit reference to the rule of law requirement of courts established by law.[186] In a similar vein, the European Commission encouraged more transparency in the allocation of cases and suggested the adoption of computerized case allocation systems. However, once again, these are only implicit references to the functional independence of judges. In contrast, Council of Europe recommendations place explicit emphasis on the internal independence of judges and the constitutional principle of a lawful judge. In addition, the Venice Commission explains in detail the connection between specific case allocation mechanisms and their foundational rule of law values, specifically pointing to tensions for the functional dimension of judicial independence.

This discrepancy is remarkable because as a result the suggestions by the European Commission failed to explain the importance of core legal values guiding the quality of judicial throughput for upholding the rule of law. If we apply here the core understanding of the rule of law as reducing arbitrariness in domestic judicial functioning, the European Commission's approach appears problematic from the perspectives of (1) establishing an adequate balance between core rule of law and contemporary new public management values; (2) and guaranteeing that legal mechanisms have effective controls against the arbitrary exercise of power.[187]

---

[183] *See* above, Table 1, Theoretical typology of European judicial organisation requirements, Mandatory – Throughput requirements.
[184] *See* above Table 1, Optional – Throughput recommendations.
[185] cf Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' [2016] Hague Journal on the Rule of Law. 40.
[186] cf Kochenov (n 8). 250.
[187] *See* chapter 1,B,III.

iii. Contribution to legitimacy and the rule of law

This section will outline a substantive and a procedural function through which the allocation of cases contribute to the legitimacy of judicial throughput and the rule of law. Moreover, the explanation will clarify possible risks posed by case allocation values and mechanisms for the functional independence of judges.

a) Enabling the independent and timely allocation of cases at the level of individual courts

Firstly, case allocation mechanisms contribute to the legitimacy of judicial throughput by incorporating, and balancing in their content, the values of lawful, independent, timely and balanced allocation of cases at the level of courts.[188] This function relates to the functional dimension of judicial independence[189] and its fulfilment entails three important conditions: (1) the existence of predetermined mechanisms; (2) the incorporation of classic rule of law and new public management values and (3) realizing a normatively sound balance between the two sets of values. The first condition of pre-established mechanisms[190] holds an important rule of law guarantee of predictability of case allocation rules.[191] As two important means of fulfilling this condition, we can mention: (a) the reliance on established rule of law conventions and (b) the explicit incorporation of legal mechanisms for the allocation of cases in the legal framework. For instance, in the Netherlands there are no codified case allocation rules. However, court presidents assign cases based on pre-established and long-standing rule of law conventions.[192] Alternatively, for example, the French, Hungarian, Romanian, Bulgarian and Italian legal orders explicitly incorporate case allocation principles and rules.[193]

The second condition relates to the necessity to incorporate in the content of case allocation mechanisms both rule of law and contemporary values. The fulfilment of this condition is important for meeting the contemporary expectations of overall quality of judicial processes.[194] Moreover, from a rule of law perspective, this condition is important for the clarity of the legal or normative framework.[195] Salient rule of law values are the principle of a lawful judge, courts established by law and the functional independence of judges. Important means for guaranteeing this condition can be the incorporation of these values in the constitutional and legal framework. For example, the German, Italian and Hungarian legal orders explicitly guarantee the principle of a lawful judge in the

[188] Fierro (n 144). 139-174. Marco Fabri and Philip M Langbroek, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries' (2007) 1 European Journal of Legal Studies. 6. 6-10; 19-23.
[189] *See* chapter 1,B,I,i.
[190] Seibert-Fohr (ed) (n 1). 1291-1302.
[191] *See* chapter 1,B,III.
[192] For critical discussions *see* e.g. Roel de Lange, 'Judicial Independence in the Netherlands' in Seibert-Fohr (n 45). 252, 246-254. Langbroek and Fabri (n 179). 105-132. Elaine Mak, 'Annotatie: EHRM 5 Oktober 2010, Nr. 19334/03, DMD Group, A.s.t. Slowakije' [2011] European Human Rights Cases 23.
[193] Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 1). 812, 813.
[194] *See* chapter 1,B,II.
[195] *See* chapter 1,B,III.

constitutional and legal frame of reference.[196] In a similar vein, the Bulgarian and Romanian legal orders explicitly guarantee the principle of courts established by law through the written Constitution and legal acts.[197] Alternatively, values of both nature can form the basis of established conventions for the allocation of cases.

Related new public management considerations are the values of timeliness, transparency and the guarantee of balanced workload among judges. The means of incorporating these new public management values are similar to those of rule of law values. One alternative is explicit incorporation in the constitutional or legal frame of reference. For instance, with respect to the values of timeliness and transparency an important place for incorporation can be the right to a fair trial. In this sense, we can mention the Bulgarian, Hungarian, Romanian, and Slovakian legal orders as examples of incorporating the right to a fair trial in the Constitution.[198] Alternatively, these values can form part of administrative conventions. For instance, Germany and the Netherlands operate with this informal value.[199]

The third condition entails realizing a normatively sound balance between the values of independence and timeliness by maintaining the rule of law principle of a lawful judge as a main point of reference.[200] This condition is of central importance for achieving the legitimacy of judicial throughput.[201] An important means for achieving this goal can be the hierarchically superior positioning of rule of law values in the constitutional, and legal or normative framework. For example, the constitutional and legal frame of reference can explicitly acknowledge the rule of law principles, such as the lawful judge and the functional independence of judges as fundamental values governing the assignment of cases. Further important loci for signalling the primacy of rule of law are: (a) legislative preparatory documents or (b) decisions of the Constitutional Court in which the meaning of constitutional guarantees is interpreted.[202]

Ultimately, it is not sufficient that case allocation mechanisms adequately incorporate the above-discussed values in their content. It is also necessary to realize these values through the practice of allocating cases at courts. The second legitimacy-enhancing function explains this aspect.

b) Distribution of case allocation powers within the multi-level court management system

A second function through which case allocation mechanisms contribute to the legitimacy of judicial throughput is by guaranteeing the adequate distribution of case allocation powers within the multi-level court management system. This function relates to the consolidation of the organizational dimension of judicial independence[203] and it entails

---

[196] Langbroek and Fabri (n 179). *See* also Anja Seibert-Fohr, 'Judicial Independence in Germany' in Seibert-Fohr (ed) (n 1). 481-483. Zoltán Fleck, 'Judicial Independence in Hungary' in ibid. 812.
[197] Smilov (n 17).
[198] Piana (n 8). Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 1). 812.
[199] Langbroek and Fabri (n 179). *See* also Anja Seibert-Fohr, 'Judicial Independence in Germany' in Seibert-Fohr (ed) (n 1). 481-483.
[200] cf. Fierro (n 144). 91. *See* chapter 1.
[201] *See* chapter 1,B,II.
[202] *See* chapter 3,B,II.
[203] Fierro (n 144). *See* chapter 1.

two main conditions of: (a) the constrained autonomy of courts and (b) the flexibility of the case allocation system by allocating central managerial powers.

Firstly, granting certain degree of autonomy to courts in the allocation of cases can be important for guaranteeing that the relevant values for the allocation of cases effectively materialize in practice at the level individual courts. The importance of court autonomy consists of the adequate position of courts to address local case allocation concerns, such as the number and complexity of incoming cases at a given court, as well as the number, specialization and workload of judges. One important means of realizing the autonomy of courts can be the empowerment of court presidents with specific case allocation powers. The nature and extent of the powers may depend on the main approach employed in a legal order for the allocation of cases (i.e. system established by court presidents or computerized case allocation methods).[204] In case of the former, court presidents can have the power to establish the specific case allocation system – comprising several methods or conditions – at a court. For example, we can identify such system in the Netherlands, Italy Germany and France.[205] Alternatively, if a computerized case allocation system is employed, court presidents, court administrative boards or clerks appointed by presidents can have the power to establish judicial panels to which cases are assigned, document the specialization of individual judges and establish a specific order for the allocation of cases (i.e. date of registration at the court). Furthermore, court presidents can also control the functioning of the case allocation system. For instance, Romania, Bulgaria and Denmark adopt such a practice.[206]

However, as mentioned in the previous section, case allocation powers may not only enhance, but also significantly endanger the legitimacy of judicial throughput and the realization of the rule of law ideal. The arbitrary exercise of de-centralized powers is of central importance here, and it requires the existence of specific safeguards.[207] As important examples, we can mention the collegial nature of administrative decisions (i.e. court administrative boards), control mechanisms by the central administrative level and the main role of court presidents to guarantee judicial independence through administrative processes.

Secondly, the functional allocation of cases entails the allocation of systemic overview powers to the central managerial level.[208] For example, central oversight by the Ministry of Justice or judicial councils of the experiences with the allocation of cases at courts – and the related technical possibilities, i.e. data collection, computerized case allocation methods – can effectively assess whether the practice of case allocation fulfils the relevant legal requirements. Furthermore, central oversight can be effective in suggesting modifications if the case allocation mechanisms systematically do not meet in practice the fundamental legal goals. However, it is of primary importance from a legitimacy perspective that central oversight maintains the rule of law consideration of a

[204] Langbroek and Fabri (n 179).
[205] Antoine Garapon and Harold Epineuse, 'Judicial Independence in France' in Seibert-Fohr (ed) (n 1). 288. Giuseppe Di Federico, 'Judicial Independence in Italy' in ibid. 378,379. Anja Seibert-Fohr, 'Judicial Independence in Germany' in ibid. 481-483.
[206] Langbroek and Fabri (n 179). European Commission, COM(2016)40 final, 'Report on Bulgaria under the Co-operation and Verification Mechanism', 4,11. Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 1). 862.
[207] Kosař (n 8). 390-398. Piana (n 8). Chapter 1.
[208] Fierro (n 144). 221.

lawful judge as a main anchor. From the procedural rule of law perspective of imposing checks or constraints on public powers, it remains important to have specific safeguards against the abuse of central powers (i.e. independence of the central body, collegial nature of decisions, obligation to give reasons, review mechanisms) or constraining mechanisms in place (i.e. mechanism for revising decisions). Finally, allowing judges to share their experiences regarding case allocation mechanisms could be particularly important to guarantee the classic rule of law principle of functional and internal independence of judges. For instance, this can be a primary means to signal if case allocation mechanisms place too much emphasis on the timeliness of judicial proceedings.[209]

III. Output standards

Quality of judicial output envisions standards for the content and delivery of judicial decisions as well as the communication of the judiciary with its surroundings, as the two main "products" of judicial organization and judging. In particular, for judiciaries functioning in contemporary societies, quality of judicial output refers to the conditions for delivering correct, legitimate and timely decisions and the transparency of the communication of the judicial branch; connected to factual independence of judges and constitutional independence of the judiciary.[210]

i. Legally binding requirements: factual independence, openness, obligation to give reasons; communication of judiciary with surroundings

Firstly, as a rule of law foundation of the quality of judicial output, the case law of the CJEU and the European Court of Human Rights refer to the *factual independence* of judges – expecting of judges to appear independent to the parties of a specific trial. The CJEU implicitly refers to factual independence in its formulation of the 'internal aspect' of judicial independence. It does so by articulating that this condition is important for guaranteeing a *"level playing field for parties to the litigation" as well as the impartiality of judges.* The CJEU has explained that internal independence under this conceptualization "seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings."[211]

In order to guarantee the internal independence of judges the CJEU makes reference to the guarantees for the personal independence of judges, concerning the composition, appointment, and length of service of judges – explained under input requirements.[212] However, of relevance for the quality of judicial output, the CJEU also highlights the importance of these measures for guaranteeing the "*appearance of independence"* of judges and the judiciary in general. It does so by explicitly indicating that these guarantees are necessary "in order to dispel any reasonable doubts in the minds of

[209] *See* chapter 1,B,III.
[210] *See* chapter 1,B,II.
[211] Case C506/04 Wilson v Ordre des avocats du bureau de Luxemburg, [2006] ECR I8613, para. 52. Case C517/09 RTL Belgium [2010] ECR I14093, para. 40. Case C-216/18 PPU LM, para. 65.
[212] E.g. Case C-216/18 PPU LM, para.66. *See* above chapter 2,B,I,i.

individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."[213] To these clarifications concerning output independence, the *LM* judgement also added that judicial disciplinary measures could not be used as a "system of political control of the content of judicial decisions."[214]

The European Court of Human Rights formulated the condition of factual independence under the explicit requirement of *"appearance of independence".* This condition is part of the Court's assessment of whether a decision-making body can be considered independent for the purposes of the right to a fair trial according to Article 6 ECHR.[215] For instance, the Court found a violation of this condition when judges returned to the bench after having served as civil servants or fulfilled judicial functions at military courts.[216] However, this is not a self-standing condition. The ECtHR considers the appearance of independence jointly with the other objective conditions of the overarching requirement of courts "established by law" (manner and length of appointment, existence of guarantees against outside pressure).[217] However, it remains a specific reference to the factual dimension of judicial independence, of importance for the quality of judicial output.[218]

As a second rule of law guarantee of the quality of judicial output, the ECtHR sets the condition of '*giving reasons*'. This is not an explicit condition of the right to a fair trial formulated in the Convention. Nevertheless, this guarantee appears as part of the Courts' Article 6 ECHR case law. In particular, the Court emphasized that complying with the obligation to give reasons is necessary for guaranteeing the proper administration of justice and ultimately the right to a fair trial.[219] The ECtHR's assessment of whether sufficiently clear reasons were given in individual judicial decisions remains a flexible one, depending on the circumstances of the specific case before the Court. For example, the Court's assessment might depend on factors such as: the nature of the decision; the diversity of the submissions that a litigant may bring before the courts; or the differences existing among Member States concerning statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments.[220] Overall, while the Court acknowledges that domestic courts have an obligation to give reasons under Article 6, the ECtHR does not require domestic courts to give detailed answers for every argument. As such, this output quality requirement of the ECtHR accommodates the differences between legal systems when organising the functioning of courts.[221] A similar importance of the guarantee of giving reasons for the EU approach is visible in Art. 36 of the Statute of the CJEU requiring

[213] Case C-216/18 PPU LM, para. 66.
[214] ibid. para. 67.
[215] ECtHR, Delcourt v Belgium, Appl. No. 11, 17 January 1970, para. 31.
[216] Sramek v Austria, Series A, Appl. No. 84, 22 October 1984, para. 42. Belilos v Switzerland, Series A, No. 132, 29 April 1988, para. 67.
[217] *See* Müller (n 8), 470,471. Martin Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Wolf Legal 2004), 289.
[218] *See* chapter 1.
[219] Janneke Gerards, 'Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning' 14 Human Rights Law Review 148. 154,155. Cases mentioned as an example: Hiro Balani v Spain A 303-B (1994) 19 EHRR 566 para.27; Helle v Finland 1997-VIII, 26 EHRR 159, para. 50, 60. Garcia Ruiz v Spain, 1999-I;31 EHRR 22, para. 26; Suominen v Finland, Appl. No. 37801/97, Merits 1 July 2003, para. 34; Ruiz Torija v Spain 1994 Series A no.303-A, para.29; Bugan v Romania App no 13824/06, Merits 12 February 2013, para. 27.
[220] Suominen v Finland, Appl. No. 37801/97, Merits 1 July 2003, para. 34.
[221] Garcia Ruiz v Spain 1999-I 31 EHRR 22, para 26.

for judgements to state the reasons on which they are based and indicate the name of the judges that took place in deliberations.[222]

Another rule of law condition for the quality of judicial output concerns the openness of judicial proceedings. In the EU legal system, an indication of this guarantee can be found in Article 31 of the Statute of the Court Justice, which guarantees that "the hearing in court shall be public", with the exception of instances where the Court on its own motion decides otherwise "for serious reasons."[223] Moreover, pursuant to Article 37 of the Statute, judgements are read in open court.[224]

In the European Convention on Human Rights system, as a first guarantee, Article 6 of the ECHR explicitly requires a "public hearing" as part of a fair trial. The established case law of the ECtHR explains two implications of public hearings: (1) protecting litigants against the administration of justice in secret and with no public scrutiny; (2) and maintaining public confidence in courts.[225] However, the Court acknowledges that publicity of hearings is not an absolute requirement. For instance, the ECtHR does not require publicity for technical hearings[226] or for professional disciplinary hearings.[227] In addition, the Court also acknowledges that the lack of publicity in first instance courts might in certain cases be remedied by the publicity of hearings at higher instance courts.[228] Furthermore, the ECtHR also acknowledged that the right to a public hearing could be waived.[229]

As a second guarantee of the openness of judicial proceedings, Article 6 ECHR requires for judgements to be pronounced publicly. The case law of the ECtHR explicitly emphasizes the importance of this condition. Nonetheless, this remains a minimum and flexible requirement. For instance, according to the Court, judgements do not need to be read out loud in court. Indeed, the Court found sufficient for guaranteeing publicity when judgements were made available to everyone with a legitimate interest in the case through deposition at court registries.[230] Nevertheless, in instances when judgements were neither read out in public, nor made public afterwards, the Court found a violation of Article 6.[231] This minimum and flexible approach is further supported by the explicit limitations of the guarantee of public hearings, contained in Article 6. These include *inter alia* the interest of morals, public order, and national security; the protection of juveniles or the private life of

---

[222] Statute of the Court of Justice of the European Union, Art. 36.
[223] ibid. Art. 31.
[224] ibid. Art. 37.
[225] Axen v the Federal Republic of Germany, App no 8273/78, 8 December 1983, para. 25.
[226] Schuler-Zgraggen v Switzerland, App no 14518/ 89, 24 June 1993, para. 58.
[227] Campbell and Fell v the United Kingdom, App no 7819/77; 7878/77, 28 June 1984, para. 87.
[228] Diennet v France, App no 18160/91, 26 September 1995, para. 34. Stallinger and Kuso v Austria, App no 14696/89; 14697/89, 23 April 1997, para. 51.
[229] Hakansson and Sturesson v Sweden, App no 11855/85, 21 February 1990, para. 66.
[230] Pretto and Others v Italy, App no 7984/77, 8 December 1983, para. 26. *See* also Axen v Germany, App no 8273/78, 8 December 1983, para. 34. Sutter v Switzerland, App no 8209/78, 22 February 1984, para. 34. B v the United Kingdom, App no 36337/97; 35974/97, 24 April 2001, para. 37-41 (in case anyone with an interest was able to consult or obtain a copy of the first instance judgements concerning child resistance cases, there was no violation of article 6.).
[231] *See* Werner v Austria, App no 21835/93, 24 November 1997, para. 48-51. Szusz v Austria, App no 20602/92, 24 November 1997, para. 44-48. (no publicity of first instance decisions and judgements in appeal combined with the lack of access to individuals with a "legitimate interest" in the outcome of the case constituted a violation). Campbell and Fell v United Kingdom, App no 7819/77; 7878/77, 28 June 1984, para. 92. (prison disciplinary proceedings neither pronounced in public, nor made public constitute a violation).

parties; as well as the interest of justice. In this way, the ECtHR acknowledges the competing values at stake between the independent administration of justice and the obligation to inform the public about court decisions.

Nevertheless, the acknowledgement of competing values by the ECtHR does not mean that the independent administration of justice would in all circumstances outweigh the obligation to inform the public. Consider for instance the seminal Article 10 judgment in the Sunday Times v UK case. In light of the specific circumstances of that case, the ECtHR established that the public had a legitimate interest of knowing about legal settlements concerning the administration of a controversial drug to expectant mothers, causing the death of newborns as well as birth defects in 450 cases.[232]

However, the more recent case law of the ECtHR under Article 10 guaranteeing the right to freedom of expression appears to add another dimension to the condition of "openness" of judicial functioning. Namely, the case law accepts the applicability of Article 10 to judges and protects their participation in public debate.[233] According to the ECtHR the participation of judges in public debate constitutes an essential element of exercising the judicial function and it is of general public interest.[234] At the same time, the Court sets important limits to this participation. As a general rule, judges must show restraint in exercising their freedom of expression "in all cases where the authority and impartiality of the judiciary are likely to be called in question".[235] Moreover, the Court established that the "dissemination of information must be carried out with moderation and propriety."[236]

Nonetheless, the existence of these limitations does not prevent the Judiciary to publicly express its opinion on judicial reforms. Consider for example the Baka v Hungary case. In this case, the Court found that the public had a legitimate interest in learning about the Judiciary's opinion concerning the 2012 judicial reforms. In the specific circumstances of the case, the President of the Supreme Court of Hungary expressed this opinion pursuant to his legal obligations.[237] The ECtHR reasoned that questions related to judicial functioning might involve separation of powers matters, which the public has a legitimate interest of knowing.[238] Consequently, the Court found that right to freedom of expression protected the speech of the President of the Highest Court. Even if this participation

---

[232] Sunday Times v United Kingdom, Appl. No. 6538/74, 26 April 1979, para. 67. *See* Mauro Cappelletti, '"Who Watches the Watchmen?"" A Comparative Study on Judicial Responsibility' (1983) 31 The American Journal of Comparative Law 1. 30.

[233] The ECtHR has recognized the applicability of Article 10 to civil servants in general *see* Guja v Moldova, Appl. No. 14277/04, 12 February 2008; and judges in particular, *see* Kudeshkina v Russia, Appl.No. 29492/05, 26 February 2009. Morice v France, Appl. No. 29369/10, 23 April 2015. Wille v Liechtenstein, Appl. No. 28396/95, 28 October 1999. *See* Sietske Dijkstra, 'The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR' (2017) 13 Utrecht Law Review 1.

[234] Kudeshkina v Russia, Appl.No. 29492/05, 26 February 2009. Para. 86. Morice v France, Appl. No. 29369/10, 23 April 2015, para. 128. Baka v Hungary [GC], para. 164.

[235] Baka v Hungary [GC], para. 164. *See* also Wille v Liechtenstein, para. 64. Kayasu para. 92. Kudeshkina para. 86. Di Giovanni v Italy, App. No. 51160/06, 9 July 2013, para. 71.

[236] Baka v Hungary [GC], para. 164. Kudeshkina, para. 93.

[237] Baka v Hungary [GC], para. 164. *See* Attila Vincze, 'Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment Baka v. Hungary' 21 European Public Law.

[238] Kudeshkina para. 86, Morice v France, para. 128. For a critical overview of the emerging separation of powers doctrine of the ECtHR *see* David Kosař, 'Policing Separation of Powers: A New Role of the European Court of Human Rights?' 8 European Constitutional Law Review 33. 33-62.

implicated taking a political stand, the Court argued "this is not sufficient to prevent a judge from making a statement on the matter."[239]

In addition to this main finding, the Court further highlighted the importance of unfettered participation of judges in public debate, in general. Namely, the Court pointed out that the removal from office of the President of the Highest Court of Hungary prompted by his public criticism of legal reforms might have a "potential chilling effect on judges in general." According to the Court, as a result judges might be discouraged to make critical remarks concerning public institutions or policies since they would fear losing their office. Such effect, as the Court pointed out, "works in the detriment of the society as a whole."[240]

Overall, as an evolving guarantee for the quality of judicial output, we can observe a specific emphasis by the Court on the importance of judicial participation in public debate, with particular reference to matters of judicial functioning. This guarantee is remarkable because it has implications for the division of domestic public powers. The Court justified this extension by the interests of society at large in judicial reforms. We will consider below how non-binding European recommendations relate to these legally binding requirements.

ii. Legally non-binding recommendations: quality of judicial decisions; ethical codes; communication with the public; performance evaluation

Non-binding EU recommendations for the quality of judicial output in this section are derived from the content of the instruments related to the accession of CEE states to the European Union (Composite Papers and regular monitoring reports) and the more recent recommendations through the Cooperation and Verification Mechanism. This will be followed by an overview of Council of Europe recommendations derived from the content of instruments by the Committee of Ministers, the Venice Commission and the Consultative Council of European Judges.

a) EU recommendations

Delivering correct, legitimate and timely decisions and the adequate communication of the judicial branch with its surroundings were important considerations for the European Commission when evaluating the development of judicial reforms in CEE. For example, during the EU accession process a factual condition framing these evaluations was the *inappropriate quality of judicial decisions* in several CEE candidate states.[241] A frequently emphasized challenge was the inconsistent application of the laws. The European Commission considered the lack of access to court decisions as a main cause of this problem. For remedying these circumstances, the European Commission dedicated

[239] Baka v Hungary [GC], para. 164. Kudeshkina v Russia, Appl. No. 29492/05, 86. *Morice,* cited above, para 128. Wille v Liechtenstein, para. 67. *Guja,* cited above, para. 88.
[240] Baka v Hungary. para. 101. Kudeshkina paras. 99,100. Baka v Hungary [GC], para. 167.
[241] See e.g. 1999 Romania Report, 13. 2005 Romania Report 36 (inconsistency of jurisprudence was specifically mentioned as an impediment for participating in the judicial co-operation between EU member states in civil and criminal matters).

attention to specific legal mechanisms guaranteeing the *publicity of judicial decisions*. For instance, the European Commission noted as positive developments in Estonia, Latvia and Lithuania the establishment of *case index databases* and the *publication of all judicial decisions on the Internet* (2000-2002).[242] But in later reports, these examples of adequate legal mechanisms turned into specific requirements. Consider, for instance Romania, where the European Commission through the Cooperation and Verification Mechanism calls for "full transparency" through the publication of all court decisions on the Internet (2007 onwards).[243] Additionally, in its ongoing assessment the European Commission examines how the Highest Court of Romania (High Court of Cassation and Justice) fulfils its main role of unifying domestic jurisprudence.[244]

As another output quality condition, more recent recommendations of the European Commission through the Cooperation and Verification Mechanism attach specific institutional guarantees to *openness of judicial administration*. For example, the European Commission recommended to the *judicial self-governance body* in Romania to take charge of guaranteeing the *transparency of communication* of the judicial branch.[245] Specifically, the European Commission expected from the *judicial council* in Romania to *reason* and to *publish* its decisions in a clear and accessible format.[246] These recommendations of the European Commission further extended the competences of the council for the judiciary in securing the quality of judiciary output.[247]

Another mechanism proposed by the European Commission focused on enhancing the quality of judicial decisions through strengthening *judicial ethics*. This recommendation appeared in the Commission's pre-accession evaluation reports and concerned for instance Bulgaria, Lithuania and Romania. The European Commission either reported on the adoption of ethical codes or assessed the ethical training of judges. For instance, the 2003 Romanian report highlighted as a positive development the inclusion of an ethical

---

[242] E.g. 2002 Estonia report, 25 (marking as positive that according to the new Public Information Act all judicial decisions are entered into an electronic registry and all cases are published on the Internet, with the exception of instances where privacy or business confidentiality.) 2000 Latvia Report, 20 (noted as positive that the publication of cases has started, as has the development of a centralized case index). 2000 Lithuania Report, 17 (all county and appeal court decisions were published online). *See* also Kochenov (n 4) 294.

[243] 2009 February Romania Report 4 (mentioning steps taken for publishing court decisions on the Internet); 2009 February Romania Report, 4 (criticizing that the IT tools were not yet operational). 2010 July Report Romania 4 (calling for "full transparency through electronic publication of motivations of all court decisions"). 2011 February Report Romania, 4.

[244] E.g. 2009 July Report Romania, 8.

[245] For e.g. Commission of the European Communities, Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reforms and fight against corruption, C (2006) 6569 final, http://ec.europa.eu/enlargement/pdf/romania/ro_accompanying_measures_1206_en.pdf (accessed 16.09.2019). Benchmark 1: "ensure a more transparent and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy."

[246] E.g. 2009 July Report Romania, 8.

[247] For example, European Commission's CVM Romania reports emphasize the *role of the council for the judiciary* for guaranteeing the transparency and adequate application of *disciplinary proceedings. See* Council Decision on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Romania 19 May 2003 2003/397/EC 12.6.2003 Official Journal of the European Union L145/21, 5 (the Commission required transparent procedures for disciplinary and removal proceedings). 2008 Romania CVM Report, 4 (The Commission was critical towards the application of disciplinary proceedings in practice). 2010 July Romania CVM Report 4 (critically assessing the application of disciplinary proceedings). *See also* Seibert-Fohr (n 3). 429.

component in the initial training offered to judges. At the same time, this report criticised the lack of in-service ethical training provided for judges.[248] The 2003 Bulgarian report highlighted the adoption of a code of ethics for judges and prosecutors as a positive development for reducing corruption.[249] The 2002 Lithuanian report specifically called for "further strengthening the professional ethics of judges."[250]

b) Council of Europe recommendations

Council of Europe instruments engage with several dimensions of the quality of judicial output. Firstly, these instruments offer recommendations with respect to delivering *quality judicial decisions*. A specific requirement in this sense is for judgments to be *reasoned* and *pronounced publicly*.[251] Moreover, Council of Europe instruments also give specific examples of normatively sound legal review mechanisms. For instance, the Recommendation of the Committee of Ministers mentions appeal or case re-opening proceedings provided by law as normatively sound means of revising the quality of judicial decisions.[252] At the same time, Council of Europe instruments also reflect upon review mechanisms or actions that would constitute a breach of decision-making independence of judges. For instance, the Recommendation of the Committee of Ministers' explicitly *prohibits* for superior courts to address *direct instructions to lower courts*, with the exception of preliminary rulings or decisions concerning remedies.[253] Moreover, the Recommendation calls for the *Executive and Legislature* branches of Government to avoid any *criticism* that would undermine the "independence of- or public confidence in the judiciary."[254]

Secondly, Council of Europe instruments explicitly acknowledge the importance of *openness of judicial proceedings.* For instance, the Recommendation of the Committee of Ministers explicitly states that "[j]udicial proceedings and matters concerning the administration of justice are of public interest."[255] The Magna Carta specifies that "[j]ustice shall be transparent and information shall be published on the operation of the judicial system."[256]

Council of Europe instruments also propose specific means for achieving the openness of judicial proceedings. For instance, the Recommendation of the Committee of Ministers' "encourages" courts, judicial councils or other independent authorities to establish *courts' spokespersons or press and communication services*.[257] Other instruments,

[248] E.g. 2003 Romania Report 18,19 . 2005 Romania Report 22 (mentioning existing "unethical behavior within the justice system" as an impediment for judicial co-operation in civil and criminal matters). *See* also Seibert-Fohr (n 3). 428.
[249] 2003 Bulgarian Report, 101. 2004 Bulgaria Report, 20.
[250] 2002 Lithuanian Report, 24 (requiring further progress for inter alia strengthening the professional ethics of judges, mentioning the establishment of an ethical board, responsible for disciplinary proceedings as positive. 2003 Comprehensive Monitoring Report Lithuania 2003, 12.
[251] ibid. para. 15 and 63.
[252] ibid. para. 16.
[253] ibid. para. 23 But consider the tensions presented by "judicial guidelines."
[254] ibid. para. 18.
[255] Recommendation CM/Rec(2010)12, para. 19.
[256] Magna Carta, para. 14.
[257] Recommendation CM/Rec(2010)12, para. 19.

such as the Reports of the Committee on the Efficiency of Justice, offer more detailed technical guidance for conducting *court user satisfaction surveys*.[258] But as an additional means of guaranteeing openness, Council of Europe instruments also recall the positive *obligation of judges to obtain information* about "society's expectations of the judicial system." According to these instruments this is necessary for achieving an effective administration of justice and securing public confidence.[259] The *central management* of the judiciary, such as judicial councils or independent authorities, should enable this judicial role by setting up "permanent feedback mechanisms."[260]

At the same time, Council of Europe instruments also reflect on the *limits* and balancing acts applicable to the openness of judicial proceedings. Consider, for example, the Recommendation of the Committee of Ministers highlighting that a balance must be struck between the right to information and judicial independence.[261] The Recommendation also expressly emphasizes that judges should exercise restraint when communicating with the media.[262] In addition, the Venice Commission reflects on possible tensions between the guarantees of judicial independence and potential pressure caused by the openness of the trial. In its explanation, the Venice Commission makes a specific reference to pressure from the media. The Venice Commission points out that there could be opposing goals at stake, which require careful balancing. The Venice Commission suggests the application of a carefully defined principle of "*sub judice*", based on which a balance can be established.[263]

Thirdly, Council of Europe instruments acknowledge the importance of *transparency of judicial administration*.[264] Guaranteeing the openness of judicial administration mainly appears as an obligation for councils for the judiciary. For example, Consultative Council of European Judges expects from councils for the judiciary to "demonstrate the highest degree of transparency towards judges and society" and to protect the image of justice.[265] As a specific obligation, Council of Europe instruments also require the activities of judicial councils to take place on the basis of *pre-established procedures* and for their decisions to be *reasoned*.[266]

Finally, as a specific mechanism guaranteeing the quality of judicial output, the Recommendation of the Committee of Ministers' and the Magna Carta of European Judges

---

[258] CEPEJ, Report, Conducting satisfaction surveys of court users in Council of Europe Member States, CEPEJ(2010)2, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1908769&SecMode=1&DocId=1664596&Usage=2 (accessed 16.09.2019). *See* also ENCJ, Justice Society and the Media, Report 2011-2012, http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf (accessed 16.09.2019).

[259] Recommendation CM/Rec(2010)12, para 20.

[260] id. For a recommendation outside the Council of Europe Framework *see* also European Network of Councils for the Judiciary ENCJ, Justice Society and the Media, Report 2011-2012, http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf (accessed 16.09.2019), 21.

[261] Recommendation CM/Rec(2010)12, para. 19

[262] id.

[263] Venice Commission, 'Judicial Appointments', CDL-AD(2007)028-e, para. 32; para. 56-64. *See* also ENCJ, Justice Society and the Media, Report 2011-2012, http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf (accessed 16.09.2019), 21.

[264] Recommendation CM/Rec(2010)12, para. 19. Magna Carta, para. 14.

[265] CCJE, Opinion no. 10 2007, Council for the Judiciary at the Service of Society, paras. 80-86; 91-96.

[266] Recommendation CM/Rec(2010)12, para. 28.

explicitly recommend the adoption of *judicial codes of ethics*.[267] The Recommendation advises for judges to be guided in their professional activities by "ethical principles of professional conduct." The Magna Carta suggests for "deontological rules" to guide the activity of judges. In addition, the Recommendation specifically highlights that the role of judicial codes of ethics is to "inspire public confidence in judges and the judiciary."[268]

These instruments also contain specific suggestions with respect to the content of judicial codes of ethics. For instance, the Recommendation highlights that these codes should not only contain "duties that may be sanctioned by disciplinary proceedings", but should also provide *effective guidance* to judges on how to conduct themselves.[269] In a similar vein, the Magna Carta explicitly emphasizes that deontological rules must be distinguished from disciplinary rules.[270]

In order to fulfil this "guidance" role, both instruments suggest for judges "to play a leading role in the development of these codes."[271] As an additional suggestion, the Recommendation highlights that "judges should be able to seek advice on ethics from a body within the judiciary."[272] In a similar vein, the Magna Carta highlights that judicial ethics should constitute a part of the training of judges.[273]

The above-described European requirements and recommendations concerning the quality of judicial output can be summarized in the table below.[274]

[267] ibid. para. 72-74. Magna Carta, para. 18. *See* also CCJE, 'Opinion no 3 on the principles and rules governing judges' professional conduct'19 November 2002.
[268] Recommendation CM/Rec(2010)12, para. 73.
[269] ibid. para. 72-74. Magna Carta, para. 18.
[270] Magna Carta, para. 18.
[271] Recommendation CM/Rec(2010)12, para. 73.
[272] ibid. para. 74.
[273] Magna Carta, para. 18.
[274] *See* chapter 4,C,II.

Table 4 European output quality requirements and recommendations

Legal nature / Content	Requirements	Sources
Legally binding requirements	Factual independence of judges	CJEU, Wilson, PPU LM, AJPS ECtHR, Delcourt v Belgium, Sramek v Austria
	Obligation to give reasons	ECtHR, Garcia Ruiz v Spain Art. 36 CJEU Statute
	Openness	Art. 31, 37 CJEU Statute ECtHR, Sunday Times v UK
	Freedom to express judicial position in public debate	ECtHR, Baka v Hungary
	Prohibition to use disciplinary proceedings as a system of political control	CJEU, PPU LM
Non-binding recommendations	Introducing ethical codes	Magna Carta, European Commission
	No instructions from hierarchically superior courts	Magna Carta, Venice Commission
	Elements 'inherent' to decisions (i.e. "professionalism")	Magna Carta
	Active participation in public debate, quality policies, courts' spokespersons	CEPEJ, European Commission, Comm Min Rec
	Judges informing themselves about society's expectations	(Comm Min Rec, Magna Carta),
	Transparency of communication	CEPEJ, Comm Min Rec, Magna Carta
	Evaluation mechanisms and transparency about them	CCJE, European Commission
	Publishing decisions on the Internet; developing case databases	European Commission

In comparison with the conceptual elements for guaranteeing the quality of judicial output, we can observe the followings. Firstly, the legally binding requirements emerging from the ECtHR and CJEU, make explicit reference to the "factual" dimension of

judicial independence. Both Courts formulate factual independence as a minimum requirement.[275] As such, this legally binding condition for the quality of judicial output directly corresponds to the conceptual values for guaranteeing the quality of judicial output[276] and allows for diverse context-specific domestic implementation mechanisms.[277] Further correspondence can be established at the levels of guarantee of openness and the value of giving reasons.

The most visible commitment in the EU legal order could be found in the Statute of the CJEU.[278] In comparison, the case law of the ECtHR appeared more extensive in two ways. First, the case law of the ECtHR contains further specific references to other rule of law values of relevance for the quality of judicial output, such as: the obligation to give reasons, the openness of judicial proceedings and the availability of judicial decisions. These are also minimum conditions and relate to the factual and functional dimensions of judicial independence. Second, the more recent case law of the ECtHR further developed the "openness" dimension of judicial functioning by emphasizing the importance of active participation of judges in public debate. This extension has its legal basis in Article 10 ECHR guaranteeing the right to freedom of expression and specifically protects the freedom of speech of judges concerning matters related to judicial organization. Through this condition the case law of the ECtHR engages with the "constitutional dimension" of judicial independence.[279] This dimension concerns the independence of the Judiciary vis-à-vis the Legislature and Executive and traditionally falls outside the scope of guaranteeing the access of individuals to an independent and impartial tribunal. Nevertheless, we must mention that the ECtHR specifically limits this guarantee by: (1) anchoring this guarantee in general to the classic rule of law value of neutrality and impartiality of judges; (2) only offering protection to the freedom of speech of judges, without granting a right to hold judicial office.

Secondly, the set of recommendations for the quality of judicial output by the European Commission and Council of Europe advisory bodies. We could observe an overlap between the content of these recommendations with the conceptual elements for guaranteeing the quality of judicial output. [280] For instance, optional European recommendations address the availability of judicial decisions, transparency of judicial administration and the effective communication of core judicial values to the public through judicial codes of ethics. These recommendations further expand on rule of law values of openness of judicial functioning and giving reasons. In this sense, non-binding European recommendations display a "family-resemblance" with core rule of law values.

A further similarity between EU and Council of Europe non-binding recommendations was that both sources proposed for councils for the judiciary to play a

---

[275] Case C506/04 Wilson v Ordre des avocats du bureau de Luxemburg, [2006] ECR I8613, para. 52. Case C517/09 RTL Belgium [2010] ECR I14093, para. 40. Case C-216/18 PPU LM, para. 65,66.
ECtHR, Delcourt v Belgium, Appl. No. 11, 17 January 1970, para. 31. Sramek v Austria, Series A, Appl. No. 84, 22 October 1984, para. 42. Belilos v Switzerland, Series A, No. 132, 29 April 1988, para. 67.

[276] *See* Table 1, Theoretical typology of European judicial organisation requirements, Mandatory – Throughput requirements.

[277] *See* chapter 1, B, II.

[278] Art. 31,36,37 Statute of the Court of Justice.

[279] *See* chapter 1, B, I.

[280] *See* Table 1, Theoretical typology of European judicial organisation requirements, Optional – Output requirements.

role in guaranteeing the openness of judicial functioning. Through these specific proposals, non-binding European recommendations address the "organizational dimension" of judicial independence. [281] Moreover, by proposing specific competences for judicial councils concerning the guarantee of judicial output, these European recommendations appear to further strengthen a specific "European model" of domestic court administration.[282]

At the same time we could observe a difference in terms of the specific mechanisms proposed by the European Commission and the Council of Europe advisory bodies. A particularly striking difference concerned the formulation of the proposed mechanisms. Council of Europe instruments appear to place more emphasis on the rule of law conditions underpinning specific output quality mechanisms (i.e. competing values between the Judiciary and the Media, role of appeal mechanisms for the quality of judgments, prohibition of giving direct instructions to judges). In contrast, the recommendations by the European Commission mainly enlist technical details (i.e. developing case-law databases, publishing cases on the Internet).[283] In a similar vein, the European Commission proposed the adoption of judicial codes of ethics and their inclusion in judicial trainings. However, Council of Europe documents paid more attention to the role of ethical codes for effectively guiding the complex professional activity of judges. In light of these differences, Council of Europe recommendations seem to show a more explicit connection with the conceptual elements of the liberal-democratic normative framework.

iii. Contribution to legitimacy, the rule of law and possible risks

This section will focus on the specific output-quality requirement discussed in-depth in the third case study: the participation of the judiciary in the public debate concerning reform processes. The analysis below will outline a procedural and a substantive function through which judicial participation in public debate concerning ongoing reform processes contributes to the legitimacy of judicial output and the rule of law. Moreover, the possible risks this participation might pose for the constitutional independence of the judiciary are highlighted.

a) Effective representation of the constitutional values for judicial functioning in public debate

Firstly, mechanisms for judicial participation in public debate contribute to the quality and legitimacy of judicial output by enabling the effective representation of judicial rule of law values in the public debate.[284] This function incorporates two dimensions. On the one hand, effective representation entails the existence of specific normative or legal possibilities for the judiciary to participate in public debate. For example, judicial participation can materialize through a specific legal mechanism or constitutional

[281] *See* chapter 1,B,II.
[282] Bobek and Kosař (n 8). 1269-1274.
[283] Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' (2016) Hague Journal on the Rule of Law. 40.
[284] David Luban, 'Bargaining and Compromise: Recent Work on Negotiation and Informal Justice' (1985) 14 Philosophy & Public Affairs 397. 397-416.

convention, which makes it possible for the representative of the judicial branch to comment on legislative proposals concerning judicial functioning. Further legal communication mechanisms can be: the obligation of the judiciary to give advice to the Executive on intended law reforms concerning the judiciary; the judiciary's possibility to indicate to the Executive or Legislature the necessity to adopt new legislation concerning the judiciary; and the obligation of the judiciary to report on the functioning of courts and judicial administration, to the Legislature by parliamentary hearings and, to the public, by publishing reports. At the level of the courts, a corresponding legal or normative mechanism can be the role of court presidents, or press secretaries, to inform the public about the functioning of courts.[285]

The second dimension of effective representation refers to maintaining core rule of law values as the main message of mainly oral, possibly written, judicial communication as part of societal debate. On the one hand, this dimension poses an obligation on the judicial branch to maintain the principle of judicial independence and related rule of law values[286] as a main point of reference for its communication, including the explanation of how contemporary values such as openness and timeliness relate to judicial independence. On the other hand, this dimension implies that other public powers participating in the public debate show mutual respect towards the position of the other branches of Government.

By fulfilling these two dimensions, judicial participation in public debate contributes to the quality and legitimacy of judicial output by (1) establishing legal or normative mechanisms that guarantee the openness of the judiciary, connected to the general requirement of publicity[287] and (2) maintaining an independent image of justice. At the same time, the effective representation of rule of law values by judges in public debate contributes to the ideal of the rule of law by realizing a balance between the constitutional powers. Thus, judicial participation in public debate can be an important means of reducing the arbitrary exercise of public power by the legislature or executive as part of ongoing judicial reform processes.[288]

However, the combination of these two dimensions creates tensions. Consider the circumstance when the communication of the judiciary does not convey an independent image of justice.[289] If a judge, deciding a case, made comments suggesting that parties to a trial were not treated equally, such communication would undermine the neutrality of the judicial branch. In order to contain this tension certain limitations of the openness of the judiciary can be employed. For instance, the group of individuals within the judiciary responsible for communicating with the public can be explicitly designated, i.e. the president of the central management, court presidents or press judges at courts. Moreover, the content and timing of judicial communication can be guided. For example, the Dutch guidelines for press communication suggest holding a press conference pro-actively whenever a high profile case has been allocated to a court. The guidance to press judges

[285] Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (n1). 157-158.
[286] *See* Chapter 1.
[287] *See* chapters 1,C; 2,B,III.
[288] Chapter 1.
[289] Jeffrey K Staton, *Judicial Power and Strategic Communication in Mexico* (1 edition, Cambridge University Press 2010). 186-190.

further suggests a brief communication focusing on the facts of the case and establishing that the court in question has the legal competence to impartially decide the case.[290]

An equally demanding situation for the independent image of the judiciary constitutes its participation in judicial reform discussions vis-à-vis political branches of Government. This role of contemporary judiciary requires that the representatives of the judicial branch directly engage with the political agenda of the legislature or of the executive. However, this engagement might suggest that the communication of the judiciary has a political content. The resulting appearance of the judiciary taking a political stand creates a tension for the independent image of justice. Given these circumstances, it appears of paramount importance for the judicial branch to maintain core rule of law values as a main point of reference for its communication. The second legitimacy-enhancing function of judicial communication mechanisms further contributes to the neutrality of judicial output.

b) Clarification of contemporary judicial values through codes of ethics

The second legitimacy-enhancing function of judicial communication mechanisms is substantive in nature and it refers to the clarification of contemporary rule of law values guiding judicial functioning by the judiciary itself.[291] This function becomes important because of the complex ethical questions raised by the communication of the judiciary with its surroundings. A specific normative instrument making possible this contribution is a judicial code of ethics.

To date, several EU Member States have adopted judicial codes of ethics. For example, notwithstanding differences in terms of the specific adopting body (i.e. judicial association, council for the judiciary) judicial codes of ethics have been adopted in Hungary (2015), Romania (2005), the Netherlands (2004), France (Conseil Supérieur de la Magistrature, Recueil des obligations déontologiques 2010), Bulgaria (2008), Czech Republic (2005), Slovakia (2015), Austria (2007) and Estonia (2002).[292] During the EU accession process (1998-2004/2007) of CEE countries, the European Commission promoted the adoption of judicial codes of ethics as a normative instrument guiding the conduct of judges and reducing corruption.[293] However, as we can observe, judicial codes

[290] Press Guidelines of the Dutch Judiciary (2003). *See* Wim Voermans, 'Judicial Transparency Furthering Public Accountability for New Judiciaries' (2007) 3 Utrecht Law Review 151-158. 155. *See also* Press Guidelines of the Dutch Judiciary (2013), https://www.rechtspraak.nl/SiteCollectionDocuments/Press-Guidelines.pdf (accessed 16.09.2019). The Dutch Judiciary and the Media, https://www.rechtspraak.nl/SiteCollectionDocuments/The-Judiciary-and-the-Media-in-the-Netherlands.pdf (accessed 16.09.2019). Lieve Gies, 'The Empire Strikes Back: Press Judges and Communication Advisers in Dutch Courts' (2005) 32 Journal of Law and Society 455. 450-472.

[291] Anthony Hol and Marc Loth, *Reshaping Justice: Judicial Reform and Adjudication in the Netherlands* (Shaker Publishing 2004). 85,86.

[292] Roel de Lange, 'Judicial Independence in the Netherlands' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (n 1). 269,270. Antoine Garapon and Harold Epineuse, ' Judicial Independence in France' in ibid. 302-304. Timo Ligi, 'Judicial Independence in Estonia', in ibid. 788,789.
Bulgarian judicial code of ethics, http://vssold.justice.bg/en/aktove/judicial_system_code_of_ethics_eng.pdf (accessed 16.09.2019). Slovakian judicial code of conduct, http://www.sudnarada.gov.sk/data/files/697.pdf (accessed 16.09.2019). *See* also Jörg Philipp Terhechte, 'Judicial Ethics for a Global Judiciary - How Judicial Networks Create Their Own Codes of Conduct' 10 German Law Journal. 506, 507.

[293] *See* chapter 2. Cristina Dallara, *Democracy and Judicial Reforms in South-East Europe: Between the EU and the Legacies of the Past* (2014 edition, Springer 2014).

of ethics have been adopted in established European democracies as well. In these legal orders, the adoption of judicial codes of ethics seems to connect to the ethical balancing questions raised by the complex legal and societal environment in which contemporary judiciaries function.[294] In this context, judicial codes of ethics seem to have acquired a new function, namely guiding the incorporation of contemporary values in the rule of law framework standing at the basis of judicial conduct.[295] This additional role of judicial codes of ethics will be of direct interest for our analysis.

Judicial codes of ethics contribute to the legitimacy of judicial output, by clearly communicating that rule of law values continue to remain at the basis of judicial functioning. Also of importance for legitimacy, can be the explicit endorsement in judicial codes of ethics of contemporary values necessary for judicial functioning. At the same time, the clarification by judicial codes of ethics of the relation between rule of law and new public management values endorsed by the judiciary contributes to upholding the rule of law by reducing the possibility to arbitrary exercise of powers by judges.[296]

However, finding effective means to establish and to communicate core judicial values through ethical codes creates tensions for the independent image of justice. For instance, empowering central judicial administrative bodies with the task to adopt a judicial code of ethics can be an effective means to establish values applicable to all judges within a legal order – as opposed to professional associations of judges with restrictive memberships. Central judicial administrative bodies are also in a position to effectively communicate the ethical code to the public, i.e. through publishing it on their Internet site. However, such empowerment raises the questions of whether the ethical codes adequately reflect the rule of law constitutional values at the basis of judicial functioning, and whether the ethical codes represent the values of judges. As important means to contain this tension we can mention: (1) the circumstance when members of the central administrative body represent all levels of the domestic court system and (2) the consultation of judges during the adoption of the code of ethics. Ultimately, these mechanisms need to be operational in the specific constitutional, legal and factual context of a domestic legal order.

C. Conclusions: European standards for judicial organization as liberal-democratic requirements

In this chapter we set out to (1) map specific EU standards for the quality of judicial input, throughput and output in Member States and (2) evaluate the existence of core requirements, resembling the content of requirements for judicial organization in liberal-democracies. We were able to map specific legally binding (mandatory) requirements and non-binding (optional) recommendations with respect to all three studied aspects of judicial organization. Of particular importance for our analysis, across all three studied areas, rule of law values (i.e. irremovability, courts established by law, functional, statutory, factual independence, openness, giving reasons, neutrality) remained the main

[294] For e.g. Lorne Sossin and Meredith Bacal, 'Judicial Ethics in a Digital Age' (2013) 46 University of British Columbia Law Review. Nathanael J Mitchell, 'Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media' [2012] Utah Law Review.
[295] Hol and Loth (n 14). 85,86.
[296] *See* Chapter 1.

point of reference for legally binding recommendations. An important consequence of this formulation is that new public management values for judicial organization and judging, such as timeliness, organizational efficiency, and transparency, are defined in their relation to the above-mentioned classic rule of law requirements. In this sense, the framework of European requirements resembles the liberal-democratic normative framework. However, we must add two critical observations.

First, an important source of binding requirements constitutes the case law of the CJEU and ECtHR. As it has been established above, the case law of both courts contains corresponding elements with the core conceptual requirements for judicial functioning under the liberal-democratic normative framework. Moreover, the more recent case law of the studied European Courts establish balancing tests concerning partially competing values of judicial organization – such as the adequate remuneration of judges and establishing national budgets taking into account financial constraints; the balance between the functional independence of judges and the timely rendering of judgements. Overall, compared to the case law of the CJEU, the more recent case law of the ECtHR discusses broader aspects related to judicial organization (i.e. the power of court presidents in the allocation of cases; having an extensive reading of "judicial" bodies requiring the irremovability guarantee, freedom of expression of judges and their participation in public debate).[297]

Nonetheless, the judgements and orders of the CJEU in the ASJP, LM and Commission v Poland cases, concerning the remuneration and irremovability of judges remain remarkable.[298] This new line of case law appears possible through the more extensive legal basis for addressing judicial organizational questions at both the CJEU and the ECtHR (i.e. Art. 19(1) TEU in conjunction with Art. 2 and 4(3) TEU; Art. 10 ECHR), and also judges addressing complaints to the ECtHR and CJEU.[299]

So far our analysis indicated that the more recent case law remains grounded in core rule of law values and continues to set minimum requirements in line with the margin of appreciation doctrine of the Court.[300] However, to the extent that the evolving ECtHR case law engages with aspects of judicial organization traditionally reserved to domestic participants in judicial reforms (i.e. constitutional independence of judges, judicial administration), the legitimacy of these developments should be subject to further critical analysis.[301]

Second, with respect to all three studied aspects of judicial organization (input, throughput and output), several non-binding recommendations focused on formal-

[297] DMD Group, A.S. v Slovakia, App no 19334/03 (ECtHR, 5 October 2010) paras. 65-70. Agrokompleks v Ukraine, App no 23465/03 (ECtHR, 6 October 2011) paras. 137, 138,139. Baka v Hungary, App no 20261/12 (ECtHR, 27 May 2014) paras 95, 96, 101.

[298] Case C-64/16, Associação Sindical dos Juízes Portugueses. Case C-216/18 PPU LM. Case C-619/18 R, Commission v Poland. EU:C:2018:852.

[299] Kosař and Lixinski (n 7). 748-749.

[300] *See in general* Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002). Howard C Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996). Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 Current Legal Problems 49.

[301] Kosař (n 8). 120-123. *See in general,* Andreas Føllesdal, 'Legitimacy Criticism of International Courts: Not Only Fuzzy Rhetoric?' in W. Sadurski, M. Sevel and K. Walton (eds), *Legitimacy: The State and Beyond* (Oxford University Press 2019), 223-237. Geir Ulfstein, 'Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties' 2019 The International Journal of Human Rights 1-18.

institutional mechanisms. Such focus was most visible in the detailed EU recommendations, which in comparison to Council of Europe recommendations appeared more technical, oriented towards economic values. Consequently, the analysed EU recommendations were less explicitly anchored in their rule of law foundations, than Council of Europe recommendations.[302] From the perspective of judicial reforms in CEE member states, this insight gains particular reference given the legal effects that these recommendations had produced within the national legal frameworks. Indeed, it remains to be seen in the case studies whether the implementation of these technical recommendations contributed to promoting rule of law values for judicial organization, or to the contrary, have hampered the development of the national normative framework in line with its rule of law foundations in CEE states.

[302] cf. Mak and Taekema (n 283). 40.

Part II. Implementing EU standards for judicial organization in Hungary and Romania

In the second part of the study, we will test how judicial reforms in Hungary and Romania have implemented EU requirements and recommendations for the quality of judicial input, throughput and output, and subsequently what we can learn from these experiences for the balancing of judicial independence and efficiency, in such a way that the rule of law is upheld. In this part of the analysis we will first introduce the constitutional values for judicial organization in Hungary and Romania. This will be followed by the detailed analysis of the integration of European standards in the Hungarian and Romanian legal orders through three in-depth studies, contained in chapters 4,5 and 6. These assessments represent the core of our analysis and they will ultimately offer suggestions on how to bring the judicial systems in Hungary and Romania up to standard with basic rule of law requirements.

3. Introducing the contextual comparative analysis

At the beginning of this study, we explained the comparative methods employed in this analysis, consisting of a combination between "the most different" and "most likely" case selection methods.[1] This combination secured sufficient ground for comparison but also sufficient counterfactuals. The selection of the Hungarian and Romanian legal orders followed the "most different" case selection methods. According to this method the selected cases would share the studied phenomenon under scrutiny, but would be different with regards to other variables. In this study Hungary and Romania share the experiences of implementing European requirements and recommendations for judicial organization and simultaneously affirming classic rule of law and new public management values for judicial organization. However, the two legal orders display significant differences with regards to the trajectory of this implementation process, as well as the progress and content of constitutional and judicial reforms. For the in-depth comparison of these two "most different" CEE EU member states, we employed the most likely case selection methods. According to these methods such elements should be selected for the analysis, where the studied phenomenon is most likely to occur. For our study, judicial selections, case allocation mechanisms and the participation of the judiciary in the public debate surrounding judicial reforms appeared as most likely cases corresponding each to the quality of judicial input, throughput and output. All three areas represent challenging dimensions of judicial organization, where a delicate balance must be struck between rule of law and new public management values. Moreover, all three areas are extensively discussed at the level of European requirements and recommendations.

This chapter serves as a bridge between Part I of this study containing the theoretical framework and the analysis of European requirements and recommendation for judicial organization and chapters 4, 5 and 6 containing the in-depth contextual-comparative analysis. It does so, by examining and comparing the content of the domestic

[1] *See* Introduction, C.

constitutional frames of reference with respect to input, throughput and output quality values for judicial organization. For these purposes, we will focus on three dimensions of the constitutional frames of reference: (1) the conceptualization of contemporary rule of law values for judicial functioning in the domestic in the constitutional text; (2) the interpretation of these values by the Constitutional Courts; and (3) the role of judicial self-governing bodies. These three elements have been selected because they constitute the constitutional foundations of judicial functioning in the two studied legal orders. Our overall aim in this chapter is to show what the specific fundamental constitutional values underpinning judicial organization in the studied legal orders are, and what context-specific tensions occur out of the interaction of these values. Chapter 4, 5 and 6 will further dissect the main insights emerging from this chapter through the analysis of the domestic legal acts and normative instruments, within the framework provided by the Constitution.

A. The constitutional frame of reference for judicial organization in Hungary and Romania

The overview of the content of the domestic constitutional texts focuses on how the Hungarian and Romanian Constitution provide (a) constitutional, statutory and institutional guarantees for the independence of the judiciary and judges as well as adequate professional qualifications; (b) conditions for swift, objective and transparent organizational processes, enabling an independent decision-making process salient for the functional independence of judges; (c) conditions for delivering correct, legitimate and timely decisions and the transparency of the communication of the judicial branch; connected to factual independence of judges and constitutional independence of the judiciary.

I. Conceptualization of rule of law values in the Constitution

In both studied legal orders, the written Constitution formally stipulates the fundamental principles and rules underpinning judicial organization and functioning. The analysis below relies on the content of the domestic Constitutions and possible clarifications emerging from the constitutional preparatory documents.

i. Hungary

Following a landslide victory of Fidesz-KDNP in 2010, the governing majority adopted a controversial new Fundamental Law in 2011, which has been subsequently amended seven times.[2] The Fundamental Law constitutes the constitutional frame of reference in force, which establishes the fundamental values of rule of law, judicial

[2] Fundamental Law of Hungary as in force on 29 June 2018, http://www.kormany.hu/download/f/3e/61000/TheFundamentalLawofHungary_20180629_FIN.pdf (accessed 16.09.2019), official translation.

independence and right to a fair trial governing the functioning of the judicial branch in the Hungarian constitutional order.[3] The constitutional text explicitly acknowledges the *rule of law* as a fundamental value governing the Hungarian legal order.[4] This ideal has been incorporated in the Constitution since the end of communism and serves as a general foundation for more specific values governing judicial functioning.[5] Moreover, the Fundamental law incorporates the principle of separation of powers, albeit with a different wording, by stipulating that "[t]he functioning of the Hungarian State shall be based on the principle of division of powers."[6] The constitutional text does not contain further definitions of this value. As such, the interpretation of this value remained the task of the Constitutional Court.[7]

The Part of the Fundamental Law dedicated to the Judicial Branch conceptualizes several dimensions of judicial independence and related values for judicial functioning. As a first dimension, the Fundamental law formally commits to guaranteeing the functional (decision-making) independence of judges by explicitly acknowledging that *judges are independent* and they are *only subordinated to the law*. In addition, the Fundamental Law explicitly *prohibits giving instructions* to judges in their professional activities.[8] Collectively, these guarantees appear important safeguards against external pressures (i.e. from the Executive or the Legislature) or internal ones (i.e. from judges or parties to a trial) interfering with the judicial decision-making process.

As a pre-condition for independent judicial decision-making, the Fundamental Law stipulates the principle of courts established by law. Namely, the Fundamental Law affirms that only courts of law and the Curia (highest court) have the power to administer justice. Moreover, the Fundamental Law indicates that courts of law are competent in civil, criminal and administrative matters.[9] Nevertheless, the Fundamental Law does not stipulate the specific levels and structure of courts. The only reference in the Fundamental Law to the hierarchical court organization system – which is a rule of law guarantee for the correctness and independence of judicial decision-making – is the acknowledgment that court organization "has multiple levels." Furthermore, as an element of flexibility, the Fundamental Law adds, "specialized courts might be established" for hearing specific

[3] *See* Annex E. For detailed critical analysis of the new Fundamental Law *see* András Jakab and Pál Sonnevend, 'Continuity with Deficiencies: The New Basic Law of Hungary' (2013) 9 European Constitutional Law Review (EuConst) 102. For a more comprehensive critical overview *see* Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012). Kriszta Kovács and Gábor Attila Tóth, 'Hungary's Constitutional Transformation,' 7 European Constitutional Law Review 183 (2011), 183-203. Andrew Arato, Gábor Halmai, János Kis 'Opinion on the Fundamental Law of Hungary' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012), 455-490. Zsolt Körtvélyesi, Balázs Majtényi, 'Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary' 18 German Law Journal 07 (2017), 1722-1744. Gábor Attila Tóth, 'Constitutional Markers of Authoritarianism', 11 Hague Journal on the Rule of Law 2019, 37-61.

[4] Fundamental Law, Article B.

[5] *See* László Sólyom, 'Introduction' in László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press 2000).

[6] Fundamental Law, Art. C(1).

[7] The analysis below focuses on the case law of the Constitutional Court conceptualizing the rule of law and separation of powers principles in connection with the principle of judicial independence. *See* Chapter 3,B,II,i.

[8] Fundamental Law, Art. 26 (1).

[9] Fundamental Law, Art. 25 (1,2). *See* Annex A.

groups of cases.[10] The preparatory documents of the Fundamental Law specified that this latter provision served the main purpose of enabling the establishment of specialized administrative and labour law tribunals.[11]

In the multi-level European legal order, the choice of codification of the principle of courts established by law, respectively, its detail remains at the latitude of domestic legal orders.[12] Nevertheless, the effectiveness of this rule of law guarantee in the Hungarian legal order has been questioned in light of the level of protection offered by the previous Constitution. The former constitutional guarantee of this principle explicitly enumerated all levels of the court system in the text of the Constitution. Because of this detailed constitutional codification, the court system could only be modified through a constitutional amendment, requiring a four-fifth-majority vote by the National Assembly.[13] In contrast, the current formulation of this guarantee makes it possible to modify the court system through a legislative amendment, requiring a two-thirds majority vote of Members of Parliament. It was this reduced level of protection that judges pointed out as creating tensions for the adequate guarantee of the principle of courts established by law.[14] That is not to say that the current constitutional framework contains no limitations on the legislative power. Indeed, the Fundamental Law explicitly stipulates that the court system (1) needs to be established at the level of cardinal acts, here referring to a special category of legal acts requiring a two-thirds majority vote of members of Parliament and therefore (2) can only be modified through the amendment of the legal act. However, in the current political context where the governing majority detains a two-thirds majority, these limitations do not represent a serious impediment.

On the one hand, the constitutional principle of courts established by law illustrates a tension emerging from the interaction of the rule of law core of this guarantee and the contemporary considerations of guaranteeing organizational flexibility. On the other hand, the incorporation in the Fundamental Law of other values complementing functional independence created fewer tensions. For instance, the Hungarian constitutional frame of reference explicitly mentions the contemporary value of *timeliness of judicial proceedings.* The right to a fair trial stipulates that everyone has access to his or her cases to be handled impartially and fairly, within a reasonable time. This procedural guarantee was introduced in the Hungarian constitution in order to comply with the requirements of Article 6 of the European Convention on Human Rights and it appears salient for ensuring the overall quality of judicial processes. At the same time, the right to a fair trial guaranteed by the Fundamental Law also makes explicit reference to the classic rule of law value of *obligation to give reasons* by obliging every authority to give reasoned decisions.[15] On its turn, this guarantee complements the functional independence of judges in order to ensure the overall quality of judicial decisions in the Hungarian legal order.

---

[10] Fundamental Law, Art. 25(4).
[11] Preparatory Documents Fundamental Law, T/2627, 46.
[12] *See* Philip M Langbroek and Marco Fabri (eds), *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (Intersentia 2007).
[13] Constitution of Hungary, Art. 24(5).
[14] Baka András Parliamentary speech 24th of March 2011.
[15] Fundamental Law, Art. XXIV. The explanatory document of the Fundamental Law T/2627, 46 explicitly acknowledges that this provision is meant to incorporate the requirements of Article 6 ECHR in the domestic legal order.

However, another constitutional provision connected to the quality of judicial decisions seemed to create tensions for the functional and factual independence of judges. The Fundamental Law introduced a provision explicitly obliging judges to *interpret* legal acts in line with their *moral and economic purposes*.[16] Criticism from judges pointed out that this constitutional provision unjustifiably restrains the decision-making process of judges in individual cases. Moreover, judges highlighted that the Fundamental Law is not the adequate level in the hierarchy of domestic legal acts for this specification. Judges suggested that specific provisions guiding judicial interpretation should be incorporated in procedural codes.[17]

As another dimension of judicial independence, the Fundamental Law guarantees the *independent status* of judges. The text of the Fundamental Law affirms that judges are *irremovable* and specifies that judges can only be removed from office for the reasons and according to the procedure laid down by a Cardinal Act.[18] As an additional statutory guarantee, the Fundamental Law explicitly states that judges are *appointed by the President of the State* in line with the rules contained in a Cardinal act.[19] Finally, the Fundamental Law also offers *guaranteed tenure* to judges selected and appointed according to the legal requirements.

However, it must be mentioned that the 2011 Fundamental Law introduced two specific limitations of the guaranteed tenure of judges. One relates to the starting point of the judicial service and stipulates that only persons reaching 30 years of age may be appointed as judges. The other limitation concerns the end-point of the judicial service and stipulates that the service relations of judges are terminated upon reaching the general legal retirement age. This latter limitation appeared to create particular tensions for the personal independence of judges in the specific context of the Hungarian legal order.[20]

Traditionally, the Hungarian legal order had operated with a mandatory retirement age for judges, set at the age of 70.[21] The novelty of the 2011 Fundamental Law constituted in reducing the mandatory retirement age of judges to the "general legal retirement age" (65) in Hungary. The criticism of this legal provision boiled down to the fact that as a result of these new constitutional provisions, effective immediately after its adoption, a large number of judges were abruptly removed.

The removal from office of these judges raised two main points of concern. One concern related to the fact that most of the affected judges occupied leadership positions. As a consequence of their removal, the newly appointed head of central judicial administration had the opportunity to select a large number of judges to leadership positions. The second point of concern was legal and highlighted that the removal from

---

[16] Fundamental Law, Art. 28.

[17] Baka András Parliamentary speech 24th of March 2011. Other possible normative mechanisms could be so-called "Judicial Guidelines." However, the tensions for functional and factual independence would remain. *See* chapter 1.

[18] id.

[19] Fundamental Law Art. 26(2).

[20] Setting specific age limits for occupying the judicial office can be a normatively and qualitatively sound choice. For e.g. Benoît Allemeersch, André Alen and Benjamin Dalle, 'Judicial Independence in Belgium', 322. Giuseppe Di Federico, 'Judicial Independence in Italy', 371 (75 years of age). Regina Kiener, 'Judicial Independence in Switzerland' 422 (64 women, 65 men). Anja Seibert-Fohr, 'Judicial Independence in Germany' 471 (Federal judges 67. State level 65). Timo Ligi, 'Judicial Independence in Estonia' , 768 (68 years of age) in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012).

[21] Zoltán Fleck, 'Judicial Independence in Hungary' in ibid. 811.

office of the affected judges appeared contrary to the constitutionally guaranteed tenure at the time of their appointment. Judges argued that this constituted a breach of the principle of personal independence judges.[22]

As an *institutional-organizational guarantee*, the Fundamental Law grants explicit constitutional status to central judicial self-governance. Namely, the constitutional frame of reference specifies that the President of the National Judicial Office is responsible for the administration of judicial functioning. Moreover, the Fundamental Law sets the general principle according to which the National Judicial Council and other judicial self-government bodies participate in the administration of courts.[23]

This conceptualization of *organizational independence* of the judiciary by the 2011 Fundamental Law represented an additional novel element in the Hungarian legal order and raised tensions for the independence of the judiciary vis-à-vis the legislative and executive branches of Government. Specifically, criticism from judges pointed out that the Fundamental Law removed the guarantee of the independence of the central administrative organ for the judiciary.[24] Judges supported this argument by highlighting that through the re-structuring of central judicial administration by the Fundamental Law, a single person, the President of the NJO, was essentially empowered with the central administration of the judiciary. This was in stark contrast with the principle of collegial judicial self-governance laid down by the previous Constitution. Furthermore, judges argued that even though the constitutional rules required a two-thirds majority vote of Members of Parliament for appointing the President of the NJO, in the existent political context of Hungary, the governing party could easily secure the required majority for appointing a loyal candidate to this key position.[25]

It was this context-specific combination of legal, structural and political circumstances, which raised concerns with respect to the independence of the President of the NJO; respectively for dismantling former constitutional checks on political powers by judicial self-administration.[26] The extensive competences of the President of the NJO in judicial administration, and the fact that the representative body of judges had only advisory competences, further exacerbated these concerns.[27]

Overall, the Hungarian constitutional frame of reference appears to formally guarantee different dimensions of judicial independence. The specific formulation of these guarantees fleshes out the conception of judicial independence in the Hungarian legal order, i.e. one that attaches particular importance to the independent status of judges through

[22] Baka András Parliamentary speech 24th of March 2011. Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, 'Disabling the Constitution' (2012) 23. Journal of Democracy 138. 143-145. For a detailed analysis *see* further chapter 4.
[23] Fundamental Law of Hungary, Art. 25 (5).
[24] Act XX of 1949, The Constitution of Hungary as amended in 1989, Art. 50(4).
[25] Baka András Parliamentary speech 24th of March 2011. However, we must also highlight that judges criticizing the new central judicial organisational model acknowledged the shortcomings of the previous collegial-model (i.e. opaqueness, excessive control by court presidents) and the need to reform Hungarian judicial self-governance. Moreover, judges also suggested that certain details of judicial self-governance (i.e. the principle of judicial representative bodies participating in self-governance) should not be constitutionally entrenched.
[26] Renáta Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 International Journal of Constitutional Law. 292. Constitution of Hungary 1989, Art. 50 (4).
[27] Baka András Parliamentary speech 24th of March 2011.

security of tenure, geographical irremovability and the administration of justice by the Judiciary. However, a remarkable tension for guaranteeing judicial independence through the new Fundamental Law appears the reduction of the constitutional checks on the powers of the legislative branch in the field of judicial organization. This tension was visible in all three major dimensions of the constitutional guarantee of judicial independence.

ii. Romania

In the Romanian legal order the fundamental values of the rule of law, judicial independence and the right to a fair trial governing judicial organization are laid down in the Constitution adopted in 1991 and amended in 2003. As a general value, the Constitution explicitly commits to the rule of law in the organization of the domestic legal order.[28] The rule of law ideal was introduced in the constitutional frame of reference after the fall of communism.[29] Additionally, the 2003 amendment of the Constitution introduced the explicit guarantee of separation and balance of powers.[30] Collectively, these two fundamental rule of law commitments serve as a foundation for more specific guarantees of judicial organization in the subsequent parts of the Constitution.

The Constitution delineates specific guarantees of judicial independence in the part discussing the judicial authority as one of the three main public powers. The first dimension concerns *functional independence.* In this sense, the Constitution explicitly acknowledges the *independence of judges* and the rule of law guarantee of *judges being subject only to the law*.[31] An additional fundamental rule of law guarantee of functional independence constitutes the principle of *courts established by law*. The Constitution explicitly states that courts of law, having the Supreme Court of Cassation and Justice as the highest court, shall administer justice. The text of the Constitution does not provide further details with respect to the court structure. However, as an additional guarantee, the Constitution explicitly states for the court system to be established through legal acts.[32] Consequently, it is guaranteed through the Constitution that any modification of the court system would require a legislative modification process. This appears as an important guarantee against the arbitrary modification of the court system by the legislative power.

Moreover, the Constitution further enforces the guarantee of courts established by law by expressly prohibiting the establishment of extraordinary courts outside the legal

---

[28] Constitution Art. 1(3). *See* Annex F. *See* Iulia Motoc and Crina Kaufman, 'Romania: Romania and the European Convention on Human Rights: A dialogue of judges' in Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016). 330.

[29] For detailed explanation of the 2012 constitutional crisis, having the lack of rule of law constitutional conventions at their basis *see* Vlad Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis' (2015) 13 International Journal of Constitutional Law. 257-269. Radu Carp, 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism' (2014) 10 Utrecht Law Review.8-15. *See* also Cosmina Tănăsoiu, 'Romania in the European Union: Political Developments and the Rule of Law After Accession' and Bogdan Iancu, "Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts" in Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (UK ed edition, Beck/Hart 2015).

[30] Constitution of Romania, Art. 1(4). Reasoning of the Constitutional amendment, 2.

[31] Constitution, Art. 124.

[32] Constitution, Art. 127.

court system. This constitutes an important rule of law guarantee in the specific historical context of judicial functioning in Romania, where under the communist regime extraordinary courts were set up to prosecute individuals on political grounds. [33] Nevertheless, as an element of flexibility within the court system, the Constitution allows for the establishment of specialized courts through organic law.[34]

Complementing this rule of law core of functional independence, the Constitutional frame of reference contains explicit contemporary guarantees for judicial proceedings. For instance, the right to access to justice acknowledges the right of individuals to a fair trial within a reasonable time. Consequently, there is an explicit guarantee of *timeliness of judicial proceedings* of importance for the quality of judicial proceedings. This guarantee was introduced in fulfillment of Romania's obligations as signatory of the European Convention on Human Rights. [35] In addition, the part of the Constitution referring to court organization, explicitly acknowledges the *publicity* of judicial proceedings. [36] This latter is an important contemporary guarantee concerning openness in the delivery of judgments.

As a further rule of law guarantee, the Constitution of Romania protects the *independent status of judges*. This protection is granted through affirming that the President of the State has the power to appoint judges. Moreover, the Constitution explicitly guarantees the irremovability of judges during their term of office. The text of the Constitution does not provide further details concerning the meaning of the irremovability principle. Nevertheless, the Constitution stipulates that the conditions of irremovability are established through legal act.[37] As an additional guarantee for the personal independence of judges, the Constitution stipulates that only the judicial self-governance body, the Superior Council of Magistracy, may propose judicial appointments; may decide on the promotion and transfer of judges; respectively on the sanctions against judges. This latter set of personal guarantees was introduced by the 2003 amendment of the Constitution[38] and points to a context-specific challenge in the Romanian legal order to guarantee the independent status of judges. Prior to the 2003 constitutional amendment, the challenge materialized in the extensive powers of the Ministry of Justice in selecting, promoting and evaluating the performance of judges. These powers led to the appointment of politicians and senior public servants to the judicial office, who seemed to remain loyal to their formal political affiliations.[39] The 2003 amendment of the Constitution was meant to overcome these challenges.[40] However, relying on central judicial self-government as a key additional element guaranteeing the personal independence of judges, might have contributed to the creation of a different tension, namely delegating an unchecked extensive competence in the field of judicial selection to the judicial branch.

---

[33] Dallara (n 124). 60-62.
[34] *See* Annex B.
[35] Constitution, Art. 21. Introduced by the 2003 constitutional amendment *see* Law on the modification of the Constitution, para. 9.
[36] Constitution, Art. 127. Reasoning for the Constitutional amendment, 3.
[37] Constitution, Art. 125.
[38] id. Law on the modification of the Constitution, Art. 62.
[39] Dallara (n 124). 62-63.
[40] Radu Carp, 'A constitutional principle under scrutiny: the immovability of judges – Romanian regulations in comparative perspectives' in Ramona Coman and Jean-Michel de Weale, *Judicial Reforms in Central and Eastern Europe* (Vanden Broele 2007). 199-225.

As a final but most remarkable addition to the conceptualization of judicial independence in Romania, the Constitution contains specific *institutional-organizational guarantees*. The Constitution stipulates that the central judicial administrative body, the Superior Council of Magistracy, has the main role of guaranteeing judicial independence in the Romanian legal order.[41] As such, a major guarantee constitutes the constitutional entrenchment of organizational independence. Moreover, the Constitution specifically stipulates the composition and term of office of the SCM members, as well as the competences of the SCM in the fields of selection and judicial discipline.[42] These specific institutional guarantees were introduced by the 2003 Constitutional amendment and they formed and important part of the pre- EU accession exchange between the Romanian Government and the European Commission.[43] However, the simultaneous constitutional entrenchment of (1) the separation of powers principle and (2) the significant role of judicial self-government pertaining to all fields of judicial functioning raised the concern of insulating judicial self-government from other public powers.[44]

Overall, we can observe a detailed conceptualization of contemporary rule of law values for judicial organization in the Romanian constitutional order. For instance, in the context-specific conceptualization of judicial independence the separation and balance of public powers, independent judicial decision-making, complemented by timeliness and openness of judicial proceedings, as well as personal independence of judges seem to have received particular emphasis. In addition, a major feature of judicial independence appears to be the role of the central judicial self-governing body as a guarantor of judicial independence. However, remarkably, there are also tensions surrounding this role. At the constitutional level the tension mainly boils down to a lack of balances or mutual checks on the judicial administrative competences by other public powers.[45] In the following paragraphs we will consider how the Constitutional Courts have addressed these tensions.

II. Interpretation by the Constitutional Court

In both studied legal orders, the Constitutional Court is the only competent court to strike down unconstitutional legislation. As such, the interpretation of the constitutional values for judicial functioning contained in the decisions of the domestic Constitutional Courts constitutes an important element of the constitutional frame of reference. For our overview in this section we selected decisions of the two Constitutional Courts discussing tensions between the rule of law and contemporary constitutional values guaranteeing the quality of judicial input, throughput and output as discussed in chapter 1.[46]

---

[41] Constitution, Art. 133.
[42] Id. *See* Dallara (n 124). 64,66.
[43] Legal act on constitutional amendment, Art. 66,67. For a detailed explanation of the political background of the constitutional and legislative changes *see* Ramona Coman, 'Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66 Europe-Asia Studies 892. 907-912.
[44] Cristina E. Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (n 18). 643-656. Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in ibid. 844-847.
[45] *See* further chapter 3,A,III; chapter 5.
[46] *See* Annex C,D. Online search is possible for decisions of the Constitutional Court of Hungary issued since the 1st of January 2012. For example, search results for the keyword "judicial independence" retained 16 results,

i. Hungary

With respect to the Hungarian Constitutional Court, we selected decisions discussing constitutional tensions related to (a) constitutional independence of the judiciary, (b) the introduction of the judicial self-government model in the Hungarian legal order and (c) the status of judges. The analysis below includes key cases concerning judicial independence from the initial case law of the Constitutional Court – which is considered foundational in terms of integrating rule of law values in the Hungarian legal order[47] – as well as the Court's recent case law. However, we must highlight that the 2011 constitutional and legislative amendments significantly reshaped the functioning of the Constitutional Court. The ex-post review competences of the Hungarian Constitutional Court were modified. The possibility of *actio popularis* was abolished and a constitutional complaint procedure was introduced. Under the legal framework in force, the ex post facto procedural review is more restrictive.[48] The review possibilities of budgetary matters by the Constitutional Court have been also limited.[49] Moreover, the number of Constitutional Court judges has been extended by four new positions. Overall, the number of judges was modified from eleven to fifteen judges. All these were combined with new appointment rules, which gave a more important role to the parliamentary majority.[50] In light of these developments, an important concern is how the legislative modifications will affect the possibility of the Constitutional Court to independently clarify the meaning of and interaction between constitutional values underscoring judicial functioning.[51] This question is further exacerbated by the inapplicability of the case law of the Constitutional Court under the previous Constitution for the interpretation of the Fundamental Law.[52]

Notwithstanding recent developments, a major contribution by the Hungarian Constitutional Court to judicial functioning concerned the interpretation of the constitutional guarantee of judicial independence.[53] To start with, shortly after the fall of communism the Constitutional Court had expressed that in the Hungarian legal order

---

http://www.alkotmanybirosag.hu/hatarozat-kereso (accessed 16.09.2019). With respect to the Romanian Constitutional Court, the search results for the keyword "judges" retained 140 results, https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx (accessed 16.09.2019).

[47] *See* Sólyom and Brunner (n 5), 81.

[48] For a critical overview *see* László Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary' in Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (UK ed edition, Beck/Hart 2015), 21 . Venice Commission CDL-AD(2012)009, para. 24-41.

[49] Fundamental Law, Art. 37(4).

[50] Zoltán Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014' 1 Constitutional Studies 1 (2016), 123-149.

[51] Kriszta Kovács and Gábor Attila Tóth, 'Hungary's Constitutional Transformation,' 7 European Constitutional Law Review 183 (2011), 200-203. Kriszta Kovács, Kim Lane Scheppele, 'The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union', 51 Communist and Post-Communist Studies 189-200 (2018), 191-194.

[52] Fourth Amendment to the Fundamental Law, Art. 19. "The following provisions replace point 5 of the Fundamental Law: (5) Decisions and the reasoning of the Constitutional Court prior into coming into force of the Fundamental Law cannot be used for interpreting the Fundamental Law."

[53] *See* László Sólyom, 'Introduction' in Sólyom and Brunner (ed) (n 5). Zoltán Fleck, Judicial Independence in Hungary in Seibert-Fohr (ed) (n 18). 793,794.

judicial independence was *formally guaranteed* through the "triangular system" of the Constitution, the legal act on court organization and legal act on the status of judges.[54] The Constitutional Court stipulated that judicial independence enjoys "absolute constitutional protection."[55]

In subsequent key decisions, the Constitutional Court further clarified the constitutional dimension of judicial independence. In this sense, the Constitutional Court held that judicial independence entails the *financial independence* of the judiciary. For instance, an early case related to an event where the Ministry of Justice re-allocated the judicial budget previously approved by the legislature to other State Institutions. Against this background, the Constitutional Court found that the lack of effective legal guarantees controlling the possibility of the Executive to re-group the budget formally allocated to the Judiciary was in violation of the constitutional provision guaranteeing the independence of the judiciary.[56]

Another key decision concerning the appointment of judges and court presidents further clarified the meaning of constitutional dimension of judicial independence. This case related to the distribution of appointment competences between the Ministry of Justice and the Judiciary. The Constitutional Court held that it is a constitutional requirement that the appointment powers of the political branches of Government are balanced by the participation of the judicial branch or another neutral participant. The Constitutional Court explicitly clarified that judicial participation in appointment processes (1) must represent the opinion of impartial and independent judges; and (2) it must result in a meaningful impact on judicial appointments. Consequently, the Constitutional Court found that the provisions of the 1972 legal act on court organization – concerning *inter alia* (a) the role of the regional assembly of judges in taking judicial administrative decisions; (b) the appointment powers of the Ministry of Justice and regional court presidents; (c) regional court presidents' powers to revise the activity of newly appointed judges – were not in violation of the constitutional guarantee of judicial independence.[57]

A paramount consideration framing the reasoning of the Constitutional Court constituted the fundamental principle of the *rule of law*, and in particular the *separation of powers* requirement. In this sense, the Court explicitly held that a special characteristic of the Judicial branch vis-à-vis the political branches of Government, is the former's *permanence and neutrality.*[58] When assessing the specific selection powers in question, the Constitutional Court looked into whether these contributed to securing the above-mentioned special characteristics of the judicial branch. Here, we can observe how the Constitutional Court clarified the procedural element of the rule of law, not explicitly contained in the constitutional text.[59] At the same time, the Court highlighted that these guarantees do not imply the lack of any control on the Judiciary. One important limitation according to the Constitutional Court constitutes the requirements that judges "are subject

[54] E.g. Constitutional Court of Hungary, Decision no. 38 of 1993 (V. 11.) AB. *See* further chapter 6.
[55] Constitutional Court of Hungary, Decision no. 19 of 1999 (VI. 25.) AB, ABH 1999 150,153. Decision no. 13 of 2013, 117. Decision 33 of 2017 (XII. 6.) AB, 76.
[56] Constitutional Court of Hungary, Decision no. 28 of 1995 (V. 19.) AB, I.
[57] Constitutional Court of Hungary, Decision no. 38 of 1993 (V. 11.) AB, I.
[58] Constitutional Court of Hungary, Decision. no. 53 of 1991 (X.31.) AB, ABH 1991 266, 267.
[59] Nóra Chronowski and Márton Varju, 'Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law' 8 The Hague Journal on the Rule of Law. 272-277. *See* above chapter 1,A.

to the law." [60] The Court considered this limitation not only the most important constitutional limitation on judicial independence, but also the very basis of the judicial decision-making function. Overall, the Court considered that the requirement of judges being subject to the law is a key condition for judicial independence, considering the role of judiciary to "autonomously interpret legislation adopted by the political branches of the Government."[61]

However, the Constitutional Court moved beyond the constitutional dimension of judicial independence and touched upon the functional-organizational dimensions of this principle. Namely, the Court explicitly acknowledged that the guarantee of judicial independence in the Hungarian legal order is more expansive than the constitutional guarantee of separation of powers. The Court held that *internal independence* of judges, applicable within the judiciary, is an equally important element of this principle, which must be observed. According to the Court, internal independence entails two elements. On the one hand, internal independence must be guaranteed vis-à-vis other judges. In other words, it must be guaranteed that judges decide cases based on their own professional opinion. On the other hand, the possibility of undue influence by the administration must be ruled out.[62]

Moreover, a key decision by the Constitutional Court concerned the *organizational* dimension of judicial independence. This case discussed the constitutionality of ministerial and judicial self-government models of central administration of the judiciary. The Constitutional Court held that the conception of organizational independence of the Judiciary in the Hungarian legal order does not require exclusively the administration of courts by an independent judicial administrative body. Other models of organizing the central administration of justice are also compatible with the constitutional guarantee of judicial independence. For instance, the independent administration of justice can be also guaranteed through the administration of the judiciary by the Executive branch. In light of this reasoning, the Court concluded that the provisions of the 1972 legal act on court organization empowering the Ministry of Justice to (1) guarantee adequate personal and material conditions for the functioning of courts (2) control the administrative activities of court presidents and to regulate the allocation of cases at courts – while observing judicial independence – was not contrary to the constitutional guarantee of independent administration of justice.[63] This decision illustrates that although judicial self-governance is a constitutionally entrenched principle in the Hungarian legal order, the Constitutional Court assumed a leading role in relation to the legislature in promoting a broader legal discussion concerning alternative models of central judicial administration. More recently, the Court stipulated that from the perspective of the professional independence of judges it is not important whether judicial administration is the responsibility of a collegial body or a single-person office, as long as the administrative powers do not influence the decision-making activity of judges.[64] For instance, in practice this would mean that the regulations by the judicial administrative body, which are binding for the judiciary, should be based either directly or indirectly on the values and principles enshrined in the constitutional

[60] Constitutional Court of Hungary, Decision. no. 53 of 1991 (X. 31.) AB, 266, 267. Decision no. 3154/2017, 19.
[61] id.
[62] Constitutional Court of Hungary, Decision 38 of 1993 (V. 11.) AB, III, 1. ABH 1993 256, 261, 262.
[63] Constitutional Court of Hungary, Decision no. 53 of 1991 (X. 31.) AB, I.
[64] Constitutional Court of Hungary, Decision no. 3154 of 2017 (VI. 21.) AB, 23.

frame of reference, the legal act concerning the functioning of courts and the legal act concerning the status and remuneration of judges. Furthermore the content of these regulations must concern matters of judicial administration and cannot relate to the decision-making activity by judges.[65]

A final dimension in the conceptualization of the principle of judicial independence by the Hungarian Constitutional Court relates to the meaning of *personal independence* of judges. According to the Court, the constitutional provision guarantees "the professional and personal independence of judges and secures judges' right to independence in connection to their role of occupying the judicial office." [66] The irremovability of judges constitutes an established element in the case law of the Court concerning the personal independence of judges.[67] The Court defined the meaning of personal independence, by explaining that judges "cannot be instructed, they cannot be removed from the judicial office or transferred against their will, only for reasons and following procedures established in cardinal acts. Moreover, the guaranteed tenure for life of judges also constitutes a part of the personal independence of judges."[68] Furthermore, the Court also clarified that the irremovability of judges serves as an important guarantee for the *decision-making autonomy* of judges because "it excludes the possibility that judges who decided cases based on the law and in accordance with their conscience, would be later subject to indirect retaliation in connection with their legal status."[69] In addition, according to the Court, the financial independence of judges, in particular adequate remuneration constitutes an element of personal independence of judges, which guarantees their economic independence. For instance, this has been established with regards to the question of remuneration during the suspension of a judge.[70]

In sum, we can observe a detailed interpretation of rule of law values for judicial organization by the Constitutional Court extending to the constitutional, organizational and functional dimensions of judicial independence. These decisions remain connected to salient constitutional questions and controversial events, which had taken place in Hungary. A remarkable contribution of these key decisions was the consideration by the Court of the given constitutional questions in light of the broader constitutional possibilities, i.e. the discussion of different models for judicial self-government, or the conceptualization of the internal dimension of functional judicial independence. In the following paragraphs we will examine how the Romanian Constitutional Court contributed to the conceptualization of rule of law values underlying judicial organization.

[65] Constitutional Court of Hungary, Decision no. 33 of 2017 (XII. 6.) AB, 81.
[66] Constitutional Court of Hungary, Decision no. 4 of 2014 (I. 30.) AB, 43, 44.
[67] Constitutional Court of Hungary, Decisions nos. 1 of 2008 (I. 11.) AB, 21 of 2010 (II. 25.) AB, 13 of 2013, 12 of 2017 (VI. 19.) AB.
[68] Constitutional Court of Hungary, Decision no.12 of 2017 (VI. 19.) AB, 83. Decision no. 33 of 2017 (XII. 6.) AB, 45.
[69] Constitutional Court of Hungary, Decision no. 33 of 2012 (VII.17.) AB, 84. Decision no. 33 of 2017 (XII. 6.) AB, 46.
[70] Constitutional Court of Hungary, Decision no. 4 of 2014 (I. 30.) AB, 33 of 2017 (XII. 6.) AB, 66.

ii. Romania

With respect to the Romanian Constitutional Court, we selected judgments of the Court discussing constitutional tensions related to the (a) separation between the judicial and prosecutorial functions; (b) the introduction of judicial self-governance in the Romanian judicial administration; (c) the appointment and independent status of judges. The Constitutional Court of Romania contributed to the conceptualization of rule of law values underpinning judicial organization mainly through its decisions concerning possible breaches of the constitutional principle of judicial independence.

A first set of key decisions of the Constitutional Court elaborate upon the meaning of *functional independence* of judges. Concerning this dimension, a fundamental task of the Constitutional Court was to clarify which participants in the administration of justice were responsible to exercise the judicial function, and by extension benefitted from functional independence. This tension related to the inclusion of the constitutional provisions regulating the prosecutorial powers in the Part of the Constitution dedicated to the "Judicial Authority." As such, the text of the Constitution appeared to raise the question whether prosecutors were entitled to exercise the judicial function and benefitted from independence. The Constitutional Court held that only judges appointed by law and holding legal competence to decide a legal dispute are entitled to these guarantees. The Constitutional Court also explicitly established that prosecutors are representatives of the Executive power in the Romanian legal order. Consequently, the inclusion of prosecutorial competences in the part of the Constitution regulating the judicial power does not entitle prosecutors to exercise judicial functions.[71]

In a subsequent decision, concerning the constitutionality of the 1997 act on court organization, the Constitutional Court confirmed its conceptualization of the functional independence of judges. In this decision, the Constitutional Court explicitly held that based on the constitutional principle of *courts established by law*, only judges can exercise the judicial function. The Court expressly highlighted that the functional independence of judges is connected to the broader constitutional guarantee of *separation of powers*. The Court held that even though there was no explicit reference to the principle of separation of powers in the text of the Constitution at that time, it constituted a fundamental part of the Romanian constitutional frame of reference. According to the Court, this implicit guarantee could be deduced from the text of the Constitution referring to the different powers of the State. Consequently, the differentiation made in the legal act on court organization between the judicial authority – including both judges and prosecutors – and the judicial power – or function, to which only judges are entitled – was not in breach of the constitutional guarantee of judicial independence.[72] In a similar vein, the Constitutional Court held that the Superior Council of Magistracy does not form part of the judicial power. The Court explicitly stated that SCM fulfils administrative functions related to the functioning of the judiciary. As such, the SCM is interposed between the judicial power and the executive power and has the main role of guaranteeing judicial independence.[73]

---

[71] Constitutional Court of Romania, Decision no. 96 of 1996. *See* also Constitutional Court of Romania decision no 73 of 1996.
[72] Constitutional Court of Romania, Decision no. 339 of 1997, 1.
[73] Constitutional Court of Romania, Decision no. 339 of 1997, 1.

This finding was important for determining the *constitutional* and *organizational* dimensions of judicial independence and opened up the way for subsequent clarifications. For example, through the decision reviewing the constitutionality of the 2003 amendment of the Constitution, the Constitutional Court recognized that the Superior Council of Magistracy enjoys independence according to the amended text of the Constitution. The Court specified that according to this guarantee prosecutor-members of the SCM cannot intervene in decisions concerning judges. In addition, this guarantee also means that the *ex officio* members of the SCM (the Ministry of Justice, Chief Prosecutor or the President of the High Court of Cassation and Justice)[74] cannot be elected as the President of the Superior Council of Magistracy.[75] Further case law clarified that the rules concerning the removal from office of the Members of the SCM, which did not guarantee the right to defence, were unconstitutional.[76] Whereas, the Court also rejected the possibility to increase the number of SCM Members from outside of the Judiciary, on account of the negative consequences that this change would have for the overall functioning of the judiciary.[77]

Moreover, in its decision reviewing the constitutionality of the 2004 legal act on judicial organization, the Constitutional Court further clarified the role of the Superior Council of Magistracy for the judiciary operating as an organization.[78] The Constitutional Court reiterated that the role of the Superior Council of Magistracy is to "guarantee the independence of judges." This role is realized through the competences of the SCM in the fields of selection, appointment, promotion and professional preparation of magistrates as well as through other constitutional provisions.[79] Concerning the obligation of the SCM to present an annual activity report in front of the Legislature, the Constitutional Court found that this obligation is an expression of the constitutional principle of *separation of powers*. According to the clarification of the Court, this principle is conceptualized in the Romanian legal order as one "entailing collaboration and mutual exchange of information."[80] Consequently, the obligation of the judicial self-administrative body to present its activity in front of the Parliament was not in breach of the constitutional guarantee of judicial independence.

However, the Constitutional Court was called to answer further questions related to the meaning of the separation of powers principle and the constitutional dimension of judicial independence. One such question concerned the scope of the power of the SCM to provide advisory opinions with regard to draft legislation concerning the functioning of the judiciary.[81] This question arose in the context of the SCM giving advisory opinion on the criminal code and the code of criminal procedure. In response to these developments the Constitutional Court clarified that the scope of this power only extends to legislation concerning the organization and functioning of courts. According to the Court, any further application of this power "would lack foundation in clear and predictable criteria and

[74] For the composition of the Superior Council of Magistracy *see* chapter 3,A,III,ii.
[75] Constitutional Court of Romania, Decision no. 148 of 2003 Part containing the judgement of the Court, 2.
[76] Constitutional Court of Romania, Decision no. 196 of 2013.
[77] Constitutional Court of Romania, Decision no. 80 of 2014.
[78] Constitutional Court of Romania, Decision no. 375 of 2005, published in the Official Journal of Romania, no. 591 of 8 July 2005. *See* also chapter 6,B,I,ii.
[79] ibid. Part of Judgement of the Court, 1,a.
[80] ibid. 1,b.
[81] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 38(4). *See* further chapter 4.

therefore would be arbitrary."[82] Despite this clarification, the problem persisted in practice when the Government asked the advisory opinion of the SCM concerning Emergency Ordinance no. 13 of 2017, which aimed to restrict the applicability of the Criminal Code with regard to the offence of abuse of office – ultimately leading to extensive protests in February 2017. The Constitutional Court rejected this complaint on account of the lack of constitutional conflict, since the Government had no legal obligation to seek an advisory opinion by the SCM."[83]

Another set of questions concerned the "loyal cooperation" between the three branches of Government.[84] The Constitutional Court connected this notion to the principle of separation of powers and provided the definition of "legal conflicts of a constitutional nature" between the public powers. One such conflict occurred between the judiciary and the legislature, when the Senate refused to comply with the final decision by the High Court of Cassation and Justice, regarding the incompatibility of a senator. The Constitutional Court found that by doing so the Senate "abused competences that belonged to the judiciary" and ordered the Senate to follow the final court decision.[85] The loyal cooperation between the Judiciary and the Government was also called into question by the SCM on account of the failure of the Government to ask for the advisory opinion of the SCM between 2005 and 2009. However, the Constitutional Court rejected this claim by stating that these events did not give rise to a "legal conflict of a constitutional nature."[86]

Finally, an important contribution by the Constitutional Court of Romania concerned the conceptualization of the *statutory* or *personal* dimension of judicial independence, in particular the core rule of law guarantee of *irremovability* of judges. For instance, the Constitutional Court clarified that the irremovability of judges guarantees the good administration of justice as well as the independence and impartiality of justice. The Court highlighted that this guarantee is not conferred in the personal interest of judges, but rather "is meant to guarantee the effective realization of the principle of judicial independence and, at the same time, irremovability is meant to secure the professionalism and dignity of justice."[87]

Additionally, in 2005 the Constitutional Court established that the principle of irremovability in the Romanian legal order entails, on the one hand, that the status of judges cannot be modified during the exercise of their professional function.[88] On the other hand,

---

[82] Constitutional Court of Romania, Decision no. 3 of 2014. *See* also Decision no. 901 of 2009.
[83] Constitutional Court of Romania, Decision no. 63 of 2017.
[84] *See* Bianca Selejan-Guțan, 'Romania: Perils of a "Perfect Euro-Model" of Judicial Council', 19 German Law Journal 7 (2018),1727.
[85] Constitutional Court of Romania, Decision no. 972 of 2012.
[86] Constitutional Court of Romania, Decision no. 901 of 2009.
[87] Constitutional Court of Romania, Decision no. 375 of 2005, 1b.
[88] Constitutional Court of Romania, Decision no. 375 of 2005, published in the Official Journal of Romania, no. 591 of 8 July 2005. (Declaring certain provisions of Law no. 247 of 2005 on the reform of the justice and property system unconstitutional). (Decision of the Court, part 3 discussed the modifications of the legal act on the status of judges through Part XVII of Law no. 247 of 2005: the Court found unconstitutional the provisions establishing that all judges occupying court leadership positions who have been in function for a longer period than 3 years at the time of the new legislation are dismissed from their position. The Court also established that "the principle of irremovability is applicable both to the duration of the tenure of judges and that of court leaders; the duration of the mandate cannot be shortened or prolonged without the consent of judges; nevertheless, the legislature can modify the length of leadership functions. However, these modifications can only be applicable for the future." The Court also highlighted that the termination or shortening of all judicial leadership mandates present a dangerous legal precedent for the rule of law. The Court emphasized that the judge is central for the rule of law

the Court clarified that the independent status "protects judges from the risk of being dismissed, demoted to other courts through transfers or promotions without their consent."[89] Through this clarification the Constitutional Court also explicitly included the geographical aspect of judicial irremovability in the conceptualization of personal independence in the Romanian legal order.

Overall, we can observe an important contribution by the Constitutional Court of Romania in conceptualizing the functional, organizational and personal dimensions of judicial independence. In particular the Court clarified: (1) the specific meaning of functional independence of judges and external threats to it; (2) questions related to the independent central administration of the judiciary, respectively the relations between the central administration and the Legislature; and (3) the meaning of irremovability of judges. A remarkable feature of these decisions is the direct reference to the separation of powers principle, and the incremental clarification of the implications of this rule of law principle for the functional and organizational dimensions of judicial independence.

III. Main Structural Change: the emergence of national councils for the judiciary

As our overview of the content of the domestic Constitutions and decisions by the Constitutional Courts indicated, an important element of judicial organization in both the Hungarian and Romanian constitutional orders relates to judicial self-administrative bodies, so-called councils for the judiciary. The initial establishment and, subsequently, the modification of competences of the domestic councils for the judiciary constituted a major structural change for judicial administration in both studied legal orders. At the same time these changes yielded significant powers to these institutions for guaranteeing the quality and legitimacy of judicial input, throughput and output. Given this role, we will review the composition and competences of these councils based on the Constitution, legal framework and legislative preparatory documents.

i. Hungary

The major tasks connected to the central administration of courts are assigned to the President of the National Judicial Office (NJO). The President of the NJO is a judge, elected by the National Assembly for a period of nine years.[90] This single person has competences *inter alia* in the fields of judicial selection, management, and financing.[91] An administrative office, composed by judges or administrative staff, helps the activity of the

---

and therefore the legal instability concerning their profession can only be a factor discouraging candidates from choosing the judicial profession; it can be also counterproductive for the fidelity of judges towards the law and the rules of conduct. Being aware of the legal precedent of suppressing the mandate of court leaders, without any professional errors applicable to the individual judges; the judge in a leadership role will cease to be independent).

[89] ibid. Part 'Decision of Court', para 3 (e,4).

[90] Fundamental Law, Art. 25(5,6).

[91] Act CLXII of 2011, Sec. 77,78.

President of the NJO.[92] Additionally, the National Judicial Council (NJC) supervises the activity of the President of the NJO.

The National Judicial Council is a representative body composed of judges.[93] The members of the NJC review the decisions of the President of the NJO and give their opinion on the regulations proposed by the President of the NJO. Moreover, the National Judicial Council has competences in the field of judicial discipline (it approves the caseload of the disciplinary tribunal), it develops the judicial ethical code, and it reviews the financing proposal for the judiciary and the centralized training programme for judges.[94]

This bifurcated model for central judicial administration was introduced by the 2011 constitutional and legal reforms,[95] and it replaced the collegial judicial council of Hungary (National Council for Justice) originally created in 1997. The 1997 model for central judicial administration empowered a body composed of judges[96] to make all major decisions related to the central administration of courts (i.e. financing, judicial selections, resource management). The Members of the National Council for Justice met once a month and an administrative office prepared their meetings. [97]

It must be mentioned that in practice, between 1997 and 2009 the central judicial administration was composed in its majority of regional court presidents, elected by the general assembly of judges. The composition raised the concern of perpetuating the interests of regional court presidents. Ultimately, the functioning of central judicial administration was deemed ineffective – especially with respect to sanctioning court presidents, – inefficient, opaque and not complying with the legal requirement of representativeness of judges.[98] In response to these criticisms, in 2009, the newly elected collegial self-government body showed commitment towards representing judges from all levels of the court system in its composition. The newly elected council for the judiciary also seemed committed to remedying the shortcomings of the functioning of judicial self-government. For instance, the council commissioned an independent evaluation report and initiated legislative proposals for enhancing their functioning, i.e. the President of the Council could make certain decisions on his own in order to enhance efficiency, and

[92] Act CLXII of 2011, Art. 86,87.

[93] ibid. Sec. 88-102, 143-146. The National Judicial Council is composed of fourteen judge-members and the President of the Curia by law. Judge-members must have at least five years of professional experience and are elected by the national assembly of judges. The judge-members of the NJC represent all four levels of the court system.

[94] ibid. Sec. 103.

[95] Fundamental Law, Sec. 25(5). Act CLXII of 2011, Sec. 101-104. On different "models" of judicial councils in Europe *see* Pim Albers 10-52, 64-70. Garoupa and Ginsburg (n 92). Figure 2. For a more detailed explanation of the Hungarian model in comparison with other prevalent models of central judicial organisation models in Europe *see* Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 German Law Journal. 1265-1269.

[96] The National Council for Justice, had 9 judge member, elected by the national assembly of judges as one delegate for forty judges; and 6 ex officio members: the Ministry of Justice, General Prosecutor, President of the Hungarian Association of Judges, two Members of the Parliament, and the President of the Supreme Court acting as chair of the Council. Until 2009 seven out of the nine judge members were regional court presidents. See Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 18). 799.

[97] Act LXVI of 1997, Sec. 127. *See* in general Zoltán Fleck, 'Judicial Independence in Hungary' in ibid. 795-801. Daniela Piana, *Judicial Accountabilities in New Europe* (Ashgate 2010). 89-121.

[98] Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 18). 797.

judicial disciplinary competences were attached to the Highest Court.[99] However, the 2011 constitutional and legislative reforms disrupted these judicial initiatives by re-organising judicial self-government in Hungary.

The official reason of the Government for the organizational reforms was to make the central judicial management operational, efficient and able to respond to societal and economic demands. [100] The ambitions essentially overlapped with those of the previous judicial self-governing body. Nonetheless, the manner in which the central judicial management was re-organised triggered serious domestic and European criticism on account of endangering the constitutional guarantee of judicial independence. Particular concerns were: (1) the manner of election, and relatedly, the possible political dependence of the President of the NJO; [101] (2) the extensive and unchecked competences of the President of the NJO extending to all fields of judicial management (with particular reference to the extraordinary case transfer competences of the NJO President); and (3) the limited role of the representative body of judges.[102]

If we refer back to the theoretical premises of this study, we can observe tensions raised by the central administrative competences for the independent status and decision-making of judges. [103] Against this background, the question emerges: What are the implications of these robust, efficiency-oriented central judicial management reforms for the independence of judges in Hungary?[104]

ii. Romania

In the Romanian legal order, the central managerial tasks for the functioning of the judiciary are formally delegated to the council for the judiciary. The Superior Council of Magistracy was established in 1992 and significantly reformed in 2004.[105] The SCM is

[99] *See* e.g. Baka András Parliamentary speech 24th of March 2011. Eötvös Károly Research Institute, 'Judicial Independence, Accountability, Judicial Reforms' (2008), http://www.ekint.org/ekint_files/File/tanulmanyok/biroi_fuggetlenseg.pdf (accessed 16.09.2019), 92-96.

[100] Legislative proposal T/4743 on the organisation and administration of courts, 60.

[101] The President of the NJO: must be a judge, with permanent appointment and at least 5 years of professional experience; the President of Hungary proposes a candidates, who is heard by a Parliamentary Committee; the Parliament can confirm the candidate with two-thirds of majority vote. The President of the NJO had a 9-years, non-renewable mandate. Fundamental Law Art. 25(6). Act CLXII of 2011, Sec. 66,67.

[102] Venice Commission, CDL-AD(001-e), 7-16, 23-25. For a more detailed overview of the exchange between the Venice Commission and the Hungarian Government concerning the case transfer competences of the President of the NJO *see* Petra Gyöngyi, 'Fundamental Principles of the European Union and Judicial Reforms in New Member States: Assessing Judicial Reforms in Hungary' (2013) No. 8 Academy of European Public Law Series. 20-29.

[103] *See* chapter 1.

[104] *See* further chapter 5.

[105] *See* in general Piana (n 71). 121-159. Horatiu Dumitru and Monica Macovei, 'Judicial Independence in Romania' in Open Society Institute, Monitoring the EU Accession Process: Judicial Independence, https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf (accessed 16.09.2019), 371-374. Constitution of 1991, Art. 132,133. Law no. 92 of 1992 on judicial organisation, republished in the Official Journal of Romania no. 259 of 30 September 1997, Art. 86-90.

[105] Constitution of Romania, Art. 133 (role and structure), Art. 134 (powers). Law no. 317 of 2004 concerning the Superior Council of Magistracy, initially published in the Official Gazette of Romania, Part I, no. 599 of 2 July 2004; republished in the Official Gazette of Romania, Part I, no. 827 of 13 September 2005; republished in the Official Gazette of Romania, Part I, no. 628 of 1 September 2012. *See* Appendices B, D.

composed of both judges and prosecutors (nine judges and five prosecutors), elected by the general assembly of judges, respectively that of prosecutors. Additionally, the SCM has as *ex officio* members the President of the High Court of Cassation and Justice, the Ministry of Justice and the General Prosecutor. Two representatives of the civil society also observe the meetings of the SCM. The judge-members of the SCM represent different levels of the Judiciary and have the competence to decide, separately from the body composed of Prosecutors, on major questions concerning judicial administration.[106] For instance, the plenum of judges issues decisions on judicial selections, evaluations and training, and the specialized section of judges' issues judicial disciplinary decisions.[107]

The activity of the judicial self-governing section of the SCM reflects its formal competences extending *inter alia* to the fields of judicial selection, training, appointments, managerial overview, performance evaluation, discipline of judges, judicial ethics as well as communication with the Legislative branch and the public at large.[108] An important aim of the 2004 judicial council reforms was to make a SCM an independent guarantor of judicial independence in Romania.[109] For these purposes the constitutional position of the SCM was strengthened and explicitly articulated. This entailed that: (1) the role of the SCM as the main guarantor of judicial independence was explicitly incorporated in the text of the Constitution; (2) the competences of the SCM were expanded; and (3) the status of its members was strengthened by transforming SCM membership into a full-time administrative appointment without the possibility of maintaining adjudicatory functions for this period.[110]

However, the sudden extension of competences gave rise to the concern that the central judicial administration would become overly autonomous, opaque in its functioning and, ultimately, unaccountable to or balanced by the Legislature and Executive. A notable concern was that the principle of judicial independence, in particular its organizational dimension would become misinterpreted in the Romanian legal order as one entailing uncontrolled power.[111] Ultimately, these concerns were also expressly mentioned by the European Commission, which required improvements concerning the capacity and accountability of the central judicial administration.[112]

---

[106] For a general overview *see* Ion Deleanu, *Institutii Si Proceduri Constitutionale in Dreptul Roman [Institutions and Procedures in Romanian Law]* (CH Beck 2006). 650-653. Cristina E. Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 18). 643-656. Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in ibid. 844-847. For recent critical analysis *see* Bogdan Iancu, 'Perils of Sloganised Constitutional Concepts Notably that of 'Judicial Independence'', 13 European Constitutional Law Review 582 (2017), 592-599. Simina Elena Tănăsescu, Ramona Delia Popescu, 'Romania High Judicial Council – Between Analogy of Law and Ethical Trifles' 36 Transylvanian Review of Administrative Sciences 165 (2012), 165-176. See Bianca Selejan-Guțan, 'Romania: Perils of a "Perfect Euro-Model" of Judicial Council', 19 German Law Journal 7 (2018), 1707-1740.

[107] Decisions of the SCM, Superior Council of Magistracy, http://www.csm1909.ro/DecisionsV1.aspx (accessed 16.09.2019). *See* Annex D.

[108] Law no. 317 of 2004, Art. 35-37.

[109] Government of Romania, Memorandum on Law no. 303 of 2004 on the status of judges. See Annex D.

[110] Constitution of Romania, Art. 133. *See* also Preparatory documents Law no. 317 of 2003 available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5547&cam=2 (accessed 16.09.2019).

[111] Cristina E. Parau ,'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 18). 643-656.

[112] European Commission, Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, 13 December 2006 (C (2006) 6569 final). *See* Introduction.

Referring back to our theoretical framework, we can observe that the consolidation of the organizational independence of the judiciary in Romania appears to have created internal tensions for the independent and quality decision-making as well as the personal independence of judges. Particular concerns relate to the extent to which the judicial self-governance body in Romania can effectively promote professionalism among judges, contribute to internalizing the conception of independence by judges, and ultimately contribute to enhancing the autonomy of individual judges. The condition of representativeness of judges in the composition of the Superior Council of Magistracy does not automatically guarantee the realization of these individual and internal aspects of judicial independence. The lack of an extensive legal conceptualization of the internal independence, for instance in the legislative preparatory documents or interpretation by the Constitutional Court, creates further difficulties for the realization of this dimension of judicial independence, by not providing guidance in this sense. This raises the general rule of law question of to what extent the SCM is an effective guarantor of judicial independence, without abusing its powers.[113]

With the overview of the composition and competences of the Romanian council for the judiciary, our presentation of the constitutional frame of reference for judicial organization in Hungary and Romania is complete. In the following section we will compare the main similarities and differences between the two constitutional frameworks.

B. Similarities and differences

As a second part of our analysis concerning the constitutional frame of reference governing judicial organization in Hungary and Romania we will proceed with the comparative analysis of the constitutional values for the quality of judicial input, throughput and output. On the one hand, the comparative analysis allows us to flesh out and explain the main similarities, which appear constant irrespective of the different contexts of domestic judicial functioning. On the other hand, the comparison allows us to point out contextual differences between the two legal orders.

I. National conceptions of rule of law values for judicial organization

As a main similarity, in both legal orders we could observe a context-specific conceptualization of rule of law values underlying judicial organization and functioning. The ideal of the rule of law is an explicit foundational value emphasized by both domestic constitutions, albeit not explained in detail. In addition, the constitutional frame of reference in both legal orders explains different dimensions of judicial independence. In particular, functional and statutory independence are explicitly guaranteed in both legal orders. As notable feature of both constitutional orders, judicial self-government is also constitutionally entrenched. Additionally, both constitutions make explicit reference to the contemporary value of timeliness of judicial proceedings. In both legal orders, timeliness

[113] *See* chapter 1.

appears as part of the right to a fair trial. Thus, the phenomenon of entrenchment of bills of rights in contemporary domestic Constitutions appears to serve as an explicit endorsement of this contemporary value of judicial functioning.[114]

At the same time, the specific content of all discussed rule of law values is different between the two legal orders. As an illustration, we can mention how the quality of judicial decisions is guaranteed. In the Hungarian legal order, the classic obligation to give reasons appears as an explicit constitutional guarantee for the quality of judicial decisions. In contrast, with reference to the quality of judicial decisions, the Romanian constitution focuses on the contemporary guarantee of openness of judicial proceedings.

In the comparison of the two legal orders, the most remarkable difference constituted the context-specific tensions for judicial independence emerging from the text of the constitution.[115] A major tension in the Hungarian legal order was the reduction, through the new Fundamental Law, of the constitutional checks on the legislative power pertaining to judicial functioning and organization. Conversely, in the Romanian legal order a major constitutional tension concerned the empowerment of the judiciary in the field of judicial functioning and the reduction of balances by other public powers. Regarding similarities, central judicial self-government was at the center of constitutional tensions in both legal orders.

II. Interpretation by the Constitutional Court

In both legal orders Constitutional Courts appeared to deliver important contributions in clarifying constitutional, organizational and personal dimensions of judicial independence. In doing so, both Constitutional Courts could address constitutional tensions for guaranteeing judicial independence, i.e. the division of competences between public powers in the field of judicial administration. A possible explanation for this contribution could be that in both legal orders, Constitutional Courts are the only courts with an explicit mandate to strike down unconstitutional legislation.[116]

However, we could also observe some notable differences regarding the specific conceptualization of constitutional principles. Remarkably, the Constitutional Court of

---

[114] cf. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004). 100-148.

[115] *See* Renáta Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 International Journal of Constitutional Law. 292.

[116] Review competences of the Hungarian Constitutional Court: Fundamental Law of Hungary, Art. 24. Act on the Constitutional Court, Sections 23,24 (ex ante: Government, 1/4th of MPs, Fundamental Rights Commissioner), 26, 27 (constitutional complaint procedure: (1) complaint against a legal provision applied in court proceedings; (2) an exceptional form of complaint against a legal provision, when there are no real and effective remedies available; (3) a full constitutional complaint against final court decisions).
Prior to the 2011 legal reforms, anyone could ask the Constitutional Court to review the constitutionality of a law under the so-called "*actio popularis*" petition. This possibility opened up the Constitutional Court to a much broader audience (i.e. not just citizens, and persons directly affected by a law) and in effect the Constitutional Court reviewed all major Hungarian laws. *See* Imre Vörös, 'Contextuality and Universality: Constitutional Borrowings on the Global Stage - The Hungarian View' (1999) 1 University of Pennsylvania Journal of Constitutional Law 651.
Review competences of the Romanian Constitutional Court: Constitution of Romania, Art. 146. Law no. 47 of 1992, Art.1,2; 10-49. Art. 29(2). Bianca Selejan-Gutan, *The Constitution of Romania: A Contextual Analysis* (1 edition, Hart Publishing 2016). Chapter 5.

Hungary included the internal aspect of functional independence in its conceptualization. In contrast, the Constitutional Court of Romania mainly focused on the external threats against the functional independence of judges. Furthermore, concerning organizational independence, the Hungarian Constitutional Court explicitly pointed out that different models of central judicial administration (i.e. by an independent judicial body, or by the Ministry of Justice) are both compatible with the constitutional guarantee of judicial independence. In contrast, the Romanian Constitutional Court discussed central administration by the judiciary as the only model compatible with the constitutional guarantees of judicial independence.

One possible explanation for this specific difference could be the extensive ex-post review competences of the Hungarian Constitutional Court. The above-mentioned decisions concerning the financial independence of the Judiciary, judicial appointments, and organizational independence were reviewed pursuant to the ex-post competences. [117] Conversely, key judicial independence decisions by the Romanian Constitutional Court were delivered as part of the ex-ante review competence. [118] Nevertheless, in light of recent Hungarian constitutional reforms, it appears questionable to what extent the Constitutional Court can maintain its position of effectively upholding the rule of law and related fundamental constitutional values for judicial functioning.[119]

III. Councils for the judiciary

As a main similarity, both legal orders opted for: (1) allocating extensive competences to the central judicial managerial organs, including initial selection, career development, and judicial discipline; and (2) the management of court resources and evaluation of court performance. However, at the same time, the resulting models for central judicial management in Hungary and Romania are different. This difference could be attributed to differences in the context-specific fundamental considerations behind the establishment of central judicial administrative bodies. In Hungary efficiency-oriented considerations seems to have propelled a new central administrative model. In Romania, the urgency of protecting the independence of judges against pressures from the other branches of the Government appears to have triggered structural reforms.

However, regardless of this difference, in both legal orders the establishment of central judicial administration appears to have created challenges for guaranteeing the functional and personal independence of judges. [120] These challenges appear context-

[117] For instance, the case concerning the financial independence of the judiciary (Constitutional Court of Hungary, Decision no. 28 of 1995 (V. 19.) AB) was introduced as constitutional complaint. The case concerning the appointment of judges (Constitutional Court of Hungary, Decision 38 of 1993 (V. 11.) AB) was introduced in part as an ex post facto norm control of the constitutionality of act 1972 on judicial organisation and in part as individual constitutional complaints requesting the annulment of administrative decisions taken on the basis of the 1972 legal act.

[118] Review of the constitutionality of the constitutional amendment law (Constitutional Court of Romania, Decision no. 148 of 2003); review of the constitutionality of the 2004 legal act on court organisation (Constitutional Court of Romania, Decision no. 375 of 2005).

[119] cf. Chronowski and Varju (n 50). 277-288.

[120] cf. David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016). 390-422. Linn Hammergren, 'Twenty-Five Years of Latin American Judicial Reforms: Achievements, Dissapointments, and Emerging Issues' (2008) IX The Whitehead Journal of Diplomacy and

specific. In Hungary two interrelated challenges are: whether the central management is independent from the Government, and whether the competences of the central management can interfere with the functional and personal independence of judges. Particular challenges concerned the case management and judicial selection competences of the central management.[121] In contrast, in Romania the challenge relates to the overly autonomous functioning of the central judicial managerial body. Specific tensions concern the transparency of the CSM's functioning, its accountability towards other public powers and its capacity to fulfill its main roles.

C. Conclusions

This chapter set out to present the fundamental tensions for the principle of judicial independence in the Hungarian and Romanian constitutional orders. In light of this analysis, a main challenge in Hungary appears to be the introduction of new constitutional provisions limiting the independent status and functional independence of judges as well as re-structuring the organizational dimension of judicial independence. The reduction of the competences of the Constitutional Court, a key public authority in conceptualizing judicial independence, could potentially exacerbate the limiting effects of the new constitutional framework. With respect to the Romanian legal order, an overall challenge appears to be the sudden introduction of strong constitutional guarantees for judicial independence mainly through the establishment and role of the judicial council. However, these guarantees appear to lack an important foundation most prominently through the missing conceptualization of the internal dimension of judicial independence in the constitutional preparatory documents and the case law of the Constitutional Court. In the following three chapters we will assess how the domestic legal frame of reference in Hungary and Romania reflect these constitutional tensions.

Finally, our overview of the domestic constitutional frameworks for court organization also yielded some general theoretical expectations with respect to the importance of the activity of Constitutional Courts and the implications of the functioning of councils for the judiciary for the functional and personal independence of judges. In the following chapters we will further dissect the above-mentioned general challenges and expectations. We will start our in-depth analysis by considering judicial selections in Hungary and Romania.

International Relations. 89-104. Daniel J Beers, 'Judicial Self-Governance and the Rule of Law' (2012) 59 Problems of Post-Communism 50. 50-67.

[121] The legal challenges partially remedied by the time of writing these paragraphs. But the important and lasting consequences, and the remaining extensive and uncontrolled competences, makes this problem of general importance. *See* further chapter 5.

4. Quality of Judicial Input and Independence of Judges in Hungary and Romania: Assessing judicial selections

In the analysis so far three aspects regarding the values and mechanisms for the selection of judges came to the fore. Firstly, judicial selection appeared critical for guaranteeing the personal independence of judges in the liberal-democratic constitutional framework. Secondly, judicial selection mechanisms appeared as an important element of European standards. Thirdly, the development of judicial selection mechanisms appeared to have created challenges for the personal independence of judges in the overview of the Hungarian and Romanian constitutional frame of reference. In the analysis that follows we will further dissect the legal framework and non-binding reports and recommendations governing the selection of judges in the two studied national legal orders. For the purposes of this analysis, judicial selection will refer to the legal principles and rules determining the conditions for occupying the judicial office and the mechanisms through which the initial selection of candidates takes place.[1]

Judicial selections constitute a "most likely case" for testing the effects of simultaneous development of rule of law and new public management values for judicial organization under EU guidance for two main reasons.[2] First, this area of judicial organization presents challenging questions for balancing rule of law and new public management values. Second, European legally binding requirements and non-binding recommendations specifically address judicial selections. On the one hand, in the contemporary legal-societal and EU setting, judicial selection mechanisms evolve in a way to incorporate contemporary values (i.e. testing for communication skills, specialized legal knowledge). On the other hand, in the liberal-democratic normative framework, judicial selections must comply with basic rule of law principles of guaranteeing the independent status of judges and securing merit-based selections. The analysis focuses on two main developments related to this balancing: (1) the reconsideration of the fundamental qualifying conditions for the judicial office and (2) the extension of central judicial powers to effectively select candidates.

The analysis proceeds in four main steps. First, the balancing questions related to ongoing reforms of judicial selection conditions and mechanisms will be explained. Second, the chapter will compare the content and context of legally binding and non-binding instruments regulating judicial selections in the Hungarian and Romanian legal orders. This will be followed by a two-step critical analysis of the studied domestic judicial selection mechanisms in the third part, in light of (1) their contribution or hindrance to the guarantee of the rule of law, as well as (2) existing European requirements and recommendations in this field. Finally, the fourth section concludes the analysis by

[1] *See* e.g. Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (1st edn, University of Toronto Press, Scholarly Publishing Division 2006). Anja Seibert-Fohr, 'Judicial Independence – The Normativity of an Evolving Transnational Principle' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012). 1304-1306.
[2] *See* Introduction, C.

depicting an adequate role of participants in judicial selection processes, from the perspective of securing objective selections, and offering suggestions in this sense. Ultimately, the analysis makes it possible to identify legal and factual conditions for reforms of judicial selection mechanisms in line with European requirements.[3]

A. Introduction: Balancing questions of judicial selections

The selection of judges had always been a critical element of judicial functioning under the classic rule of law framework. After all, the selection conditions guaranteed that candidates with adequate legal knowledge and showing the possibility to become personally independent judges entered the judicial profession. The classic rule of law guarantee of merit-based judicial selections reflects these elements. [4] As such, judicial selections are a critical aspect for the input legitimacy of the non-elected judicial branch.[5] Conceptually, these remain mandatory rule of law elements for the quality of judicial input.[6]

However, judicial selection conditions and processes are also an important element of contemporary judicial reforms. During these reforms judicial selections are reconsidered in a substantive and procedural sense. Substantively, new considerations relate to the specialized professional knowledge of judges – relevant for certain legal areas – as well as to the time management skills of judges. This is particularly true for EU Member States, where judges are expected to have increasingly expert legal knowledge (for example specialized fields of law (i.e. family, commercial law, EU law and ECtHR case law) and to show affinity towards new public management-inspired values of quality and efficiency.[7] Conceptually, these new public management values become optional elements that can be incorporated in the judicial system.[8]

Moreover, in a procedural sense, questions concern how to guarantee the timeliness and transparency of judicial selection processes and how to guarantee the accountability for these decisions. In legal orders where a council for the judiciary has been created, this question specifically relates to the empowerment of central managerial bodies

[3] *See* chapter 7, Conclusions.

[4] *See* Charles Louis de Secondat Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989). András Sajó (ed), *Judicial Integrity* (Brill Academic Publishers 2004).

[5] Graham Gee, 'The Persistent Politics of Judicial Selections' in Seibert-Fohr (ed) (n 1). 123-130.

[6] *See* Table 1, Theoretical typology of European rule of law requirements for judicial organisation, Mandatory – Input requirements.

[7] *See* Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Brill 2014). Mark Wissink and others, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (Eleven International Publishing 2011). Bruno De Witte and others, *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar Pub 2016). Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgements of the ECtHR in National Case-Law* (Intersentia). 13-95. Judith Resnik, 'Managerial Judges' (1982) 96 Harvard Law Review. Yves Emery and Lorenzo Gennaro De Santis, 'What Kind of Justice Today? Expectations Of "Good Justice", Convergences And Divergences Between Managerial And Judicial Actors And How They Fit Within Management-Oriented Values' (2014) 6 International Journal for Court Administration 63.

[8] Table 1, Theoretical typology of European rule of law requirements for judicial organisation, Optional – Input recommendations.

with the selection of judges and management of human resources.[9] Conceptually, these new public management-inspired procedural values also fall within the ambit of optional elements for guaranteeing the quality of judicial input.[10]

Combining these two types of values can increase the quality of judicial input by securing both the personal independence as well as the advanced professional qualifications of judges.[11] However, the combination of these different considerations also gives rise to several balancing questions. How to ensure that the search for specialized legal knowledge does not lead to an unfair selection process? How to guarantee that in the quest to appoint judges with organizational and time-management skills, the high-level general legal knowledge of candidates receives sufficient emphasis during the selection process? More generally, what do merit-based selections mean and what place does the personal independence and the irremovability of judges gain in the reconsidered selection processes? The following case study will explore if and to what are these questions are taken into account in the Hungarian and Romanian legal orders.

B. Comparing Judicial Selections in Hungary and Romania

The comparative analysis pursues two main aims. First, it seeks to identify and compare the nature of domestic legal principles and mechanisms for the initial selection of judges (i.e. classic rule of law, new public management values). Second, the analysis intents to identify context-specific legal and extra-legal conditions that lead to judicial selection tensions or challenges in the Hungarian and Romanian legal orders.

I. Legal Basis and Context

With respect to both studied legal orders, the analysis derived from the legal content from the domestic legal acts on the status and remuneration of judges. Furthermore, we reconstructed the context of the legal framework through an overview of the preparatory documents of the domestic legislation.[12]

i. Hungary

In the Hungarian legal order, the 2011 legal act on the status and remuneration of judges expressly incorporates the fundamental principles, conditions and processes for

[9] *See* in general Héctor Fix Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing 2003). 147-158. Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 American Journal of Comparative Law 103. Annex 2.

[10] *See* Table 1, Theoretical typology of European rule of law requirements for judicial organisation, Input – Optional recommendations.

[11] *See* above chapter 1,B; chapter 2,A. cf. Elaine Mak, *The T-Shaped Lawyer and Beyond. Rethinking Legal Professionalism and Legal Education for Contemporary Societies* (Eleven International Publishing 2017).

[12] *See* Annex C and D.

occupying the judicial office.[13] This legal act is important for our analysis because it significantly modified the mechanisms governing the selection of judges. The President of the NJO gained new and significant powers, including revision- and veto powers over the outcome of judicial selection processes. The legislature reasoned that the introduction of these new legal powers was necessary for achieving the new public management goals of *efficient (timely)* selection of candidates for the judicial office and for guaranteeing the *balanced workload* of courts and of judges.[14] However, the explicit emphasis on new public management considerations raises the question of whether the legal mechanisms secure the merit-based selection of independent candidates on the basis of objective criteria? This question will be examined with respect to the three main groups of legal norms delivered by the 2011 legal act with respect to judicial selections: general principles, conditions for occupying the judicial office and judicial selection mechanisms.

[13] Act CLXII of 2011 on the status and remuneration of judges entered into force on the 1st of March 2011. Replaced: Act LXVII of 1997 on the status and remuneration of judges, adopted by the Parliament on 8 July 1997. *See* Annex D.

[14] Government of Hungary, Legislative Proposal no. T/4744 on the status and remuneration of judges, October 2011, 86.

Table 5 The development of the Hungarian legal judicial selection mechanisms since 1997

1997 framework	2011 framework
Independent status of judges (Constitution, Art. 48) ("judges may not be members of political parties and may not engage in political activities")	Independent status of judges (Fundamental Law Art. 26(1))
Irremovability (Constitution Art. 48 (3))	Irremovability (Fundamental Law Art.26 (1))
Principle of independence (1997 Legal Act, Art.1)	Principle of independence (2011 Legal Act, Art.1)
Immunity of judges (1997 Legal Act, Art.2)	Immunity of judges (2011 Legal Act, Art.2)
Appointment of judges, President of Hungary (1997 Legal Act, Art 3(2))	Appointment of judges, President of Hungary (Legal Act, Art. 3(2))
Transparency of judicial selections (1997 Legal Act, Art. 6(1))	Transparency of judicial selections (2011 Legal Act, Art.7(2))
Legality of judicial selections (containing all conditions) (1997 Legal Act, Art. 7(2))	Legality of judicial selections (2011 Legal Act, Art. 7(2))
	Equality in judicial selections (2011 Legal Act, Art. 7(2))
	Selection of the most competent candidate as defined by law (2011 Legal Act, Art. 7(2))
Conditions for occupying the judicial office (1997 Legal Act, 3(1))	Conditions for occupying the judicial office (2011 Legal Act, Art.4 (1))
Conditions disqualifying applicants from the judicial office (1997 Legal Act, Art. 4)	Conditions disqualifying applicants from the judicial office (2011 Legal Act, Art. 4(2))
	Conditions for assessment (2011 Legal Act, Art. 14(4))
	Power to further clarify points (Ministry of Justice) (2011 Legal Act Art. 14(5))
Details of the content and process of aptitude test (1997 Legal Act, Art. 5(2)) (Ministry of Justice, Ministry of Health Joint Decree no.1/1999 18 January 1999 as amended by Decree no. 5/2002, 29 March 2002)	Details of the content and process of the aptitude test (2011 Legal Act, Art. 6)
	Skills and abilities measured in the aptitude test (2011 Legal Act, Annex 5)
~~Power to approve the content of the aptitude test (NJC) (1997 Legal Act, Art. 5(2))~~	Power to approve the content of the aptitude test (President of the NJO) (2011 Legal Act, Art. 6(2))
Power to publish vacancies (regional, appeal or highest court president, 1997 Legal Act, 7(1))	Power to publish vacancies (President of the NJO, 2011 Legal Act, Art. 9(1))
~~Power to select candidates (court presidents, 1997 Legal Act, Art.8 (1), with the proposal of the selection committee)~~	Power to conduct selection process, administrative board of courts (2011 Legal Act, Art. 14 (1))
	Power to approve the outcome of judicial selections (ranking), court presidents (2011 Legal Act, Art. Art. 16)
~~Power to approve the outcome of selection processes (NCJ) (1997 Legal Act, Art. 9(2) exceptional cases)~~	Power to approve the outcome of judicial selections (nomination), President of the NJO or President of the Curia (2011 Legal Act, Art. 17, 18(1-3))
~~Power to modify ranking (OIT, 1997 Legal Act Art. 9(3-4))~~	Power to control final ranking, National Judicial Council (2011 Legal Act, Art. 18(5))
	Veto power concerning the final outcome of selections, President of NJO (2011 Legal Act Art. 18(5))

Firstly, at the level of general legal principles, the rule of law principle of personal independence of judges is a main foundation of judicial selections. The preamble of the legal act highlights that the main aim of the legislation is to "fully materialize" the constitutional guarantee of judicial independence and impartiality.[15] In addition, the first legal principle explicitly stipulates that judges are independent in their decision-making activities.[16] The preparatory documents for the 2011 legal act clarify that the personal independence of judges means that judges cannot be instructed in their decision-making function.[17] At the same time, this principle places a constraint on the personal independence of judges by stipulating that judges serve as part of the judicial system.[18] The codifiers clarified that this limitation serves as a counter-balance for the independence of judges. The balancing act manifests itself through several elements, such as: the "multi-level" hierarchical structure of the judicial system, the collegial nature of judicial decision-making process in specific instances determined by law, the deliverance of judicial decisions as part of an appeal system, and the "public-service" nature of the judicial role. This final element is defined as the fulfillment of the function of the State to deliver justice.[19] Furthermore, the second legal principle guarantees the immunity of judges in the Hungarian legal order.[20]

Secondly, at the level of general conditions for occupying the judicial office, the rule of law value of adequate professional qualifications is emphasized. In the Hungarian legal order, adequate legal qualifications entail the possession of a law degree and qualification to practice the legal profession – entailing 3 years of practical experience. Indeed, the legal act stipulates these two requirements as specific conditions, along the general conditions concerning citizenship, age and disclosing financial statements.[21] Furthermore, a separate condition requires the accumulation of at least one year of professional experience. This condition is meant to guarantee the adequate judicial skills of candidates. The legislation prescribes different possible means of gaining professional experience, such as: serving as a court secretary; prosecutor, lawyer, public notary or legal consultant.[22] In addition, the legal framework also accepts professional experience at national public institutions, (i.e. governmental official, civil servant or at the central administrative body), experience as a constitutional judge, ordinary judge, military judge or prosecutor and previous appointment at an international institution or European Union institution.[23] Out of these possiblities, serving as a court secretary represents the most

[15] Act CLXII of 2011 on the status and remuneration of judges, Preamble. Referring to Articles 25-28 of the Fundamental Law of Hungary.
[16] ibid. Art. 1(1).
[17] Government of Hungary, Legislative Proposal no. T/4744 on the status and remuneration of judges, October 2011 http://www.parlament.hu/irom39/04744/04744.pdf (accessed 16.09.2019), 84.
[18] ibid. Art. 1(2).
[19] Government of Hungary, Legislative Proposal no. T/4744 on the status and remuneration of judges, October 2011, 84.
[20] Act CLXII of 2011 on the status and remuneration of judges, Art. 2.
[21] ibid. Art. 4(1,a-e). Compare with the conditions in Art. 3(1) of the 1997 Legal Act,: Hungarian citizenship, no prior criminal convictions, eligibility to vote, university law degree and successful legal examination, one year of professional experience as court secretary or other legal profession requiring examination in law or public administration) obligation to submit disclosure declarations concerning property (Art 10(4a) as amended 2001).
[22] ibid. Art. 4 (1,f,fa).
[23] ibid. Art 4 (1,f,fb-fd).

common means of entering the judicial profession in Hungary.[24] For instance, in 2016 all of the appointed judges served as court secretaries previously.[25]

At the same time, the legal act explicitly stipulates the importance of contemporary decision-making and communication skills. For instance, specific skills that are tested through a legally mandated general aptitude examination[26] include *inter alia*, decision-making and cooperation skills, analytical thinking, foresight, discipline, responsibility, determination, fastidiousness, integrity, communication, conflict management, independence (autonomy), problem-solving, planning and organizational skills.[27] The Ministry of Justice, with the agreement of the President of the National Judicial Office, appoints an expert committee responsible for conducting the assessment test.[28]

Thirdly, the legal rules pertaining to selection mechanisms refer most visibly to new public management considerations such as judicial specialization and efficient use of human resources. The selection rules establish three stages of the selection process: (1) publishing vacancies and accepting applications, (2) the actual selection process and (3) approval by the President of the NJO.[29] Based on these legal rules, there appear to be three main participants in the selection process: court presidents, the selection committee and the President of the NJO. These main participants share the common obligation to announce judicial vacancies[30] and to guarantee the merit-based nature of the selection process. With respect to the latter, according to the legal act, the selection process must secure that the "most suitable candidate occupies the judicial office."[31] This condition is fulfilled if the candidate (1) meets all the requirements contained in the legal act and vacancy notice and is appointed on a basis of a process, which is (2) public, (3) confers equal opportunities to all candidates and (4) complies with the legal procedural requirements for judicial selections.[32]

Out of these main participants, it appears that the main selection role is assigned to the selection committee. Indeed, special legal rules guard the objectivity of the selection process. For instance, the legal act explicitly stipulates that the selection committee consists of the administrative board of county courts,[33] regional courts and the Curia – composed of

---

[24] *See* Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 1). 804. Eötvös Károly Research Institute, 'Judicial Independence, Accountability, Judicial Reforms' (2008), http://www.ekint.org/ekint_files/File/tanulmanyok/biroi_fuggetlenseg.pdf (accessed 16.09.2019) 75-84.

[25] President of the NJO, 2016 Report, 109. The information refers to the total number of 59 appointed judges in 2016.

[26] ibid. Art. 4(1,g). The aptitude test comprises of a general health and psychological evaluation.

[27] id.

[28] ibid. Art. 6(2).

[29] Act CXII of 2011, Art. 9, 10, 15,16.

[30] ibid. Art. 7(1). The legal act lists in Art. 8 (1,2) circumstances when the main rule of publicity is not applicable, such as: termination of appointment at the National Judicial Office, Ministry of Justice and Curia; if a judge previously removed from office by the President of Hungary must be re-appointed following the outcome of the related labour dispute; a judge received a positive evaluation for a permanent appointment; a court has been closed or its competence reduced to the extent that the judicial position in question is no longer required; if the service relations of a military judge have been ceased with the Hungarian Defence Forces.

[31] Act. CLXII of 2011, Art. 7(2).

[32] Act. CLXII of 2011, Art. 7(2).

[33] In case of vacancies at first instance courts, labor- and administrative courts, and county court, the administrative board of the county court evaluates the candidates. ibid. Art. 14 (1,a).

judges of these courts elected by the general assembly of judges at the respective courts. [34] The selection consists of interviewing the candidates and establishing a ranking. [35] Furthermore, the legal framework explicitly stipulates the criteria for the evaluation of candidates. [36] There are two main groups of criteria. According to the legal act, the committee must consider criteria related to general conditions for occupying the judicial office, such as: the length and evaluation of the practical experience, the length of professional, the results of the aptitude tests and results of legal qualifications. Furthermore, the legal act allows the committee to consider additional criteria, such as specialized legal degree, language skills, legal publications; further professional training and the opinion of the president of the first instance, administrative or labour court concerning the vacancy.

With respect to initial appointments, the legal act does not explicitly prioritise certain conditions over others. Nevertheless, it empowers the Ministry of Justice to establish in a separate regulatory instrument the specific points that the interview committee can assign to each of the enlisted criteria.[37] Furthermore, the National Judicial Council has the advisory power to clarify any outstanding issues with reference to the allocation of points.[38]

However, a closer examination of the selection powers of the President of the NJO reveals that in fact this participant gains a key role in the selection process. What is more, new public management values of efficient use of human resources and securing adequate judicial specialization support this role. Indeed, in the first stage of publishing judicial vacancies the President of the NJO has the power to revise the notification by court presidents concerning a judicial vacancy based on its legal power to optimize human resources within the judiciary.[39] Furthermore, the legal act empowers the President of the NJO to stipulate two special conditions, if necessary, for occupying the judicial office – apart from the general legal conditions. Both of the special conditions fit the new public management paradigm through emphasis on judicial specialization and efficient use of (human) resources. One additional condition is the specialized legal knowledge of candidates. [40] The other additional condition is the possibility to transfer the judge to another court within three years from the original appointment for workload optimization reasons (so-called moving judicial position). [41] According to the legal act, for these "moving" positions, the application of the candidate represents a tacit agreement to a possible transfer within the legally prescribed timeframe.

Furthermore, a novel and widely criticized element of the 2011 legal act, was the introduction of discretionary revision powers of the President of the NJO. These confer a possibility to the President of the NJO to either nominate the candidate ranked second or

[34] Act CLXI of 2011 on the organisation of courts, Art. 147, 148. The selection committee (referred to as "judicial council" in the legislation) has 5-15 members and 3-13 alternate members. The general assembly of judges at the county courts, appeal courts and the Curia elects for 6 years the members and alternate members of the council. The general assembly of judges of county courts comprises judges of the first instance courts, administrative and labor courts within the circumscription of the county court, as well as judges of the county court.
[35] ibid. Art. 14(1).
[36] ibid art. 14 (4).
[37] Act CLXII of 2011 on the status and remuneration of courts. Art. 14(5).
[38] Act CLXI of 2011 on the organisation of courts, Art. 103(3,b).
[39] ibid. Art. 9(2). Act CLXI of 2011 on the organisation of courts, Art. 76(4,a).
[40] ibid. Art. 10.
[41] ibid. Art. 33.

third for the position, or render the entire selection process unsuccessful.[42] The revision powers are subject to legal conditions. Indeed, in case of deviation from the original ranking, the President of the NJO must transfer its reasoned decision to the National Judicial Council – which has the possibility to either approve or reject the decision.[43] However, these do not seem to effectively limit the revision powers by the President of the NJO. The decision by the NJC is not binding, since the President of the NJO may send a new decision to the NJC for approval. Alternatively, the President of the NJO may render the entire selection process unsuccessful.

Once again, the legal act prescribes the circumstances in which the President of the NJO may render a selection process unsuccessful. However, the combination of substantive, procedural and factual conditions leaves an extremely wide discretionary room for the annulment of the selection process. For instance, the legal act explicitly empowers the President of the NJO and the President of Curia, to choose not to nominate any of the successful candidates, if they do not wish to offer the position to any of the selected candidates.[44] Furthermore, the NJO President can render a selection process unsuccessful for procedural reasons such as, incompatibilities, procedural irregularities, and if the selection committee (the judicial council) "did not adequately fulfill its obligation to give reasons."[45] Finally, the President of the NJO may invoke factual grounds, such as: "changes affecting the work organization, workload or budget of a court, which render the position unnecessary."[46]

Finally, the President of the NJO retains important powers concerning the posterior control of judicial selection processes. According to the legal act unsuccessful candidates may contest the outcome of the selection process in front of courts.[47] However, the President of the NJO has the obligation to approve the contestation request and to transfer the document to the Budapest labour law court, competent to examine the complaint.[48]

Overall, we can observe that the 2011 legal act allocated important procedural powers to the President of the NJO in the selection of candidates for the judicial office, spanning from the initial stage of opening up a judicial position, to evaluating the selection process, to nominating candidates to the President of Hungary, and, ultimately, to managing the contestation process. These new and extensive legal powers of the President of the NJO became of central importance in light of the major changes in the composition of the judicial branch following the 2011 reforms. A highly contested element of the reforms was the forced retirement of 274 judges, as a result of the retroactively reduced mandatory

[42] ibid. Art. 18 (3).
[43] Act CLXII of 2011, Art. 18 (4,5). As amended by Act CXI of 2012, in force since July 17, 2012. *See* e.g. the assessment of the Venice Commission, CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI on the organisation and administration of courts of Hungary, 16-17 March 2012, para. 58-61 (appointment competences of the NJO President); 102-110 (transitional issues related to the retirement age of judges). Compare Original form of Act CLXII of 2011, Art. 18(4), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2012)006-e (accessed 16.09.2019) (English translation provided by the Hungarian Government).
[44] ibid. Art. 20(1,b).
[45] ibid. Art. 20(1,ba,bb,bc). As amended by Act CCXLIII of 2013, in force since January 1, 2014.
[46] ibid. Art. 20(1, bd).
[47] ibid. Art. 21(4).
[48] ibid. Art. 21(5).

retirement age. This included 2 per cent of court presidents and, overall, the percentage of judges with more than 30 years of experience fell from 7.2% to 5.9%.[49] Both the Constitutional Court of Hungary and the Court of Justice of the European Union struck down the retroactive application of the new retirement age of judges.[50] In particular, the Constitutional Court ordered the reinstatement of affected individuals to the judicial office.[51] However, these reinstatements did not materialize in practice. As part of the reinstatement process, the affected judges had to attack the removal decisions in front of the Budapest Labour Court. Nevertheless, the President of the NJO used its powers to appeal these complaints to frustrate reinstatements.[52] In effect, the President of the NJO could use its new legal selection powers to nominate ten per cent of the judicial corps.[53]

ii. Romania

In the Romanian legal order, the 2004 legal act on the status and remuneration of judges establishes specific principles, conditions and processes governing the selection of judges.[54] This legal act is relevant for our analysis because it significantly re-organised the selection of judges by introducing: (1) explicit legal principles and conditions, and (2) new selection powers of the central judicial managerial body. The main goals behind these reforms were reducing external, political influence over the selection of judges, respectively guaranteeing the personal independence of judges.[55] However, the robustness of reforms raises the question of how and to what extent the reforms lived up to the original rule of law ambitions.

---

[49] 2012 Annual Report of the President of the National Judicial Office, 67. 2013 Annual Report of the President of the National Judicial Office, 80,81. 2014 Annual Report of the President of the National Judicial Office, 94.

[50] Constitutional Court of Hungary, Decision no. 13 of 2013 (VI. 17.) AB. CJEU, Case C-286/12 European Commission v Hungary, 6 November 2012. *See* Tamás Gyulavári and Nikolett Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts' 42 Industrial Law Journal 289. 289-297. Gábor Halmai, 'The Early Retirement Age of the Hungarian Judges', *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017). Uladzislau Belavusau, 'Commission v Hungary: On Age Discrimination and Beating Dead Dogs' (2013) 50 Common Market Law Review 1145. 1145-1160.

[51] Constitutional Court of Hungary, Decision no. 13 of 2013 (VI. 17.) AB. *See* chapter 3.

[52] Venice Commission, CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, para 75, 76.

[53] 2012 Annual Report of the President of the National Judicial Office, 67. 2013 Annual Report of the President of the National Judicial Office, 80 (total number of judges: 2807). 2014 Annual Report of the President of the National Judicial Office, 94 (total number of judges: 2813). National Judicial Office, 2015 Report, http://birosag.hu/sites/default/files/allomanyok/obh/elnoki-beszamolok/felevesbeszamolo2015.pdf (accessed 16.09.2019), 21 (total number of active judges: 2839).

[54] Law no. 303 of 2004 on the status of judges, republished in the Official Gazette of Romania, Part. I, no. 653 of 22 July 2005; initially published in the Official Gazette of Romania, Part I, no. 576 of 29 June 2004, Art. 12-30 (admission in the magistracy); 31-34 (judicial appointments). Replaced: Law no. 92 of 1992 on judicial organisation, republished in the Official Gazette of Romania, Part I, no. 259 of 30 September 1997. Modified through Law no. 142 of 1997 concerning the completion and modification of Law no. 92 of 1992, Official Gazette of Romania, Part I, no. 170 of 25 July 1997, Art. 3 (independence of judges), 42-69 (the admission and promotion of magistrates). *See* Annex D.

[55] Government of Romania, Memorandum on Law no. 303 of 2004 on the status of judges,1. *See* Annex D.

Table 6 The development of the Romanian legal framework for judicial selection since 1992

1992 constitutional and legal framework	2004 constitutional and legal framework
Independence of judges (1992 Constitution, Art. 124)	Independence of judges (Constitution, Art.125)
Irremovability (1992 Constitution, Art. 124)	Irremovability (Constitution Art. 125, 2004 legal act, Art.2)
Appointment of judges by the President of Romania	Appointment of judges by the President of Romania
~~Retirement age (fixed possibility to continue professional activity, approved by court presidents, statutory framework Art. 156)~~	Retirement age (fixed, statutory framework Art. 65; possibility to continue professional activity, approval by the SCM)
~~Conditions for occupying the judicial office (1992 Legal Act, Art. 46):~~ ~~-Possessing exclusively Romanian citizenship, permanent residence in Romania and full mental capacities;~~ ~~-completed legal education or economic-administrative law education, with the practical experience required by law for the position and proves a corresponding professional training;~~ ~~-lack of criminal record and *good reputation*;~~ ~~-Romanian language skills;~~ ~~- ability from a medical standpoint to fulfil the judicial function;~~ ~~- completed initial training programme organised by the NIM or passed the admission test organised by the Ministry of Justice~~	Conditions for occupying the judicial office/ for gaining admission to the initial training programme (2004 legal act on status of judges, Art. 14(2)): -Romanian citizenship, permanent residence in Romania and full mental capacities; -completed legal studies; -lack of criminal record; -language skills; *-physical and mental abilities necessary for the judicial function*
~~Mandatory training NIM (since 1998 statutory framework, Art. 46-50)~~	Candidates must complete a mandatory training organised by INM (2004 legal act, Art. 14)
	Admissions in the magistracy must be: -competitive -must be based on the professional skills and abilities, as well as the *-good reputation* of candidates (2004 legal act, Art.12)
	Admission to the training programme is based on the principles of "equality", "transparency" and "competitiveness" (2004 legal act Art.14)
~~Selection for appointment (council for the judiciary) (training institution subordinated to the Ministry of Justice, Art. 70)~~	National Judicial Institute is responsible for organising the initial training programme (2011 Legal Act, Art. 31)
	SCM power to approve the training developed by the NJI
	SCM nominates judges to the President for appointment
~~Special conditions for occupying the judicial office (1992 Legal Act, Art. 51-69)~~ ~~(1992 Legal Act, Art. if conditions in Art.46 are fulfilled the Ministry of Justice can appoint trainee judges and prosecutors)~~ ~~Candidates holding a doctoral degree in law or candidates with 5 years of professional experience (magistrates, general inspectors, judicial councils within the Public Ministry) can be appointed without the mandatory training and examination (1992 Legal Act, Art. 67).~~	Possibility to occupy the judicial office without the mandatory training programme for legal professionals with 5 years of work experience (i.e. as legal counsel at the Ministry of Justice, lawyer) (2004 Legal Act, Art.33)

Explanation: strikethrough indicates that the legal provision had been repealed

Firstly, at the level of general principles, the 2004 legal act secures the rule of law value of personal independence of judges. The legal act reiterates the constitutional guarantee according to which judges, appointed by the President of Romania, are irremovable in the conditions of the legal act.[56] The text of the legislation clarifies that the guarantee of "irremovability" means that judges may only be relocated through transfer, delegation, secondment or promotion with their express consent. Furthermore, judges can be suspended or removed from office only in the conditions established through the legal act. [57] As an explanation, the legislative preparatory documents pointed out that irremovability was not perceived as a "privilege or right" of a judge, but rather as an important safeguard securing the independence of judges and in particular protecting judges "against pressures of any nature." [58] This general legal principle governs all legal mechanisms guaranteeing the special legal status and adequate remuneration of judges, including the selection of candidates for the judicial office.

Secondly, the general conditions for occupying the judicial office exhibit a commitment towards the rule of law value of merit-based selections. Indeed, next to the conditions of citizenship, residence, language knowledge, and lack of criminal record, the legal act requires the conditions of law school graduations and successful completion of the initial training programme for judges.[59] The latter condition relates to the explicit ambition of the 2004 legal act to secure the "integrity", "competence" and "adequate legal training" of candidates for the judicial office through empowering the National Institute of Magistracy with initial training competences. The 2004 legal act envisioned the financial and organizational independence of the NIM as key elements to achieving these goals.[60] In addition, with these legal modifications codifiers also aimed to secure the new public management goals of "*transparency"* and "*efficiency*" of judicial selections. [61] The commitment of the 2004 in securing merit-based selections is also visible concerning the selection of experienced legal professionals, with at least of five years of professional experience, for the judicial office.[62] According to the 2012 legal modifications, experienced legal professionals must successfully complete competitive examinations similar to the final examination under the initial training programme, organised by the NIM and a six-month training programme.

Thirdly, the level of rules setting out selection mechanisms displays a commitment to both merit-based selection as well as contemporary principles, such as transparency and competitive examinations. As a main rule, the legislation prescribes that selection processes must take place on a (1) *competitive basis* and must take into account (2) the *"professional skills and abilities"* and (3) the *"good reputation"* of candidates.[63] In addition, the legal act explicitly states that the NIM is the main actor in charge of organising the initial training

[56] Law no. 303 of 2004 on the status of judges, Art. 2(1). Compare: Constitution of Romania as amended in 2003, Art. 125(1).
[57] ibid. Art. 2(2).
[58] Government of Romania, Memorandum on Law no. 303 of 2004 on the status of judges. Law no. 304 of 2004, Art.2.
[59] ibid. Art. 14 (2,a-e).
[60] Government of Romania, Memorandum on Law no. 303 of 2004 on the status of judges,3. Memorandum, Law no. 3017 of 2004 on the Superior Council of Magistracy, 2.
[61] id.
[62] Law no. 303 of 2004, Art. 33. The full group of candidates is described in Art. 87(1).
[63] ibid. Art. 12. *See* also Art. 14(1).

programme.[64] Nevertheless, the reference to only vague terms creates a tension for the objective nature of the judicial selection. Subsequent legal modifications did not fill this gap. For instance, following legislative amendments in 2012, the legal act stipulates that the "good reputation" of candidates is assessed after the results of the examination are final.[65] The reasons for introducing this clarification were the previously experienced high costs occurred during this step.

Instead of defining specific assessment criteria, the legal framework aims to secure the objectivity of the selection process by stipulating detailed procedural rules concerning all steps of the initial training programme: (1) selection process, (2) the training programme and (3) final examinations and nominations to the President of Romania.[66] Of particular importance, for our analysis are the rules concerning selection process. In this sense, for instance, the legal act empowers the NIM to establish the time and the date of the examinations. In addition, the NIM has the power to organise the examination and to publish the results.[67]

However, at the same time, the legal framework assigns important control powers to the SCM. For example, the SCM has the power to establish the budget for the examination, to appoint the admission board – upon the proposal of the NIM – as well as to establish further rules concerning the examination through regulation.[68] The SCM also has the power to organise the final examinations, conducted by the NIM.[69] Furthermore, even though the results of the final examination are subject to publicity rules and candidates have the possibility to contest the results,[70] the SCM retains an important power to render the final examinations null, if the legal and regulatory requirements are not complied with, or in case of fraud.[71] Finally, the SCM nominates the candidates who have successfully completed the final examinations to the President of the Romania for appointment. As a legal control mechanism, the President of Romania has the possibility to refuse nominations. However, these decisions must be reasoned[72] and must be transferred to the SCM.[73] Regardless, the SCM has the possibility to sustain the nomination upon informing the President of Romania about its reasons.[74]

Overall, we can observe a strong commitment by the 2004 legal act to the personal independence of judges combined with the contemporary values of publicity and competitive-nature of judicial selection mechanisms. Indeed, major concerns for the 2004 legal reforms were to secure independent (objective, transparent and merit-based) selection processes and to establish factual guarantees, such as guaranteed status and salary of trainee-judges and overcoming financial difficulties posed by the psychological assessment of a high number of candidates for the judicial office. With respect to these procedural

[64] ibid. Art.13.
[65] ibid. Art. 15(8). *See* also Superior Council of Magistracy, 2012 Annual Activity Report 18, 19.
[66] Ibid. Art 15-29.
[67] ibid. Art. 15(1,6).
[68] ibid. Art. 15(4).
[69] ibid. Art. 26.
[70] ibid, Art. 29(1,2).
[71] ibid. Art. 29(5).
[72] ibid. Art. 31(3).
[73] id.
[74] ibid. Art. 31(4).

aspects, the legal rules are detailed and they confer main powers to the judiciary itself, through the NIM and the SCM. During the judicial training, appeal court and highest court judges also receive important roles, through their membership in the final examination committee and through the submission of evaluation reports of the practical experience of candidates at courts.[75] Nevertheless, the lack of substantive rules concerning the assessment of candidates for the judicial office and the extensive powers of the SCM create a tension for both the objective nature of judicial selections and the main legal role of the NIM to conduct initial selections. Apart from these internal tensions between the SCM and the NIM, the significant and relatively sudden empowerement of the judicial branch in a society where the judiciary was facing integrity challenges, remains of a broader constitutional concern.

iii. Similarities and differences

A main similarity is that both studied legal orders explicitly incorporate in the legal act on the status of judges the principles, conditions and procedures governing the selection of candidates for the judicial office.[76] The nature of legal rules is mixed in both legal orders. On the one hand, the legal principles explicitly refer to the rule of law value of personal independence of judges as a main consideration. In both legal orders the principle of equal opportunity of candidates supplement this rule of law core. On the other hand, both legal frameworks encapsulate contemporary principles governing judicial selections. The Hungarian legal order explicitly stipulates the transparency and timeliness of judicial selection processes and the selection of the "most suitable candidate" as important considerations. The Romanian legal order explicitly stipulates the principles of competitiveness and transparency. This similarity highlights the efforts of codifiers in both legal orders to establish objective selection processes.[77]

Moreover, the *merit-based selection* of candidates for the judicial office is secured in both legal orders by explicitly stating the general conditions for occupying the judicial office and stipulating additional evaluation criteria. However, the detail and quality of specific evaluation criteria show context-specific variance across the two legal orders. The Hungarian legal framework stipulates specific criteria based on which the selection of candidates must take place and contains a list of specific skills that the aptitude test must assess. In contrast, the Romanian legal act contains solely a general reference according to which the selections must be "competitive" and they must assess the "professional skills" and "good reputation" of candidates. In addition, the Romanian legal framework solely prescribes the involvement of the Ministry of Health in organising the aptitude test, without detailing specific skills that are assessed.

A possible explanation for this difference could be the different nature of the main legal and factual challenges experienced with the selection of judges prior to the adoption of the current legal framework. In the Hungarian legal order, a salient criticism concerning

---

[75] *See* e.g. ibid. Art. 17,20,27.

[76] Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (CA Thomas ed, Oxford University Press 2002). Graham Gee in Seibert-Fohr (ed) (n 1). John Bell, 'Judicial Cultures and Judicial Independence' (2001) 4 The Cambridge Yearbook of European Legal Studies.

[77] *See* Introduction, chapter 2,A,II,iii. *See inter alia* Peter H. Solomon, Jr., 'The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability' in Seibert-Fohr (ed) (n 1).

the 1997 legal act was the discretionary nature of court presidents' selection powers. This criticism could have contributed to a more detailed codification of specific conditions for occupying the judicial office.[78] Whereas, in the Romanian legal order the main criticism prior to the 2004 legal framework concerned the influence of the Executive over the selection of judges. Ultimately, main concerns were that selected candidates were loyal to the Executive and were unqualified.[79] This circumstance may explain the codifiers' efforts to provide detailed procedural rules and to empower the independent judicial training institution with the selection of candidates. Nevertheless, these circumstances do not explain why Romanian codifiers did not clarify specific evaluation criteria for the selection of candidates.[80]

Finally, an additional important similarity is the empowerment of the central judicial managerial body in conducting judicial selection processes. The specific powers are context-specific. In the Hungarian legal order, the 2011 reforms vested important revision and annulment powers with the President of the NJO. Whereas, in the Romanian legal order the SCM has important powers in determining specific evaluation criteria and appointing the members of the selection committees.

A possible explanation for empowering judicial councils in the constitutional balance of powers could be the portrayed role of judicial councils as key institutions securing both judicial independence and effective management of human resources.[81] However, in both legal orders, this empowerment raises concerns for the personal independence of judges.[82] In the Hungarian legal order, main points of concern are the extensive and unchecked nature of the President of the NJO powers. A specific tension based on this analysis is that the combination of human resource management powers with substantive review powers, create overly extensive powers – with the possibility in practice to manipulate the objective selection conditions in order to push through loyal candidates. The current political circumstances, in particular the ambition of the Government to capture the judiciary by using central management as a tool, compound these concerns.[83] In the Romanian legal order, the powers of the SCM appear to raise two main concerns. Concerns emerge regarding the powers of the SCM to appoint examination committee members and to determine evaluation criteria. These powers could potentially undermine the legal role of

---

[78] Zoltán Fleck, 'Judicial Independence in Hungary' in ibid. 804. For a detailed criticism of these powers *see* Open Society Institute, Judicial Capacity report in Hungary (2002), 111,112. Eötvös Károly Research Institute, 'Judicial Independence, Accountability, Judicial Reforms' (2008), http://ekint.org/lib/documents/1479373866-biroi_fuggetlenseg.pdf (accessed 16.09.2019), 75-84 (summary and assessment of the judicial selection process), 102 (recommendations).

[79] Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in ibid. 849,850. Daniela Piana, *Judicial Accountabilities in New Europe* (Ashgate 2010) 153.

[80] cf. Cristina E Parau, 'The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe' (2013) 49 Representation 267. 267-280.

[81] *See* above chapter 2,B,I. *See* also Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 German Law Journal.1258-1262.

[82] cf. David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016). 334-339.

[83] cf. Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015). 33-110. Zoltán Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Univ Pr 2017). 456-476.

the NIM as the main participant in the selection process. The other concern is the unchecked nature of the powers of the SCM. The SCM is an independent and collegial body, representing all levels of the judicial branch.[84] Nevertheless, the question occurs whether the above-mentioned guarantees are sufficient against possible arbitrary exercise of these powers, especially considering the powers of the SCM to both define and evaluate the condition of good reputation. A specific threat here for the personal independence of judges is the possibility to select candidates that would be loyal to the judicial leadership. The questionable integrity of Members of the SCM exacerbates this concern. In particular, the apparent cooperation between senior members of the SCM and the Romanian Secret Services – with the ultimate goal to collect information that could be used to exert pressure on judges in (politically sensitive) individual cases, is a factual circumstance which fundamentally questions whether the empowerment of the central judicial managerial body contributes to objective selections.[85]

II. Experiences in practice

The second step of the contextual-comparative analysis assesses how and to what extent regulatory and non-binding instruments maintain the rule of law values of personal independence of judges and merit-based assessments as main anchors for judicial selections.[86] In other words, the focus for the analysis will be how the studied instruments contribute to objective judicial selections.

i. Hungary

In the Hungarian legal order, the decree by the Ministry of Justice[87] and the Regulation on the functioning of courts by the President of the NJO[88] are two relevant binding regulatory instruments further governing the selection of judges. Moreover, the advisory opinions by the National Judicial Council[89] on the scoring of selection interviews[90] and on the principles based on which the President of the NJO may deviate from original selection rankings,[91] are two relevant non-binding sources guiding the practice of judicial selections.

---

[84] *See* chapter 3, A, III, ii.
[85] cf. Cristina Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 1). 651,652.
[86] *See* Appendices, C, D, G and H.
[87] Ministry of Justice Decree 7/2011, https://net.jogtar.hu/jogszabaly?docid=a1100007.kim (accessed 16.09.2019).
[88] President of the National Judicial Office, Decision no 6 of 2015 (November 30).
[89] National Judicial Council, Decision 9/2017 (II.3). together with Decision 50/2015 the decision modifies Decision 1/2012 concerning the detailed rules of judicial selection processes interpreting Ministerial Decree 7/2011, http://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/kim_rendelet_ajanlas_mod.pdf (accessed 16.09.2019).
[90] National Judicial Council, Decision 9/2017 (II.3). together with Decision 50/2015 the decision modifies Decision 1/2012 concerning the detailed rules of judicial selection processes interpreting Ministerial Decree 7/2011, http://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/kim_rendelet_ajanlas_mod.pdf (accessed 16.09.2019).
[91] NJC, Decision 3/2013, http://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/3_2013.pdf (accessed 16.09.2019).

In general, the above-mentioned instruments seem to contribute to objective selection processes by establishing detailed rules and by limiting the powers of the President of the NJO. For instance, the Ministerial decree lists all the legal evaluation criteria and assigns specific scores to each category, ranging from 5 to a maximum of 32.[92] Based on this scoring table, the two most important conditions are the evaluation of the professional experience and the higher academic qualifications of a candidate (i.e. Phd) (20 points). The second most valued condition is specialized legal knowledge, which can yield 15 points (i.e. selected LL.M. degrees). Whereas, the results of professional examination (i.e. good, above average, outstanding), the outcome of the selection interviews (i.e. ranging from 0,1-9,9 per cent approval to 90-100 per cent) and language knowledge can be evaluated with additional 10 points each. Finally, according to the decree, the selection committee can assign maximum five points each for the conditions of: legal publications, further specialization courses and studies abroad. Furthermore, the non-binding Opinion of the NCJ complements the Ministerial decree by clarifying any outstanding issues regarding the assessment of candidates.[93] For instance, the NCJ establishes specific interview questions, such as: reasons for applying, the motivation of the applicant, career path, professional output, areas of interest, and devotion.[94] Moreover, the opinion by the NJC stipulates the legal specializations that must be allocated the maximum possible points, irrespective of the advertised position requiring specialization. For instance, LL.M. degrees in EU law, information technology, data protection and environmental law automatically receive maximum scores under the "additional legal specializations" condition.[95]

A separate decision by the NJC concerns the legitimate grounds to override the proposed ranking by the selection committee. By doing so, the decision limits the powers of the President of the NJO.[96] The decision stipulates eight principles: (1) the principle of discretion, (2) equal evaluation, (3) avoiding conflicts of interest, (4) realizing service interests, (5) protection of the judicial career, (6) evaluating the candidate's previous professional qualifications; (7) re-evaluating the scores assigned by the selection committee, and (8) exclusion of derogation.[97]

While these principles are meant to guide and limit the revision practice by the President of the NJO, the stipulation of these principles does not seem to solve the legal tension created by the wide discretionary powers of the President of the NJO. For instance, the principle of discretion states that the President of the NJO – pursuant to the legal nomination power – is free to consider all circumstances that could lead to a different outcome of the selection process. In this exercise, the President of the NJO must follow the guidelines of the National Judicial Council. Nevertheless, the President of the NJO is

[92] Ministry of Justice, Decree no. 7 of 2011 on the detailed rules and scores for judicial selections, Annex 1.
[93] National Judicial Council, Decision 9/2017 (II.3). together with Decision 50/2015 the decision modifies Decision 1/2012 concerning the detailed rules of judicial selection processes interpreting Ministerial Decree 7/2011, http://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/kim_rendelet_ajanlas_mod.pdf (accessed 16.09.2019).
[94] NJC Decision 9/2017, 3.4.
[95] ibid.7.3.
[96] NJC, Decision 3/2013, http://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/3_2013.pdf (accessed 16.09.2019).
[96] Ministry of Justice, Decree no. 7 of 2011 on the detailed rules and scores for judicial selections, Annex 1.
[97] NJC, Decision 3/2013, http://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/3_2013.pdf (accessed 16.09.2019).

explicitly free to assess the contemporary requirements of *judicial career*, *the interest of a court* and *the general goals of court administration*. Furthermore, the principle of realizing the service interests of a court allows ample room to reconsider the selection outcomes based on three management considerations: *adequate workload management of a court*, *specialized legal knowledge* and *uninterrupted functioning of a court*. For example, according to the first sub-principle, if the candidate obtaining the highest ranking has limited professional experience and there is a workload problem, the ranking can be modified. In line with a decision of the NJC, a workload problem can be invoked concerning a specific court if the workload is more than ten per cent higher than the national average.

The extensive role of the President of the NJO in judicial selections is more apparent in light of the practice of judicial selections. Consider in this sense, the breakdown of selection processes rendered unsuccessful by the President of the NJO. Similarly, the instances when the President of the NJO modified the original ranking by the selection committee appear of relevance. These modifications are possible since the establishment of the National Judicial Office in 2012. In 2013, out of the total 115 appointments, the President of the NJO rendered the selection process unsuccessful in ten instances and modified the ranking in fourteen instances. In 2014, out of the 105 total appointments, the President of the NJO declared nine selections unsuccessful and modified the ranking in five instances. The number of selections rendered unsuccessful grew to 28 in 2015, out of the total 122 selection processes. In addition, the President of the NJO requested a different ranking in six instances.

The annual reports contain the official reasoning for both types of modifications. Concerning, unsuccessful selection processes, in 2013 in three cases there were no valid applications. In two cases it was argued that the work reorganization of the court, rendered opening a judicial position unnecessary. In fives instances the President of the NJO registered procedural irregularities, such as: the candidate ranked first did not complete a psychological assessment; the examination committee did not assess the legal qualifications of the candidate; and the transcript of the interview did not comply with the requirements of publicity.[98] In contrast, the report on the 2014 practice does not contain reasons for the nine unsuccessful selections processes. Similarly, concerning the 28 unsuccessful selection processes in 2015 did not motivate these decisions in the report.

Concerning, the modification of the rankings, the 2013 report reveals that the President of the NJO agreed in eleven instances with the ranking proposed by the President of the court. In contrast, in three instances, the President of the NJO employed the *principle of discretion*.[99] In particular, in two instances the NJO President deemed a different candidate "most suitable for occupying the judicial position" – echoing the text of the legal provision – on the basis of "overall higher objective scores", *"specialized judicial publications"* and *"academic teaching activities."* In one instance, the NJO President appointed the second candidate from the list on account of *"protecting the judicial career."*[100] In 2014, in two instances, the President of the NJO aimed to follow the ranking

[98] 2014 Annual Report of the President of the National Judicial Office, 95, 96.
[99] National Judicial Council, Decision no. 3 of 2013 of January 21, 2013.
[100] 2014 Annual Report of the President of the National Judicial Office, 95, 96. The 'judicial career model' is an initiative of the central administration of the judiciary aimed at improving the salary conditions of judges. The main aim of this initiative is to make the judicial profession more attractive to highly qualified candidates.

established by the court president, in contrast to the evaluation of the selection committee. The NJC accepted these modifications. In three instances, the President of the NJO employed the principles of *discretion, qualitative re-assessment of scores and adequate workload management of a court.* The NJC rejected these requests and the President of the NJO complied with the ranking by the selection committee.[101] In contrast, the report summarizing the selection practice in 2015 only mentions that in six instances the President of the NJO modified the original ranking of the selections and requested the approval of the NJC, which it received – without reasoning.[102] Finally, the President of the NJO's direct influence over the composition of courts is also visible in light of the transfer practice (referring to the so-called 'moving-judges'), pursuant to Article 33 of the legal act on the status of judges.[103] The annual reports indicate the between 2012 and 2015 there were eleven, two, fifteen, and seven judges appointed under these conditions.[104]

Overall, we can observe that the President of the NJO has extensive control over the practice of judicial selections. What is more, the President of the NJO relied on new public management values as a justification overruling decisions by the selection committee. Furthermore, specialization and professional assessment from within the judiciary appear as key considerations for the selection practice in Hungary.

ii. Romania

In the Romanian legal order, the 2006 Regulation on the admission and final examinations of the National Institute of Magistracy,[105] and the 2012 Regulation on the admission to the Magistracy, both adopted by the SCM, represent the broader regulatory framework of the selection of candidates for the judicial office.[106] In addition, the website of the National Institute of Magistracy contains more information on the admission examination.[107] The annual reports by the SCM summarize experiences in practice with judicial selection processes.[108]

The SCM regulations contain two main types of information. One is the content and organization of the admission tests and interviews.[109] The other is the assessment of the legal condition of "good reputation" of candidates. Firstly, regarding the admission process, the regulation provides more details concerning the content of the examinations and the assessment of conditions. For instance, the regulation specifies that the admission exams have two main parts. The first, preliminary part assesses the legal knowledge of candidates in the fields of substantive and procedural civil and criminal law. This part of the examination consists of multiple-choice questions (100 questions in total, 25 for each

[101] 2015 Annual Report, 105.
[102] 2016 Annual Report, 109.
[103] Act CLXII of 2011 on judicial organisation, Art. 33. *See* above chapter 6,B,I.
[104] 2012 Annual Report of the President of the National Judicial Office, 66. 2014 Annual Report of the President of the National Judicial Office, 96. 2015 Annual Report of the President of the National Judicial Office, 109.
[105] SCM, Regulation no. 439 of 2006 concerning the admissions to the NIM and final exams.
[106] SCM, Regulation 279 of 2012 on the organisation and process of the entry exam to the Magistracy.
[107] National Institute of Magistracy, http://www.inm-lex.ro/displaypage.php?p=66&d=1844 (accessed 16.09.2019).
[108] This overview is available on the Internet page of the Superior Council of Magistracy starting from 2008, http://www.csm1909.ro/csm/index.php?cmd=080114&pg=7&arh=1 (accessed 16.09.2019).
[109] 2006/2015 Regulation Art. 4-14.

subjects). The regulation specifies the grading system (1-10) and the minimum grade for admission (8).[110] Furthermore, the regulation explicitly grants candidates the possibility to contest the results of the test.[111] The NIM publishes on its website tests from previous years.[112]

The second part of the admission test consists of a logical reasoning test and an interview. The rational reasoning test contains 100 multiple-choice questions, out of which candidates must correctly answer at least 30 questions.[113] Concerning the interview, the regulation establishes the composition of the interview-committee, consisting of a psychologist, a judge, a prosecutor, a university professor and a trainer at the NIM. In addition, the regulation stipulates that the SCM has the power to appoint the committee members upon the proposal of the NIM. Furthermore, the 2006 regulation establishes the grading scale for the interviews (1-10). The 2012 regulation further clarified the content of the interviews. First, the candidate draws a proverb, a maxim or a quote and has half an hour to prepare an answer in writing. Then, the candidate presents orally the analysis. Questions from the commission follow this presentation. Second, the candidate must elaborate upon an ethical dilemma.[114]

However, with regard to two aspects the regulation does not appear to contribute to the objectivity of the selections. First, the regulation delegates to the interview committee the power to determine the specific assessed skills during the interview and to assign a specific score to each skill. While this provision appears to support the main legal role of the NIM to select candidates for the judicial office, in practice it raises questions with respect to clarity and transparency. Specific interview questions are not made public. Instead, the NIM publishes a selection of recommended materials, such as the Romanian code of ethics for magistrates, interpretation guideline of the ethical code and international documents. As further guidance, the NIM publishes information on the aim and process of conducting selection interviews. Accordingly, the aim of the interviews is to establish *the professional abilities of candidates, their motivation as well as their commitment to moral values (judicial ethical values).* Nevertheless, these criteria remain vague. In particular, it remains unclear which specific professional abilities of the candidates are evaluated and how is the reflection on the ethical dilemma by the candidates assessed. Second, the regulation stipulates that the score assigned by the interview committee is final. As such, candidates cannot contest the outcome of the interviews.[115] However, this appears problematic from the perspective of access to justice of candidates.

A second important clarification by the SCM regulations concerns the meaning and the assessment of the legal condition of "good reputation" of candidates. Regarding the

---

[110] ibid. Art. 15,16.
[111] ibid. Art. 21.
[112] E.g. NIM, 2017 July-October examinations, http://www.inm-lex.ro/displaypage.php?p=66&d=1844 (accessed 16.09.2019).
[113] 2006/2015 Regulation, Art. 22.
[114] 2012 Regulation, Art.22(2). NIM, Methodology for the organisation of the interview September-October 2017, http://www.inm-lex.ro/fisiere/d_1844/Metodologia%20privind%20organizarea%20si%20desfasurarea%20interviului%20(4.07.2017).pdf (accessed 16.09.2019).
[115] 2006/2015 Regulation, Art. 23(3).

assessment, the regulation stipulates that inspectors of the SCM have the power to evaluate this condition.[116] Indeed, the plenary session of the SCM decides upon the fulfilment of this condition for each candidate.[117] Regarding the meaning of this condition, the 2012 and 2015 regulations establish that the SCM takes into account the existence of contraventions, of an administrative or criminal nature as defined by the Criminal Procedural Code, as well as the existence of any disciplinary sanctions. In case of the latter, the regulation explicitly stipulates that the SCM considers *ex officio* disciplinary sanctions applied three years preceding the application. In addition, the SCM verifies whether the applicant was expelled from the entry exam in the five-year period prior to the application.[118] The applicants are responsible for submitting relevant documents for the purposes of the evaluation (i.e. CV, evaluation from previous workplaces, including potential disciplinary proceedings, documents from public authorities). [119] Finally, the regulation specifies evaluation conditions that the SCM must take into account, such as: the elapsed time since the contravention, the nature and circumstances of the acts, the nature of the sanction, the behaviour of the accused during criminal investigations, as well as *the public opinion generated by the acts*. [120] While these conditions are more detailed than the legal provisions,[121] the evaluation criteria do not seem to limit the powers of the SCM. What is more, evaluation criteria raise further questions concerning their assessment. In particular, it remains unclear how the criterion of "public opinion generated by the committed acts" is evaluated in an objective and consistent manner.

In summary, main concerns for the practice of judicial selections in Romania seem to be securing the adequate professional knowledge, personality traits and integrity of candidates for the judicial office. The SCM holds main powers in practice with respect to establishing rules and conditions governing the selection process. Furthermore, the SCM has the important final competence to evaluate "the good reputation of candidates." The NIM (examination board) has the power to establish the specific exam questions and grading. All these tensions in practice highlight the extremely complex nature of the integration process or rule of law values beyond the adoption of formal guarantees. Below, we will compare the similarities and differences between the Hungarian and Romanian legal orders and provide possible legal and extra-legal explanations.

iii. Similarities and Differences

As a main similarity, regulatory instruments in both legal orders lay down detailed conditions for occupying the judicial office and specific rules for the assessment of the conditions. In this sense, the increasing and detailed codification of judicial selection rules

[116] ibid, Art. 27 (1).
[117] ibid, Art. 27(2).
[118] 2012 and 2006/2015 Regulation 26bis 1, 27bis 1.
[119] 2012 Regulation, Art. 26bis1(2).
[120] 2015 Regulation, Art. 27bis1(9).
[121] See above chapter 4,B,I,i.

is traceable. A possible explanation appears the strict hierarchical organizational structure of the judiciary in both legal orders.[122]

At the same time, the strict hierarchical organizational structure has led in both legal orders to an important role of central judicial managerial bodies in the practice of judicial selections.[123] From this perspective, the practice of judicial selections confirms the important legal role of these bodies.[124] However, this role has contributed to tensions concerning the objectivity of judicial selections. Concerning Hungary, the extensive selection powers of the President of the NJO put at risk the work autonomy of court presidents, the selection committees and the NJC. Respectively, in the Romanian legal order, the extensive powers of the SCM create tensions for the work autonomy of the NIM – which according to the legal framework should have the main role in judicial selection processes – and this situation also reflects on the quality of the evaluation criteria.[125]

C. Assessing judicial selections in light of European rule of law requirements

The comparative analysis opens up the way for two main critical questions. First, whether and to what extent judicial selections in Hungary and Romania contribute to, or hinder the guarantee of the rule of law with regard to judicial input. Second, whether and to what extent the legal mechanisms can be considered a translation of European standards, and if so, whether this translation contributes to the rule of law.

I. Contribution to legitimacy of judicial input and the rule of law

The second chapter of this study clarified two functions through which judicial selection conditions and mechanisms contribute to the legitimacy of judicial input and the rule of law. These will constitute the basis for the normative assessment. Our aim here is to separate mechanisms that secure the rule of law and should be incorporated in a context-specific manner in the legal frameworks of Hungary and Romania, from those mechanisms that hinder the rule of law.

i. Defining adequate professional qualifications of judges

Concerning the function of defining the adequate legal qualifications of judges, the analysis revealed positive developments but also remaining challenges in both legal orders. As a shared positive development we can mention the codification of general conditions for occupying the judicial office. Moreover, with respect to the Hungarian legal order, we can highlight as a desirable practice the codification of more specific qualifications and skills (i.e. decision-making, communication) required of judges. These measures could ultimately

[122] cf. Anja Seibert-Fohr, 'Judicial Independence – The Normativity of an Evolving Transnational Principle'in Seibert-Fohr (ed) (n 1). 1291-1302.
[123] cf. Kosař (n 82). 334-339.
[124] *See* above section C,I,iii.
[125] *See* above section C,I,ii. Law no. 303 of 2004, Art.13.

contribute to realizing objective and verifiable judicial selection conditions and contribute to the rule of law by securing the predictability of the general conditions.[126]

However, in both legal orders the formulation of the conditions presented context-specific challenges for securing merit-based selections. In terms of the content of the Hungarian legal framework, a point of concern is that the 2012 legislation aims to secure the selection of the "most suitable candidate" for a position. The legal analysis indicated that the legislation defines this term (i.e. meeting all conditions) and stipulates specific principles for the assessment process (i.e. equality, publicity and legality of the process). Nevertheless, this legislative goal in combination with the legal grounds for review by the President of the NJO, allows extensive discretion to the President of the NJO in the reassessment of the selection process. As such, the content of the legal act gives leeway to arbitrariness in the selection process. For instance, additional criteria such as "specialized legal publications" can be invoked which could modify the overall score of candidates. Such practice goes against the rule of law ideal.[127] Indeed, the analysis indicated that the President of the NJO explicitly invoked the prerogative to select the "most suitable candidate" when modifying the outcome of the selection process.[128]

In the Romanian legal framework, a main challenge is that the legal framework only stipulates general principles governing judicial selections (i.e. competitiveness, transparency, equality), combined with the vague conditions of assessment of professional skills and good reputation.[129] A specific point of concern is that the legal principles do not provide sufficient clarity with respect to the adequate qualifications, as well as decision-making and communication skills expected of judges – which merit-based selections should ultimately secure. Regarding the condition of good reputation, the analysis indicated that the regulations by the SCM contain useful clarifications. For instance, the clarification of the regulations concerning the nature of contraventions (i.e. administrative, criminal and disciplinary) and corresponding timeframes (3 years for administrative sanctions and 5 years for disciplinary sanctions) are beneficial from the perspective of enhancing the clarity of this condition. However, it must be noted that criminal convictions are considered by the SCM without a time limit. In the specific context of the Romanian legal order, characterised by the rapid turnover of the criminal procedural codes, constituting the legal basis for this condition, the SCM chose to stipulate additional circumstances in the regulation (i.e. the time elapsed since the contravention, behaviour of the candidate during investigations, the public opinion generated by the act), which the SCM may consider for an objective assessment. Nevertheless, these circumstances do not enhance, but rather diminish the clarity of the regulation by leaving extensive discretion to the SCM. Ultimately, the circumstances create the possibility of arbitrary assessments.[130]

[126] *See* chapter 1,B,III; 2,B,I,iii.
[127] *See* above section C,I,i.
[128] *See* above section C,II,i.
[129] *See* above section C,I,ii.
[130] *See* chapter 1,B,III, 2,B,I,iii.

ii. Guaranteeing objective and transparent judicial selection processes

With respect to guaranteeing pre-established, objective and transparent judicial selection processes, we could observe positive developments in both studied legal orders. For instance, the incorporation in the statutory framework of the responsible agents and the specific stages of judicial selections, secure the rule of law requirement of predictability. In a similar vein, the empowerment of central management with competences to secure transparency seemed positive. Indeed, the central judicial management in both legal orders effectively relies on its website and major legal communication channels to secure the openness of selection processes and seems well placed in fulfilling this contemporary role.[131]

However, a major shortcoming is that the empowerment of central judicial managerial bodies raised challenges in terms of undermining the personal independence of judges, from within the judiciary.[132] In the Hungarian legal order, central concerns are the revision and veto powers of the President of the NJO. Overall, these legal powers and corresponding practice fundamentally question whether the new selection processes introduced by the 2011 legal act were meant to secure the personal independence and qualification of judges; or whether they serve as an instrument to select loyal judges.[133]

The concern over securing "loyal" individuals within the judicial corps is compounded by the full legal discretion of the President of the NJO to promote judges to senior positions (i.e. court presidents).[134] For example, a highly controversial process concerned the 2017 selection of a new president for the Budapest Tribunal, where the President of the NJO rejected the application of both the former president and vice-president of the court on account of insufficient connection of their leadership programme with the strategic objectives set by the President of the NJO for the administration of the judiciary.[135] Ultimately, in the current legal, political and judicial-cultural context in Hungary, combining human resource management powers with selection powers within one institution appears as a major threat for upholding the rule of law.

Regarding the Romanian legal order, main concerns are the competences of the NIM's selection committee to assess interviews and the power of the SCM to assess the condition of good reputation. The extensive and unchecked nature of both of these powers, combined with the vagueness of relevant legal conditions and the lack of rule of law conventions, result in a threat of arbitrariness. The questionable integrity of the Members of the SCM further compounds these concerns.[136]

---

[131] *See* above Section C,II, i and ii.
[132] cf. Kosař (n 82). 406-411.
[133] cf. *See* Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015). 112. Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in ibid. 33-110. Zoltán Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Univ Pr 2017). 456-476.
[134] *See* e.g. Halmai (n 50). 472-477.
[135] *See* e.g. https://budapestbeacon.com/lawsuit-obh-president-tunde-hando-begun/ (accessed 16.09.2019).
[136] cf. Cristina Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 1). 651,652. *See* above section C,I,iii.

These challenges regarding selection processes become particularly important in the context of reform processes from 2017.[137] Part of the proposed reforms concerned the selection process. In order to enhance the quality of the training system, the intended legal reforms aimed to extend the duration of the judicial training programme from two to four years – involving a one-year course period followed by three years of practical training at courts. However, this failed to secure the human resources needs of the judicial branch. One potential problem in the Romanian context was re-opening access to experienced legal professionals from the political branches of government.[138] Another potential problem was the enhanced influence that court presidents would gain over the career of trainees.[139] Ultimately, experiences with reforming the Romanian legal framework point to the key importance of securing the quality of the legal framework and the continued efforts to guarantee that the Members of the SCM are independent and have the necessary ethical profile required by this position.[140]

In summary, in the current political and judicial-cultural context of Hungary and Romania, securing the merit-based selection of personally independent and qualified candidates appears as a main legitimacy and rule of law challenge. The case studies illustrate that formally empowering the judicial branch with selection powers may not only augment merit-based selections, but these powers can also be used to frustrate selection processes.[141] The less established the guarantee of personal independence of judges and the tradition of merit-based appointments, the higher the risks of arbitrary exercise of central powers. Ultimately, specialized legal knowledge, and advanced communication and managerial skills are important for fulfilling the role of de-centralized EU judges.[142] However, (i) neither can contemporary considerations be invoked as a guise to select loyal candidates, (ii) nor can contemporary principles (i.e. competitive selections) and related procedural rules replace the development of fundamental rule of law conditions regarding who is qualified to occupy the judicial office.

II. Compliance with European standards

The critical analysis in light of European standards aims to clarify whether the legal values and mechanisms in the two legal orders follow European binding recommendations. Another line of our evaluation will be whether current European recommendations for judicial selections can secure in CEE Member States the fundamental rule of law requirements of personal independence and merit-based selections.

---

[137] For the original legislative proposal *see* http://www.cdep.ro/comisii/suasl_justitie/pdf/2017/rd_resume.pdf (accessed 16.09.2019), Art.4.
[138] Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 1). 849,850. Piana (n 79). 121-159. Cristina Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 1). 641. See above Section C,I,ii.
[139] id.
[140] cf. Michal Bobek, 'Fortress of Judicial Independence and Mental Transitions of the Central European Judiciary' (2008) 14 European Public Law.
[141] *See* above chapter 4,B,II,ii.
[142] *See* chapter 2,B,I,iii.

i. Binding requirements: specific statutory rules, irremovability of judges, no discrimination in judicial appointments

The second chapter of this study revealed the existence of core binding European rule of law requirements for the selection of judges pursuant to Article 267 TFEU and Article 6 of the ECHR, and the corresponding case law of the CJEU and the ECtHR.[143] In particular, the Court of Justice of the European Union requires the existence of specific rules securing the status of judges, such as the composition of the judicial body, appointment, length of service or grounds of dismissal.[144] In a similar vein, the European Court of Human Rights established through its case law that the manner of appointment and the term of office are fundamental input guarantees for judicial independence protected under Article 6 ECHR guaranteeing the right to a fair trial.[145] With respect to the 'manner of appointment and term of office the ECtHR does not require a specific appointment period from Member States. Nevertheless, the Court requires as a core guarantee for the security of their tenure, that judges are irremovable.[146] In addition, while there is also no fixed rule on the composition of the body in charge of selecting judges,[147] the Court specified that no discrimination could take place in judicial selections.[148]

According to this analysis, both legal orders comply with the letter of these binding European requirements by securing the personal independence of judges both as constitutional and legal principles. Moreover, the two studied legal orders aimed to comply with these core requirements through the detailed codification of the specific rules concerning selections in the legal acts. However, a major concern is that these formal rules leave room for the arbitrary exercise of legal powers. An overview of the practice of judicial selections confirmed these concerns.[149] In light of these findings, the two studied legal orders appear to fall short of binding core European requirements.

ii. Non-binding recommendations: clear, objective, transparent criteria; role of judicial councils; merit-based selections

In addition, at the level of the European Union and the Council of Europe the study identified non-binding recommendations highlighting the importance of the independence, impartiality and professional qualifications of judges, with particular

---

[143] *See* chapter 2,B,I,i. Table 2 European input quality requirements and recommendations.
[144] Case C506/04 Wilson v Ordre des avocats du bureau de Luxemburg, [2006] ECR I8613, paras. 50-53. Case C517/09 RTL Belgium [2010] ECR I14093, paragraph 39. These notions are established with reference to the established case law of the ECtHR in particular Campbell v Fell, para 51.
[145] Campbell and Fell v UK, App no. 7819/77, 7878/77 (ECtHR, 28 June 1984) para. 78. Other input elements highlighted by the Court are guarantees against outside pressure and presenting an appearance of independence. *See* above chapter 1,C,I,i.
[146]Campbell and Fell v UK, App no. 7819/77, 7878/77 (ECtHR, 28 June 1984) para.80. Hauschildt v. Denmark, 24 May 1989, para 48, Series A no. 154; Thorgeir Thorgeirson v. Iceland, 25 June 1992, para 51, Series A no. 239; *Incal v. Turkey*, 9 June 1998, para 71, Reports of Judgments and Decisions 1998-IV.
[147] Belilos v. Switzerland, App no 10328/83 (ECtHR, 29 April 1988) para.55.
[148] Sramek v Austria, App no 8790/79 (ECtHR, 22 October 1984) para. 41-42.
[149] *See* above section B,II,i.

reference to the conditions of occupying the judicial office.[150] Our analysis pointed out that these non-binding recommendations maintain and further build on the core requirements set out through legally binding European requirements emerging from Article 2 of the TEU and Article 6 guaranteeing the right to a fair trial under the ECHR.[151] However, it remains to be seen whether and to what extent the Hungarian and Romanian legal orders have translated European recommendations in their legal orders. And, if so, whether this has contributed to upholding the rule of law.

a) Pre-established, objective and transparent criteria securing merit-based selections

Firstly, legally non-binding European recommendations reiterate the importance of having clear, objective and transparent conditions for occupying the judicial office.[152] For instance, the European Commission drew attention to the followings: guaranteeing the independence of judges and the judiciary at the highest level of the normative framework,[153] adequate guarantees for the status of judges, including *transparent and objective rules* on appointment, promotion and service,[154] as well as *adequate training.*[155] Similarly, in the context of the Council of Europe, the Committee of Ministers Recommendation on the independence, efficiency and responsibility of judges also emphasized that decisions, which affect judges should be based on *objective* and *pre-established* criteria.[156] This recommendation is shared for instance by the Magna Carta of Judges of the CCJE, which also emphasized that decisions on the selection, nomination and career of judges need to be based on objective criteria.[157]

Moreover, non-binding European requirements also specifically emphasized the importance of deciding upon judicial appointments based on "merit."[158] According to the Recommendation of the Committee of Ministers decisions on judicial appointments should be merit-based, a notion which, refers to the necessary "*skills, qualifications and capacity to fulfil judges' adjudicatory functions*."[159] Concerning the basis for judicial appointments, the Venice Commission reinforces that judicial appointments should be based on objective criteria and should be merit-based.[160]

---

[150] *See* above chapter 2,C,I,ii. *See* Recommendation CM/Rec(2010)12, paras. 22-25. CCJE Magna Carta, paras. 5-12. CCJE Opinion No. 9 V.A, para. 70, paras. 8,12. *See* Table 2 European input quality requirements and recommendations.
[151] *See* above chapter 2,C.
[152] id.
[153] E.g. Composite paper (1999), 13. Composite Paper (2000), 56. Composite Paper (2001), 12, 61, 65. Composite Paper (2002) 74.
[154] Kochenov (n 4) 271, footnote 259. Mentioned for e.g. in the 2nd Accession Partnership with Romania, 6. 3rd Accession Partnership with Romania, 13.
[155] E.g. Composite paper (1998), 3, 16. Composite paper (1999), 41 (Hungary), 44 (Latvia), 45 (Estonia) (Lithuania). Composite paper (2000), 39 (Estonia), 41 (Hungary), 46 (Lithuania). Composite paper (2001), 25, 43 (Estonia), 46 (Hungary), 53 (Lithuania), 59 (Poland). Strategy paper (2002), 44 (Czech Republic), 47 (Estonia), 66 (Poland). Composite paper (2003), 42 (Slovakia).
[156] Recommendation CM/Rec(2010)12, para. 44.
[157] CCJE, Magna Carta of Judges, paras. 5,6.
[158] *See* above chapter 1,C,I,ii.
[159] Recommendation CM/Rec(2010)12. para. 44.
[160] Venice Commission, 'Judicial Appointments', CDL-AD(2007)028-e. para.27.

Our analysis revealed efforts to follow these recommendations in both legal orders. After all, the general conditions for occupying the judicial office are pre-established and incorporated in the legal and regulatory frameworks. Furthermore, both legal acts show specific commitment towards the transparency of selection processes and aim, at least at the level of the legal framework, for the objective nature of selection processes.

However, the translation of these recommendations in the specific legal, political and cultural setting of both the Hungarian and Romanian legal orders seemed problematic.[161] A shared shortcoming appears realizing objective selection conditions and securing corresponding merit-based selections. While the two legal orders exhibited variance in terms of specific challenges, the context-specific combination of classic rule of law values (i.e. adequate legal knowledge, judicial skills) and contemporary values (i.e. specialized knowledge, communication skills, competitive examinations) into specific conditions and mechanisms remains a challenge. In this sense, the combination at the European level of the two types of principles does not appear to further the fundamental rule of law requirement of securing objective and pre-established conditions in the domestic legal orders.

b) Competence of judicial councils for judicial selection

Secondly, an important recommendation by several non-binding sources was the empowerment of judicial councils with selection competences. [162] European recommendations consider councils for the judiciary as bodies that are sufficiently independent to supervise that the conditions of occupying judicial office are respected.[163] For instance, the European Commission specifically suggested to several Central and Eastern European countries during the pre-accession process preceding the 2004 and 2007 EU enlargement rounds to establish a council for the judiciary, which is competent *inter alia* to supervise the selection, appointment, promotion as well as training of judges.[164]

In the context of the Council of Europe the Recommendation of the Committee of Ministers emphasized the importance of having an independent selection authority, meaning free from pressure from the Executive and Legislative branches, as well as having at least half of the selection or examination board judge-members.[165] We noted that the Recommendation of the Committee of Ministers' of the Council of Europe accepts judicial appointments by the Executive or Legislative branches as a legitimate national choice. However, it advises that in those instances a consultative body composed at least in half by judges to make recommendations.[166] Furthermore, the Venice Commission also considers

[161] cf. Michal Bobek, 'Judicial Selection, Lay Participation and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation' in Sophie Turenne (ed), *Fair Reflection of Society in Judicial Systems - A Comparative Study* (1st ed 2015 edition, Springer 2015). 121-146.
[162] *See* above chapter 1,C,I,ii.
[163] For e.g. Recommendation CM/Rec(2010)12. para. 26.
[164] E.g. Composite paper (2002), 47 (Estonia), 51 (Hungary), 74 (Slovakia). Central and Eastern European countries opting for centralized judicial administration through a council for the judiciary include: Bulgaria, Estonia, Hungary, Lithuania, Poland, Romania, Slovakia, Slovenia. For a detailed assessment *see* Open Society on the councils for the judiciary Open Society Institute, 'Monitoring the EU accession process: Judicial Independence '(2001), https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf (accessed 16.09.2019), 69-472.
[165] Recommendation CM/Rec(2010)12, para. 46.
[166] ibid. para. 47.

councils for the judiciary as an adequate body to take decisions on the selection, appointment and career of judges. However, the Venice Commission does not expressly promote a certain model for such councils.[167] In addition, the CCJE Magna Carta of judges also suggested that decisions on occupying the judicial office should be taken by a body in charge of guaranteeing judicial independence.[168] This recommendation also implies a council for the judiciary.

On the one hand, our analysis indicated that the empowerment of councils for the judiciary with selection competences enhanced the transparency of selection processes.[169] On the other hand, this empowerment has led to the concern of influencing the outcome of selection processes from within the judiciary. In the studied legal orders, neither the collegial nature of selection bodies, nor the internal checks within the central judicial body seemed sufficient to overcome this challenge.

The emphasis in European recommendations on possible external threats (i.e. from the Executive or Legislature or businesses) for the independent of status of judges, and the lack of detailed considerations on the internal threats (i.e. from within the judiciary through central managerial bodies and court presidents) aggravates these concerns. Consider, for instance, the EU Justice Scoreboard.[170] This is an information tool published annually since 2013 by the European Commission, which measures the functioning of justice systems under three main indicators: (1) the efficiency and (2) quality of justice systems as well as (3) judicial independence in Member States. Ultimately, the instrument aims to deliver suggestions for the functioning of courts in all EU Member States.[171] An important contribution of the Scoreboard is the separate part dedicated to judicial independence and, in particular, the general indicator concerning the "proposing and appointing authorities" with regard to the appointment of judges in Member States.[172] However, the Scoreboard only contains as a more specific indicator the "possible discretion that the executive or the parliament may have" in the appointment of judges.[173] The resulting lack of consideration of possible discretion by judicial bodies involved in the selection process fails to capture potential relevant challenges that might emerge in Member States with a fragile rule of law framework.

In sum, in light of the above-explained shortcomings it appears that the incorporation of European recommendations in the Hungarian and Romanian legal orders did not deliver the main rule of law objectives of these recommendations.[174] At a fundamental level, our analysis indicated that following the European recommendation of

---

[167] Venice Commission, 'Judicial Appointments', CDL-AD(2007)028-e, para. 27, 32.
[168] CCJE, Magna Carta of Judges, paras. 5,6.
[169] See above section D,I,ii.
[170] European Commission, EU Justice Scoreboard (http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm) (accessed 16.09.2019). For a critical assessment of the development of the content of the Scoreboard from a rule of law perspective Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' (2016) Hague Journal on the Rule of Law. 40.
[171] E.g. 2017 EU Justice Scoreboard, Introduction.
[172] E.g. 2017 EU Justice Scoreboard 2017, Part 3.3. Figure 56.
[173] ibid. Figure 57.
[174] cf. Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 German Law Journal 1290-1292. For an overview of the main objectives of the European Commission *see* above chapter 1,A,II,i.

empowering judicial councils with selection powers (i) does not automatically guarantee the personal independence of judges – in fact, it creates challenges for securing this value – and (ii) may contribute to the selection of loyal or inadequately qualified judges.[175]

D. Conclusions and suggestions

Judicial selection processes are essential for securing that judges are personally independent and adequately qualified. The importance of judicial selection processes is reinforced by the special emphasis placed on it the liberal-democratic normative framework and EU requirements. Despite this importance, our analysis indicated that currently both the Hungarian and Romanian legal orders fall short of these requirements. The background to the following suggestions are the two main identified rule of law shortcomings: (1) vagueness (i.e. quality) of legal conditions and (2) extensive and unchecked competences of judicial councils.

i. Suggestions for judicial selections in Hungary

Concerning the Hungarian legal order, as a main legal suggestion, we propose re-enforcing the role of the NJC in the selection of judges, consisting in the empowerment of the NJC vis-à-vis the NJO.[176] In light of the specific model of central judicial administration adopted in Hungary, this should consist in effective review powers that could act as a collegial check on the NJO President's powers, by a representative body of judges. However, it must be mentioned that in the current political context and judicial culture in Hungary, realizing this control seems highly problematic.[177] As a corollary, the annulment powers of the President of the NJO should be discontinued, as they do not appear justified.

Further improvement would consist in the elimination of the vague term of "most suitable candidate" from the legal framework. A more adequate means of securing that the selection committee determines a meritocratic ranking, could be the explicit inclusion of the rank or importance of conditions, i.e. in the Ministerial decree or regulations; similar to the promotion conditions.

Finally, based on the foregoing analysis it appears necessary to separate the general human resources competences from the judicial selection competences of the President of the NJO. This should be visible in the legal act, but also the non-binding

[175] cf. Anja Seibert-Fohr, 'Judicial Independence – The Normativity of an Evolving Transnational Principle'in Seibert-Fohr (ed) (n 1). 1291-1302. Kosař (n 82). 406-411.

[176] cf. *See* Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015). 112. Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in ibid. 33-110. Zoltán Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Univ Pr 2017). 456-476.

[177] Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 1). 801-803.

documents, for instance through the elimination of human resource management grounds as a valid basis for deviating from the ranking of the selection committee.

However, beyond these legal suggestions, what would appear conducive to securing rule of law quality on a longer term would be the reestablishment of core rule of law notions of personal independence and merit-based appointments of judges as the main basis for judicial selections. In particular, in light of the above-analysis pointing to the proneness to abuse of a mainly formal approach combining the two types of values, it would appear advisable to have more extensive reflections on the position and role of judges in the Hungarian legal order and society. Discussions should address how and what kind of new public management values would ultimately strengthen this rule of law role. Moreover, as a EU member state, the reflection should extend to how the role of Hungarian judges can accommodate the simultaneous role of Hungarian judges as EU de-centralized judges. Currently this does not seems to be the case. Ultimately, these broader steps are necessary for securing input legitimacy and the independent position of judges in society.

ii. Suggestions for judicial selections in Romania: eliminating vagueness; continued efforts for legal training

With respect to the Romanian legal order a first formal recommendation concerns the legal condition of "good reputation" of candidates. It appears more beneficial for the quality of the legal framework, to either eliminate this condition from the legal act altogether, or re-join the condition with the general condition of lack of criminal convictions. After all, the general condition of lack of criminal convictions captures the essence of good reputation of candidates. Instead of defining the meaning of good reputation, legal and regulatory efforts should rather focus on refining the meaning of the general condition of lack of criminal convictions. For instance, specific periods could be included during which candidates cannot apply for the judicial office, in case of prior administrative and criminal convictions or investigations. In any event, the circumstance of "public opinion generated by the act" should be eliminated from the assessment of good reputation of candidates. If applicable and relevant for certain criminal convictions, these have been already considered as an aggravating factor by an independent adjudicator. As such, the re-assessment of this circumstance by the SCM does not appear necessary.

At the same time, modifications could also eliminate the discretionary competences of the SCM in establishing the "good reputation" of candidates.[178] As further means of reducing the discretionary powers of the central management, it would be useful to pre-establish and publish the interview questions and assessment conditions. Furthermore, the regulations should make clear, that the ethical component of the interviews, by its nature, could not have a "good answer." However, ultimately, there is a deeper rule of law quality challenge in Romania: the definition of the legal function in the legal framework and society. Beyond legal modifications, this appears critical for securing the rule of law. The establishment of judicial training institution and formalization of detailed rules governing judicial selections cannot replace this more fundamental exercise.

[178] cf. Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in ibid. 849,850.

5. Quality of Judicial Throughput and Independent Judicial Organization in Hungary and Romania: Assessing case assignment mechanisms

This chapter assesses how judicial reforms in Hungary and Romania have translated European throughput-quality standards concerning the allocation of cases at courts into domestic legal mechanisms. Case allocation mechanisms in this chapter refer to legal and normative principles and rules establishing a general system based on which cases are assigned to judges at courts. The reasons for selecting this specific subset of judicial organizational processes were two-fold. On the one hand, as a prerequisite for the right to a fair trial, case allocation mechanisms are part of the European and liberal-democratic legal framework for judicial organization. This provides a sufficient empirical basis for assessing domestic case allocation mechanisms in light of European and liberal-democratic requirements and recommendations. On the other hand, case allocation mechanisms serve as a particularly good illustration of the tensions, and possible challenges, that the simultaneous affirmation of new public management values of timely handling of cases and ensuring a balanced workload between courts pose for the decision-making independence as well as the external and internal independence of judges. The chapter focuses on two main related developments: (1) the incorporation of case allocation mechanisms in the normative framework and the (2) effects of control powers of judicial self-governing bodies in the field of case allocation.[1]

The analysis proceeds in four main steps. The first part (A) introduces the analysis by explaining the importance of case allocation mechanisms for judicial independence and the balancing questions they entail in the contemporary legal and societal context of EU Member States. The second part (B) contains the comparative-contextual analysis of the legal and normative case allocation mechanisms applied in the Hungarian and Romanian legal orders. The third part (C) critically analyses the studied domestic legal and normative mechanisms in light of the liberal-democratic normative framework and in terms of their compliance with European requirements and recommendations. The fourth part (D) concludes by summarizing the theoretical insights advanced by this analysis and proposes specific suggestions for enhancing rule of law case allocation mechanisms in Hungary and Romania.

A. Introduction: Balancing questions of case allocation mechanisms

The classic rule of law framework places critical guarantees in terms of case allocation. The principle of “courts established by law” and “lawful judge” guarantee that cases are only allocated to courts, which have legal competence to decide cases, respectively, that cases are allocated within a court to an independent and impartial judge. These core values guarantee that judges fulfil their adjudicatory function independently and

[1] *See* chapter 1,B,I,ii.

free from any influences or pressures originating from inside or outside of the judiciary.[2] As such, the principle of a lawful judge is a prerequisite for the functional dimension of judicial independence and remains a primary consideration for the right to a fair trial guaranteed to individuals.[3]

However, the allocation of cases is also a key aspect for ongoing judicial reforms driven by new public management values. From this perspective, important considerations are how to increase the timeliness of case allocation processes, overall improving the timeliness of judicial decisions; how to secure a balanced workload among judges, and how to ensure more transparency towards litigants.[4] These additional elements are also critical for guaranteeing the right to a fair trial.[5] Moreover, in legal orders where a central judicial self-governing body has been established a further puzzle consists of how to divide case allocation and oversight competences between the central level and the de-centralized level of courts. Respectively, how to guarantee that ultimately the allocation of cases remains predictable and there is responsibility attached to these processes.

As it has been argued, the consideration of the legal values and mechanisms for the allocation of cases from both rule of law and new public management perspectives could enhance the legitimacy of judicial organizational processes, referred to as judicial throughput in this study.[6] However, the combination of these two perspectives also requires consideration to be given to certain balancing questions. How to make sure that mechanisms introduced for guaranteeing the timeliness of case processing and balanced workload of judges maintain the principle of a lawful judge as a main consideration? And, how to guarantee that new powers divided within the multi-level judicial self-governance setting do not infringe the internal independence of judges? This case study will consider in detail the weight attached to such balancing questions in the Hungarian and Romanian legal orders.

B. Comparing case allocation mechanisms in Hungary and Romania

The comparative-contextual analysis comprises two main parts. First, (I) we will describe and compare the legal mechanisms for the allocation of cases in the Hungarian and Romanian legal orders. Second, (II) we will assess how and to what extent the Hungarian and Romanian judiciaries maintain the principles of a lawful judge and functional

[2] Marco Fabri and Philip M Langbroek, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries' 1 *European Journal of Legal Studies* 2 (2007). 6-10; 19-23. Elaine Mak, *De Rechtspraak in Balans* (Wolf 2007) 137,138. Héctor Fix Fierro, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing 2003). 33.

[3] Martin Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Wolf Legal 2004). 309-366.

[4] Fierro (n 2). 139-174. Anthony Hol and Marc Loth, *Reshaping Justice: Judicial Reform and Adjudication in the Netherlands* (Shaker Publishing 2004). 59-66. Marco Velicogna, 'ICTs in the Justice Sector' in Coman and Dallara, *Handbook on Judicial Politics* (Ed. Institutul European Iasi 2010). 195-236.

[5] Martin Kuijer, 'The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings' (2013) 13 Human Rights Law Review 777. 781-783.

[6] *See* in general David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016) 390-398. For examples of other organisational processes, which raise risks for judicial independence *see* chapter 1,B,I,ii and further references.

independence of judges as main points of reference for legal mechanisms governing the allocation of cases at courts.

I. Legal Basis and Context

For the analysis of the legal framework, we derived the legal content from the domestic legal acts on judicial functioning, supplemented by the constitutional texts and relevant decisions of the Constitutional Courts. Respectively, we reconstructed the context of the legal framework through an overview of the preparatory documents of domestic legislation.[7]

i. Hungary

In the Hungarian legal order, the 2011 legal act on the organization of courts establishes the main principles and specific conditions for the allocation cases at courts.[8] This legal basis introduced new central guidance- and oversight mechanisms for the allocation of cases. The legislature's main consideration behind these modifications was to enhance the timeliness of judicial proceedings, respectively the balanced workload between courts and judges.[9] In its argumentation, the legislative proposal expressly emphasized that the central administrative body of the judiciary could not solve these efficiency-related problems between 1997 and 2008; necessitating a robust legal change.[10] However, this strong economic-value orientation propelling the 2011 legal changes questions the extent to which the resulting case assignment mechanisms maintain the principles of a lawful judge and the functional independence of judges at their basis.

[7] *See* Annex C,D.
[8] Act CLXI of 2011 on judicial organisation. *See* Annex C.
[9] Government of the Republic of Hungary, Legislative proposal T/4743 on the organisation and administration of courts, 60.
[10] id.

Table 7 Legal case allocation mechanisms in Hungary (1997-2011)

1997 statutory framework	2011 statutory framework
Independence of individual judges (Constitution Sec. 50(3))	Independence of individual judges (2010 Fundamental law Art.26)
~~National Council of Justice exercises the administration of justice; self-government bodies for the representation of judges shall participate (Constitution Art. 50(4))~~	President of NJO manages the administration of courts, NJC oversees the administration, judicial self-government bodies participate (Fifth Amendment of the Fundamental Law modifying Art. 25(5))
Right to a fair trial, including timeliness (Constitution, Art.57, 1997 legal act Art. 9)	Right to a fair trial, including timeliness (Fundamental law,Art. XXVIII(1))
Principle of a lawful judge (1997 Legal Act, Art.11)	Principle of a lawful judge (2011 Legal Act, Art.8)
Possibilities for derogation: (1) cases specified in procedural codes; (2) for important reasons affecting the functioning of courts (1997 Legal Act, Art. 11(2))	Possibilities for derogation: (a) cases regulated through the procedural codes and (b) important reasons concerning the functioning of a respective court (2011 Legal Act, 11(2))
Case allocation must take into account the complexity, labour-intensiveness and chronological order of cases (1997 Legal Act, Art. 11(5))	
Power of court presidents to allocate cases (1997 Legal Act, Art. 11)	Power of court presidents to allocate cases (2011 Legal Act, Art. 9)
President of the court is responsible for the lawful and efficient functioning of the court (1997 Legal Act, Art. 61(2))	
Specific case allocation rules (court presidents, 1997 Legal Act, Art.11, 63 (1,f))	Obligation of court presidents to establish case allocation mechanism annually (2011 Legal Act, Art.10)
Obligation of court presidents to publish case allocation rules (1997 Legal Act, Art.11)	Obligation of court presidents to publish case allocation rules (2011 Legal Act Art. 11)
~~Central case transfer powers (National Justice Council, 1997 Legal Act, Art. 41 (1))~~	~~President of the NJO, case transfer power (2011 Legal Act, Art. 62)~~ ~~President of the NJO case transfer power (2013, Fourth Amendment Fundamental Law, Art. 27(4))~~ 2013 Act repealed Art. 62-64. Act CXXXI of 2013, Art. 16(1) Fifth amendment of the constitution removed the constitutional power
~~General guidelines for case allocation (central management, main legislation Art.41)~~	Power to establish general guidelines for case allocation (President of the NJO, 2011 Legal Act Art. 76)
~~Central control on court presidents' case allocation powers (National Justice Council, 1997 Legal Act, Art. 41(1))~~	Central control on court presidents' case allocation powers (President of the NJO, 2011 Legal Act, Art. 76)
	Role of central management to guarantee the balanced workload of courts (President of the NJO, 2011 Legal Act, Art. 76(4,e))

Explanation: strikethrough indicates that the legal provision had been repealed.

Firstly, the 2011 legal act on court organization stipulates the main principles and rules governing the allocation of cases under the section of "Fundamental Provisions." As a

main rule of law principle, the legal act explicitly recalls the principle of a lawful judge, as a general foundation for the allocation of cases at courts.[11] The legal principle explicitly stipulates that, *"nobody can be deprived of a lawful judge."*[12] Furthermore, the legal framework defines two main dimensions of the principle of a lawful judge. According to the legal act, (1) a lawful judge is the judge assigned to hear a specific case at a court holding legal competence. In addition, the assignment of a case to a judge (2) must be based on the pre-established case allocation system at a court.[13]

This legal principle has its foundations in the constitutional *right to a fair trial*[14] and has been explicitly incorporated in the legal framework through the 1997 legal act on judicial organization. [15] Already before the explicit codification, the Hungarian Constitutional Court has clarified that the right to a fair trial obliges the State to guarantee that litigants are "parties to rather than objects of a trial."[16] According to the Court, this obligation entails the respect for litigant's rights during trials – among which the Constitutional Court explicitly highlighted the right to a lawful judge.

Secondly, also as part of the general provisions, the legal act stipulates specific rules for the allocation of cases. As a main rule, the legal act empowers court presidents with the allocation of cases.[17] However, the legal act constrains these powers by stipulating specific new public management conditions that court presidents must observe. According to the legal act, in the exercise of case allocation powers court presidents must observe the specific criteria of: (1) the importance (complexity) of cases, (2) the labour-intensiveness of cases and (3) the statistical data concerning the registration of cases at the respective court. The legal provision also mentions expressly that when establishing the specific case allocation rules, those holding this competence (4) must strive for the proportional distribution of cases within a court.[18]

A particularly important constraint concerns the *timing* of the case allocation system. Namely, the principles establish that court presidents must establish the case allocation rules before the end of each calendar year.[19] This is an important rule with the purpose to guarantee the objectivity of the case allocation system, respectively that the principle of a lawful judge materializes in practice.[20]

Furthermore, the legal framework guarantees that court presidents comply with the legal requirements by explicitly stipulating *transparency* requirements. Namely, the legal act stipulates that court presidents (1) must communicate the case allocation rules, or their modifications, within the court as soon as possible, (2) must make the rules accessible to the litigants and (3) must publish the rules at the central Internet page of the judicial branch or, if available, the Internet page of the respective court. [21] These requirements were

[11] Act CLXI of 2011, Art. 8. Compare Act LXVI of 1997, Art. 11(1,2). *See* Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (n 45). 812.
[12] Act CLXI of 2011 on the Organisation of courts, Art.8 (1).
[13] ibid. Art. 8(2).
[14] Fundamental law, Art. XXVIII(1).
[15] Zoltán Fleck, 'Judicial Independence in Hungary' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012). 812.
[16] Constitutional Court of Hungary, Decision no. 59 of 1993 (XI.29.) AB.
[17] ibid, Art. 9(1).
[18] ibid. Art. 10(1).
[19] ibid. Art. 9(1).
[20]Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 15). 812.813.
[21] ibid. Art. 11(1).

incorporated in the legal framework during the EU-accession process (2002) as an additional guarantee against the arbitrary exercise of case allocation powers by court presidents.[22]

Nevertheless, we must mention that the legislative framework allows court presidents to derogate from the official case allocation system.[23] According to the legal framework instances of permissible derogations are: (a) cases regulated through the procedural codes and (b) important reasons concerning the functioning of a respective court.[24]

Thirdly, the legal framework empowers the central judicial administrative body through the President of the NJO with the central oversight and control of the allocation of cases. The President of the National Judicial Office holds (1) the power to establish general administrative rules for the internal functioning of courts, mandatory for courts to implement; as well as (2) holds general control competences of court presidents' managerial activities – which includes that of case allocation.[25] In addition, (3) the NJO President holds competences for guaranteeing the balanced workload of courts.[26] It is important to note, that the re-structuring of the central judicial management through the 2011 legal reforms fundamentally affected these competences.[27] The 2011 legal act newly introduced the central power to guarantee the balanced workload of courts. Moreover, the 2011 legal act shifted the central guidance and control powers from the collegial judicial council, functioning in the 1997-2010 period, to the President of the NJO. The legislature's explicit main goals behind the reorganization of central case management powers were (1) to enhance the efficiency of central administration (2) to guarantee the timeliness of judicial proceedings and (3) to guarantee the balanced workload between courts.[28]

The important role of the President of the NJO in realizing the Hungarian legislature's ambitions is even more visible in light of the original design of the formal central case management powers. Consider the formal power of the President of the NJO in effect between 2011 and 2013 to transfer a particular case from a court holding legal competence to another court with corresponding jurisdiction. This legal power was connected to the general competence of the President of the NJO to guarantee the balanced workload of courts, and it was permissible in "exceptional circumstances", demanded by the *timeliness* of judicial proceedings.[29] Adding more emphasis to this power, in 2013, the case transfer competence was entrenched in the constitutional frame of reference. The Fourth Amendment of the Fundamental Law enabled case transfers "in the interest of the enforcement of the fundamental right to a court decision within a *reasonable time* and the *balanced distribution of caseload* between courts." [30]

---

[22] Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 15). 812,813. E.g. European Commission, 2002 Hungary Accession Evaluation Report, 24. *See* chapter 2,B,II,ii,a.
[23] id.
[24] ibid. Art. 11(2).
[25] Act CLXI of 2011, Art. 76(1,b;6,b).
[26] Act CLXI of 2011, Art. 76 (4,e).
[27] *See* chapter 3,A,III,i.
[28] Government of the Republic of Hungary, Legislative proposal T/4743 on the organisation and administration of courts, 60.
[29] *See* above Table. 7. Act CLXI of 2011, Art. 62. Articles 62-64 were abolished by Act CXXXI of 2013, Art. 16(1), effective of 1st of August 2013.
[30] Fourth Amendment of the Fundamental Law, Art. 14 amending Art. 27 of the Fundamental Law with para. 4. *See* Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in Armin von Bogdandy, Pál

However, these extensive legal case transfer powers of the President of the NJO were met with substantial criticism both at the domestic[31] and European levels in light of the rule of law principle and guaranteeing judicial independence.[32] Of particular importance was the 2013 decision of the Constitutional Court concerning these powers.[33] Fourteen individuals introduced the constitutional complaint;[34] who had been litigants in cases transferred by the President of the National Judicial Office.[35] The Constitutional Court held that the extraordinary transfer powers, having the *timeliness* of judicial proceedings and the *balanced workload of courts* as main justifications was in breach of the constitutional right to a fair trial and the guarantee of the rule of law.[36]

In its argumentation, the Constitutional Court underlined that the principle of a *lawful judge* in the Hungarian legal order refers to a judge appointed to a court possessing (1) *pre-established legal competence*, and to whom a specific case has been allocated according to the (2) *pre-established case allocation system.* The Court emphasized that the legal requirement to establish the case allocation system before the start of the applicable calendar year, serves the main purpose of guaranteeing the *objectivity* and *impartiality* of the case allocation system. In addition, this rule aims to prevent the arbitrary use of power. Accordingly, the constitutional requirement for the assignment of cases gains the specific meaning to allocate cases based on a "pre-established, general rules", and in an "objective manner."[37] The Constitutional Court found that the case transfer powers of the President of the NJO fell short of these requirements.

Ultimately, against the backdrop of the significant domestic and international criticism, the Hungarian Legislature first constrained,[38] and later, following *inter alia* the

---

Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015). 112.

[31] E.g. Eötvös Károly Institute, Hungarian Helsinki Committee, Hungarian Civil Liberties Union (TASZ), 'Opinion on the new judicial administration system', http://www.ekint.org/ekint_files/File/velemeny_az_igazsagugyi_torvenycsomagrol_ekint_mhb_tasz.pdf (accessed 16.09.2019). Eötvös Károly Institute, Hungarian Helsinki Committee, Hungarian Civil Liberties Union (TASZ), 'Assessment on the Amended Hungarian Laws on the Judiciary' (September 2012), http://www.ekint.org/ekint_files/File/mhb-tasz-ekint_modos%EDtott_birosagi_torvenyek_kritikaja_20120916_angolul.pdf (accessed 16.09.2019).

[32] E.g. European Commission, Infringement Proceedings against Hungary on account of independence of the National Central Bank, Independence of the Data Protection Authority and measures affecting the independence of the judiciary, IP/ 12/24; IP/ 12/222; MEMO/12/265. Venice Commission, CDL-AD(2012)001. Venice Commission, CDL-AD(2012)020, 'Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session', paras. 60-74, 90,91. Venice Commission, CDL-AD(2013)012, 'Opinion to the Fourth Amendment to the Fundamental Law of Hungary', 73,74.

[33] Constitutional Court Decision 36 of 2013 (XII.5.) AB. Art. 62,63 of Act CLXI of 2011 on the organisation and administration of courts. The Constitutional Court pronounced on the power in effect between January 1, 2012 and 16 July 2012.

[34] *See* above chapter 3,A,I,i.

[35] Constitutional Court Decision 36 of 2013 (XII.5.) AB, Part I, I. Part II. Provisions of the Fundamental Law: Art. B (on the sovereignty and democratic nature of the Hungarian State governed by the rule of law), Art. Q (on the respect for International Treaty Obligations), XXVIII (1,3,7) (right to a fair trial). Applicable provisions of the European Convention on Human Rights and Fundamental Freedoms: Art. 6 (right to a fair trial), Art. 13 (right to a legal remedy). *See* Decision no. 6 of 1998 (III.11) AB.

[36] Constitutional Court Decision 36 of 2013 (XII.5.) AB, para. 34.

[37] ibid, para. 32. *See* also Decision 993/B/2008. Decision 166 of 2011 (XII. 20.) AB.

[38] Legal constraints included: the obligation to publish the decisions and give reasons (Act CLXI of 2011, Art. 76(4,b). Repealed by Act CXXXI of 2013, Art. 16(d), effective of 1st of August 2013.); the power of the NJC to

decision by the Constitutional Court, repealed the case transfer powers of the President of the NJO through Act CXXXI, effective of the 1st of August 2013.[39] Subsequently, the Fifth Amendment of the Fundamental Law removed the transfer power from the constitutional frame of reference.[40] Nevertheless, this legal power remains notable because of its important risks for the guarantee of functional independence of judges and its serious effects in practice for the affected cases.

ii. Romania

In the Romanian legal order, the 2004 legal act on court organization contains the relevant principles and rules for the allocation of cases to judges.[41] This legal act is particularly important for our analysis because it fundamentally redefined the allocation of cases at Romanian courts. On the one hand, the 2004 legal act introduced new legal principles governing the allocation of cases and a computerized case allocation system. On the other hand, the 2004 legal act fundamentally reshaped the central control powers over this activity of courts.[42] The main reasons for introducing these new legal mechanisms were to enhance the *transparency*, *objectivity* and *timeliness* of the allocation of cases; as well as to *reduce any form of arbitrariness*.[43] However, the robustness of these legislative modifications raises the question to what extent the resulting case allocation mechanisms lived up to these original ambitions. A further question that occurs is how these legal mechanisms connect to the rule of law guarantee of functional independence of judges.

---

establish specific criteria for the transfer of cases (Act CLXI of 2011, Art. 62. National Judicial Council, Decision no. 58 of 2012 of 17 September 2012 on Principles governing the appointment of competent court.); the possibility of litigants to appeal the transfer decisions in front of the Curia within 8 days from the date of publication. Curia was competent to pronounce on the legality of the decisions (Act CLXI of 2011, Art. 63(3). Articles 62-64 were repealed by Act CXXXI of 2013, Art. 16(1), effective of 1st of August 2013.

[39] For a detailed overview of the exchange between the Venice Commission and the Hungarian Government and subsequent legal modifications *see* Gyöngyi (n 407).

[40] Fifth Amendment of the Fundamental Law of Hungary, Art. 7(1) repealed Art. 27(4) of the Fundamental Law effective of the 1st of October 2013. Act CXXXI of 2013. For a critical overview see Hungarian Helsinki Committee, Eötvös Károly Policy Institute, Hungarian Civil Liberties Union, 'Comments to the Fifth Amendment to the Fundamental Law of Hungary', 18 September 2013, http://helsinki.hu/wp-content/uploads/NGO_comments_on_the_5th_Amendment_to_the_Fundamental_Law_October2013.pdf (accessed 16.09.2019), 2 .

[41] Law no. 304 of 2004 on the organisation of the judiciary, Official Gazette of Romania, Part I, no. 576 of 29 June 2004. Replaced: Law no. 92 of 1992 on judicial organisation, originally published in Official Gazette of Romania, Part I, no. 197 of 13 August 1992, republished in Official Gazette of Romania, Part I, no. 259 of 30 September 1997. Law no. 142 of 1997 concerning the completion and modification of Law no. 92 of 1992, Official Gazette of Romania, Part I, no. 170 of 25 July 1997. *See* Annex D.

[42] *See* Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 15). 862.

[43] Government of Romania, Reasons for the adoption of Law no. 304 of 2004, http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5239 (accessed 16.09.2019), 2.

Table 8 Legal case allocation mechanisms in Romania (1992-2004)

1992 framework	2004 framework
Independence of individual judges (1991 Constitution, Art. 123(2))	Independence of individual judges (Constitution, Art. 125(1))
Right to a fair trial (1991 Constitution, Art.24)	Right to a fair trial (Constitution, Art.21 (3))
	Principle of fair trial (Law no. 304 of 2004, Art.10)
	Principle of continuity of judicial sections (Law no. 304 of 2004, Article 11)
	Principle of random allocation of cases through a computerized system (Law no. 304 of 2004, Article 11)
Case allocation (Court presidents, 1992 Legal Act, Art. 15)	Case allocation (computerized system, Law no. 304 of 2004, Article 53)
	Exceptions permitted only in cases "foreseen by law" (Law no. 304 of 2004,Article 53)
	Court presidents' managerial overview of courts' activities (Law no. 304 of 2004,Article 43, 46(1))
	Central management establishing more specific rules (Law no. 317 of 2004, Art. 38)
	Control competences of central management (Law no. 317 of 2004, Art. 38)

Firstly, the 2004 legal act on court organization lays down the general principles governing the allocation of cases in the Romanian legal order. The legal act reiterates as a general principle the constitutional guarantee of the right to a fair trial of every individual within a reasonable time, by an independent and impartial tribunal.[44] This is an overarching principle that must be observed in the organization of judicial functioning in general. The legal act does not explicitly connect this principle to the allocation of cases. Nevertheless, the legal act stipulates two new public management principles that specifically apply to case allocation: the "random allocation of cases" and the "continuity of the judicial panel."[45] All of the above constituted novel principles in the Romanian legal framework, introduced by the 2004 legal act. The principle of random allocation of cases was explicitly introduced to guarantee that objectivity in the allocation of cases, respectively the elimination of any kind of influence over the outcome of decisions. The preparatory documents explained that the principle of "continuity" of the judicial panel, aimed to guarantee that the random allocation of cases was effective in practice.[46]

Secondly, the legal act stipulates the specific mechanism for the allocation of cases in line with the principle of random allocation of cases. The main mechanism constitutes the computerized allocation of cases.[47] The introduction of this case allocation mechanism by the 2004 legal act represented a robust change in the Romanian legal order. Before the 2004 judicial reforms, the legal framework empowered court presidents to allocate cases at

[44] Law no. 304 of 2004, Art. 10. *See* also Constitution of Romania (2003), Art. 21(3) (access to justice) (everyone has the right to a fair trial within a reasonable time).
[45] Law no. 304 of 2004, Art.11.
[46] Government of Romania, Reasons for the adoption of Law no. 304 of 2004, http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5239 (accessed 16.09.2019), 2.
[47] ibid. 53(1). 53(2) the allocated cases can only be transferred in the cases foreseen by law.

the level of courts.[48] However, the allocation of cases appeared as an extremely controversial means through which court presidents influenced the outcome of cases. Respectively, court presidents used their extensive powers to exert political influence on the outcome of cases. The European Commission during the EU accession process heavily criticised court presidents' abuse of power and specifically suggested the adoption of a computer system that would randomize the allocation of cases.[49] According to the legislative preparatory documents, the main purpose of *the computerized system* was to increase the *"transparency" and "objectivity"* of the allocation of cases. Furthermore, it was meant *to "reduce arbitrariness"* and enhance the *"timeliness"* of case allocation processes.[50] Apart from explicitly establishing the main method for the allocation of cases, the legal framework does not stipulate further criteria concerning the allocation of cases. The legal act empowers the central judicial administration with the determination of further rules through the internal rules of procedure of courts.[51] The SCM delivers these rules in the normative mechanism containing the internal rules of procedure of courts.[52]

Thirdly, the legal act on court organization specifies control mechanisms on the above-mentioned case allocation powers. In terms of oversight of the courts' managerial activities, the legal act on the functioning of courts allocates powers to court presidents. Indeed, court presidents hold the general competence to manage a court. According to the legal act, the main purpose of this oversight is two-folded. On the one hand, it is meant to efficiently organize the court's functioning. On the other hand, court presidents are meant to oversee the court's activity in light of the legal provisions and the normative framework.[53] The legal framework also expressly mentions that the oversight must respect the rule of law principle of judicial independence and that "judges are only subject to the law."[54]

In addition, the legislative act concerning the functioning of the Superior Council of Magistracy allocates oversight powers to the central management of the judiciary. Namely, the SCM has the general power to control the administrative activities of courts.[55] This control also extends to the allocation of cases.[56]

---

[48] Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 15). 836-837. Cristina Parau, 'The Drive for Judicial Supremacy' in ibid. 641. Daniela Piana, *Judicial Accountabilities in New Europe* (Ashgate 2010). 121-159.

[49] E.g. European Commission, 2001 Romania Report 21; 2002 Romania Report 26. 2003 Romania Report 19; 2005 Romania Report 11. 2006 Romania Report 9. (recommending the modernization of case allocation methods). *See* chapter 2.

[50] Government of Romania, Reasons for the adoption of Law no. 304 of 2004, http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5239 (accessed 16.09.2019), 2.

[51] ibid. Art 139(1,b).

[52] SCM, Internal Rules of Procedure of Courts (2013). *See* further chapter 5,C,II,ii.

[53] Law no. 304 of 2004, Art. 43, 46(1).

[54] ibid. Art. 46(2).

[55] Law 317 of 2004 on the Superior Council of Magistracy, Art. 38(1).

[56] Superior Council of Magistracy Decision no. 162 of 21 March 2013. Superior Council of Magistracy, Judicial Inspection, Report no. 1696/IJ/1128/DIJ/2013, 'Report on the verifications carried out by the management of courts concerning the compliance with the legal provisions on the registration and random allocation of cases at courts', http://www.csm1909.ro/csm/linkuri/29_01_2014__65045_ro.pdf (accessed 16.09.2019). The content of the report was approved by the Superior Council of Magistracy through Decision no. 805 of 19 September 2013. *See* further chapter 5,C,II,ii.

iii. Similarities and differences

As a main similarity, we can observe that both legal frameworks explicitly incorporate legal principles and mechanisms for the allocation of cases. Furthermore, in both instances, the legal framework explicitly referred both to the classic rule of law principle of a lawful judge and courts established by law, as well as new public management-values. A plausible explanation for this formalization seems the explicit focus during domestic legislative processes in both studied legal orders on the allocation of cases.

However, the studied domestic legal case allocation mechanisms presented two main differences in terms of the (1) established-nature of the rule of law foundation of these mechanisms and (2) the specific content of these mechanisms. With respect to rule of law principles, the Hungarian legal framework explicitly places the principle of a lawful judge as a main foundation for the allocation of cases and offers a detailed conceptualization of this principle. In contrast, the Romanian legal order makes a general reference to the principle of courts established by law. This principle is applicable to the organization of courts in general, with only an implicit relevance for the allocation of cases. This difference is notable, because the implicit reference might not constitute a sufficiently firm basis in practice. In contrast to the implicit reference to the "courts established by law" principle, the explicit reference in the Romanian legal act to new public management principles governing the allocation of cases can further aggravate this legal tension.

Our analysis also indicated differences in terms of the specific content of new public management principles. The Hungarian legal order explicitly incorporates the values of timeliness, transparency and balanced workload among judges in case allocation mechanisms. In contrast, the Romanian legal act explicitly refers to the random allocation of cases and continuity of judicial panels. The specific principles in both cases seem to connect to the specific new public management consideration emphasized in the legislative preparatory documents (e.g. timeliness and balanced workload with reference to Hungary; objectivity and reduction of any form of arbitrariness in Romania).[57] Moreover, the specific new public management principles also seem to connect to the specific main case allocation mechanism, opted for in the domestic legal orders. This leads us to the second main difference.

The Hungarian legal order prescribes a case allocation system where seemingly court presidents receive main powers. In contrast, the Romanian legal order introduced a computerized case allocation system. Court presidents retain powers in terms of establishing the judicial panels and introducing these panels in the ICT system. A possible explanation for this difference could be the different assessment of abuse of powers by court presidents and judicial corruption between Hungary and Romania during the EU accession process. [58] As explained above, with respect to Hungary the European Commission deemed sufficient the enhancement of transparency of court presidents' case allocation activities. In contrast, with reference to Romania, the European Commission strongly recommended the introduction of a computerized case allocation system that would guarantee the random allocation of cases. Nevertheless, we must highlight that

[57] Anja Seibert-Fohr, 'Judicial Independence – the Normativity of an Evolving Transnational Principle' in Seibert-Fohr (ed) (n 15). 1291-1302.
[58] *See* Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in ibid. 836-837. Cristina Parau, 'The Drive for Judicial Supremacy' in ibid. 641. Piana (n 48). 121-159.

despite these modifications, court presidents in the Romanian legal order retain important case allocation powers – and as such there is a risk of internal influence.[59]

Irrespective of the above-mentioned contextual differences, a further main similarity was that the central judicial management in both legal orders received significant guidance and oversight powers concerning the allocation of cases. A possible explanation for this development appears to be the general administrative empowerment of central judicial managerial bodies, experienced in both legal orders.[60] However, as a result, the central managerial level has important powers through which it can shape the allocation of cases at courts. On the one hand, this creates a risk for internal influence. On the other hand, these developments raise the question of effectiveness of the safeguards against the abuse of central powers.[61] This is particularly important in the Hungarian context, where a single person is empowered. However, these administrative decisions are not directly controlled, for example by a role to guarantee functional independence or the decisions being subject to collegial vote.

Overall, in the Hungarian legal order a main tension appears the extensive discretionary powers of the President of the NJO in the allocation of cases, whereas in the Romanian legal order a main source of tension is the implicit reference to the rule of law principle of courts established by law. In both instances, these tensions question the effectiveness of the rule of law principle of a lawful judge in the practice of allocating cases. We will further investigate this aspect in the next section.

II. Experiences in practice

As a second step of our contextual-comparative analysis, we will present the content of case allocation mechanisms issued by the judicial managerial bodies of Hungary and Romania. This part of the analysis focuses on two main case allocation mechanisms: the internal regulation by the judiciary for the allocation of cases and the reports by the domestic judicial councils summarizing experiences with applying the case allocation methods in practice.[62] The overall aim here is to determine (1) how the judicial management bodies incorporate the principles of functional independence and lawful judge in the case allocation mechanisms for which they are responsible, respectively (2) how the

[59] cf. David Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice' 13 European Constitutional Law Review. 120-122. *See* further Chapter 5,C,II,ii.

[60] cf. Bogdan Iancu, 'Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania' [2010] European Constitutional Law Review 28. Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 German Law Journal. 1257-1292. *See also* Cristina E Parau, 'Explaining Governance of the Judiciary in Central and Eastern Europe: External Incentives, Transnational Elites and Parliamentary Inaction' 67 Europe-Asia Studies. Carlo Guarnieri, 'Judicial Independence in Europe: Threat or Resource for Democracy?' (2013) 49 Representation. 350.

[61] cf. Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in Bogdandy and Sonnevend (eds) (n 30). 33-110. Zoltan Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in Andras Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Univ Pr 2017). 456-476.

[62] *See* Appendices, C,D,G and H.

legal, factual and political context of reforms influences the independent allocation of cases.

i. Hungary

In the Hungarian legal order, the President of the NJO establishes specific principles and rules for the allocation of cases as part of the Regulation on the administration of courts. This internal guidance is meant to further clarify the meaning of the legal conditions. Therefore, it gains a complementary nature to the legal rules. Nevertheless, this instrument becomes particularly important, because of the explicit legal obligation of court presidents' to follow the instructions contained in the regulation.[63] The binding nature of this instrument raises the question what is the nature of principles and methods highlighted in this instrument: does the regulation emphasize the principle of a lawful judge or does it emphasize the new public management principles of timeliness and balanced-workload – of particular importance for the 2011 legal reforms; or a combination thereof? This question becomes even more pressing in light of the main goal court administration rules, which is formulated in the regulation as: (1) "guaranteeing a productive, timely, customer-friendly and service-oriented functioning of courts, (2) specifically taking into account the strategic goals of the President of the NJO and in line with the tools and methods promoted by the central administration of courts."[64] This main ambition indicates a (a) strict organizational hierarchy and (b) a particular weight of new public management considerations.

The specific rules concerning the allocation of cases seem to follow suit. The regulation stipulates six principles on which court presidents must base their case allocation activities.[65] Five out of these principles seem to serve the purpose of guaranteeing the objectivity of case allocations, and therefore by extension, albeit implicitly, appear connected to the principle of the lawful judge. Consider in this sense the first and second principles, of *completeness* and *generality*. The first principle stipulates that the case allocation rules must include all decision-makers at a court. The second principle requires court presidents to formulate the case allocation rules in a general manner based on which it can be determined to which judicial panel to assign a specific case. In a similar vein, the third principle also seems to serve the objectivity and transparency of case allocations. According to the third principle, the case allocation rules can only be *modified based on pre-established procedures* applicable for an entire calendar year. Furthermore, according to the sixth principle of *interchangeability*, case allocation methods must be identified based on pre-established principles, in a predictable and transparent manner.

In contrast, the fourth principle appears to stand out both in terms of its new public management nature and its specificity. With reference to its nature, the fourth principle explicitly refers to the new public management consideration of *balanced workload among judges.* With reference to its specificity, this principle explicitly stipulates that the case

---

[63] President of the NJO, Regulation no. 6 of 2015 on the administration of courts, http://birosag.hu/sites/default/files/allomanyok/obh/dokumentumok/6_2015_igazgatasi_szabalyzat.pdf (accessed 16.09.2019).
[64] ibid. para.2.
[65] ibid. para. 115.

allocation system must contain a specific timeframe for the periodic impact-assessment of the effects of the case allocation system on the balanced workload among judges. Furthermore, this principle highlights that a particular concern for the assessment should be whether the case allocation rules generated a significant discrepancy among the workload of judges. Finally, the regulation highlights that the outcome of the assessment might lead to the modification of the pre-established the case allocation rules.

The balanced workload of judges is not only present as a specific principle but also as a specific method for the allocation of cases. Overall, the internal regulation stipulates twelve methods that court presidents can use in the allocation of cases.[66] Out of these, the last method refers to the simultaneous application of several of the listed methods – giving relevance to all listed methods. The majority of the methods seem objectivity-oriented. For instance, the regulation suggests employing a system based on: (a) odd-even numbers; (b) numeric groups; (c) the initials of the defendant; (d) the division of the territorial competence among judges (i.e. cities, districts); (e) the assignment of cases to a specific judicial panel in weekly, bi-weekly and monthly distribution rules, (f) registration order of cases; (g) the professional experience of judges or judicial secretaries, (h) specialisation of judges, (i) automated case assignment methods. However, the regulation highlights explicitly (j) the balanced workload of judges as a specific method. Furthermore, the regulation explicitly stipulates (k) the complexity of cases as one of the specific methods that court presidents must take into account. This double-reference to the balanced workload of judges, both as a principle and method, remains notable because it might interfere with the legal case allocation powers of court presidents. A further notable aspect is that the regulation enlists the balanced workload among judges as a specific consideration, related to the internal functioning of courts, which warrants the legal possibility to either modify the case allocation rules or re-allocate a specific case outside the pre-established case allocation system. Such derogations are important, because they create a possibility to supersede the legal principle of a lawful judge and allocate a case outside the general case allocation system. Here, the guarantee of functional independence of judges can be at stake.

The regulation relies on additional new public management considerations when explaining specific situations that justify derogation from the pre-established case allocation rules. According to the regulation, the extraordinary nature, the particular legal importance, and the complexity of a case (i.e. entailing a high workload) as well as the necessity to attend a case during the summer recess or public holidays (for timeliness considerations) can constitute grounds for allocating a case outside the pre-established case allocation system.[67] A particular point of concern is that these timeliness- and complexity-considerations open up the allocation of a large group of potential cases to derogation from the legally guaranteed system.

The seeming importance attached by the President of the NJO to the balanced workload- and timeliness considerations in the allocation cases were particularly visible during the period in which the president of the NJO could transfer cases from one court to another. Consider, for instance the argumentation of the 42 transfer decisions issued by the

[66] ibid. para. 116.
[67] ibid. para. 119.

President of the NJO in 2012-2013.[68] In these decisions, the President of the NJO reasoned: "taking into account the workload of the Budapest Municipal Court, the timeliness of the proceedings could not be guaranteed." Moreover, some decisions also mention that the "short procedural timeframes foreseen by law could not be guaranteed otherwise."[69] As we can note, the reasoning solely refers to balanced workload- and timeliness-considerations. We established earlier that according to the Constitutional Court such a complete shift in primary values underlying the allocation of cases was in breach of the guarantee of a lawful judge.[70] However, taking a closer look at the nature of the transferred cases might raise the serious concern that new public management considerations were used as a façade to handpick cases. A main concern here is that the transferred cases concerned, among others, money laundering and corruption charges against the members of the main parliamentary opposition party.[71]

This concern is compounded, when we contrast the number of cases transferred by the President of the NJO with the number of cases transferred by the previous collegial judicial administrative body, based on a similar legal competence.[72] We reconstructed information on the application of this power in practice from the publicly available sources of: (1) the 2012 Annual Evaluation Report of the President of the NJO and (2) the Open Society Institute's 2001 evaluation report of judicial functioning. According to these, in the 1997-2001 period, the National Council of Justice discussed approximately in thirteen cases per year the expedited hearing of a case at a court, outside the previously established case allocation system. According to OSI's account, the Ministry of Justice proposed the expedited hearing of cases concerning money laundering and corruption charges. However, these proposals remained subject to majority vote of the National Council of Justice. The report highlights that not all proposals were accepted.[73] These sources indicate a significant discrepancy between the number of cases transferred by a collegial central administrative body and a single-person administrative leader.

---

[68] Office of the central management, Case transfer decisions, http://birosag.hu/obh/birosag-kijeloles-hatarozatai?created[min]=&created[max]=&tid=All (accessed 16.09.2019). *See* also, President of the NJO, Decision no. 3 of 2012 on the assignment of courts for guaranteeing the delivering judicial decisions within a reasonable time. President of the NJO, 2012 Annual Report, Appendices II.2, II.3.

[69] "Taking into account the statistical data concerning the workload of the Budapest Municipal Court, the President of the NJO considered that the case could not be tried within the applicable short procedural timeframe and therefore ordered the transfer of the case to a different court." Decision 29 of 2012, Decision 28 of 2012, Decision 27 of 2012, Decision 26 of 2012 (only reference that the timeliness of the judicial proceeding cannot be guaranteed otherwise), Decision 25 of 2012, Decision 24 of 2012 (reference only to timeliness), Decision 23 of 2012 (reference only to timeliness), Decision 22 of 2012, Decision 21 of 2012 (reference only to the timeliness), Decision 70 of 2012, Decision 79 of 2012, Decision 83 of 2012, Decision 114 of 2012, Decision 128 of 2012, Decision 217 of 2012, Decision 126 of 2012, Decision 125 of 2012, Decision 135 of 2012, Decision 134 of 2012, Decision 133 of 2012, Decision 132 of 2012, Decision 211 of 2012, Decision 210 of 2012, Decision 208 of 2012, Decision 206 of 2012, Decision 248 of 2012 (making reference to the criteria established by the National Judicial Council), Decision 247 of 2012 (making reference to the NJC criteria), Decision 276 of 2012 (making reference to the NJC criteria), Decision 300 of 2012 (making reference to the NJC criteria), Decision 325 of 2012 (making reference to NJC criteria and mentioning specific workload data), Decision 57 of 2012, Decision 58 of 2012, Decision 59 of 2012, Decision 60 of 2012, Decision 61 of 2012, Decision of 79 of 2012, Decision 209 of 2012.

[70] Constitutional Court Decision 36 of 2013 (XII.5.) AB. *See* above chapter 5,C,I,i.

[71] For a detailed presentation of the nature of transferred cases *see* Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in von Bogdandy and Sonnevend (eds) (n 30). 119.

[72] Act LXVI of 1997, Art. 41 (1). *See* above Table 7.

[73] OSI Report (2001), 221. President of the NJO, 2012 Annual Report, 31 refers to 13 transferred cases in 2001.

Overall, the content of the normative instruments for case allocations in Hungary seems to shift focus to the new public management principles emphasized as a matter of priority by the legislature during the 2011 legal reforms. In the following section, we will consider whether the content of normative instruments in the Romanian legal order exhibits a similar pattern.

ii. Romania

In the Romanian legal order, the Superior Council of Magistracy establishes central rules for the allocation of cases in the regulation on the internal order of courts.[74] This normative mechanism supplements the content of the legal mechanisms.[75] However, the binding nature of this instrument for court presidents attaches particular importance to the specific content of the case allocation rules contained in the regulation.

The regulation seems to place main emphasis on new public management principles governing the allocation of cases in the Romanian legal order. For example, the regulation explicitly states that central for its guidance is the main legal principle of random allocation of cases. In light of this main goal, the internal operating rules stipulate specific (1) rules concerning the ICT system and (2) specific agents and their respective powers with respect to the case allocation system. Concerning the ICT system, the internal regulation lays down the specific computer software that courts must use (ECRIS).[76] In addition, the internal regulation clarifies that in case the random allocation through the computer system is not possible, because of "objective grounds", court presidents should allocate cases following the "cyclic allocation method – which is an alternative method that also fulfils the legal requirements of randomness."[77] Furthermore, the internal regulation stipulates that court presidents should establish judicial panels at the beginning of every calendar year. Related to this requirement, the regulation stipulates for the panels to be numbered, and the numbers to be introduced in the computer system. In addition, the regulation mentions the specific criteria for the establishment of judicial panels, such as: the nature of cases decided by the panels (i.e. civil, criminal), the specialization of judges and the procedural stage of the cases.[78] These rules remain notable, because although they seem to promote the objectivity of case allocation processes, they place main emphasis on operationalizing the legal principle of randomness, respectively the computer system for the allocation of cases, rather than the guarantee of functional independence of judges.

Concerning the agents holding specific competences, the regulation stipulates three main agents: the administrative board of courts, court presidents and clerks. The regulation grants the general competence to the administrative board of courts – composed of the court president and vice-president(s) – to establish and to supervise the introduction of all relevant parameters of the computer system at the beginning of every calendar year.

---

[74] SCM, Regulation on the Internal Order of Courts, Decision no. 1375 of 17 December 2015.
[75] Law no. 317 of 2004, Art. 38.
[76] Regulation on the Internal Order of Courts, Art. 101 (1).
[77] ibid. Art. 101(2). Art. 104 (cyclical method). The cyclic distribution of cases also relies on a numbered list of judicial panels and requires establishing a list of cases based on their date of registration at the court. A particular case is assigned to the judicial panel next in line on the list following in line the judicial panel to which the previous case has been assigned.
[78] ibid. Art. 101(3).

An additional competence of the administrative board is to approve the composition of the judicial panels.[79] In addition, the administrative board is also responsible to approve the introduction of the members of every judicial panel in the computer system.[80] The specific powers of the administrative board become notable because they subject the powers of court presidents to a collegial control. This appears necessary because the regulation empowers court presidents with the important competence to appoint at the beginning of every calendar year the person responsible for overseeing the case allocation system.[81] The regulation empowers court clerks with relevant competences. According to the regulation, the designated court clerk is responsible for the initial introduction of a case in the computer system.[82] Moreover, the judicial clerk has the power to update the parameters of a case in the computer system, if applicable.[83] The internal regulation mentions that this activity takes place under "judicial oversight."[84]

The focus on the computer system for the allocation of cases is not only prevalent in the internal regulation, but also in the control activities of the SCM. Consider, for example, the 2013 report evaluating the case allocation practices at courts. For this evaluation, the SCM requested the presidents of the 15 appeal courts 15[85] to review the compliance at the level of appeal courts and courts under their supervision[86] with the pertinent legal[87] and normative obligations[88] concerning the registration and allocation of cases at courts.[89] The specific points of verification concerned, *inter alia*, the manner of appointment of the agent responsible for operating the computer system; the specific manner of registering and allocating cases; the manner of establishing and numbering judicial panels; the manner of handling judicial incompatibilities as well as the group of all persons with access to the computer system.[90]

The assessment revealed some highly important points of concern in light of the legal requirements. For example, although the second step of the allocation process – consisting of the random distribution of cases – was not problematic, the first step – consisting of the introduction of cases in the computer system based on their order of registration at a given court – was questionable at several courts. Namely, after the original case allocation system was established, the order or registration of selected cases was

[79] ibid. Art. 19(1,h). Art. 7(g) (granting the competence to Presidents of appeal courts to organize and coordinate the random allocation of cases and to establish rules for situations not foreseen by law).
[80] ibid. Art. 19(1,i). Court leaders also approve modifications to the judicial panels if one of the objective grounds occurs in practice.
[81] ibid. 103(1).
[82] ibid. 94(10).
[83] ibid. Art. 53(1,f).
[84] id.
[85] Superior Council of Magistracy Decision no. 162 of 21 March 2013. Superior Council of Magistracy, Judicial Inspection, Report no. 1696/IJ/1128/DIJ/2013, 'Report on the verifications carried out by the management of courts concerning the compliance with the legal provisions on the registration and random allocation of cases at courts', http://www.csm1909.ro/csm/linkuri/29_01_2014__65045_ro.pdf (accessed 16.09.2019). The content of the report was approved by the Superior Council of Magistracy through Decision no. 805 of 19 September 2013.
[86] Law no. 304 of 2004 on the organisation of courts, Art. 43(2) (presidents of appeal courts have managerial control over hierarchically inferior courts falling under their territorial circumscription).
[87] Law no. 304 of 2004, Art. 10,11,53.
[88] The normative basis concerned Art. 95-99 of the Internal Rules of Procedures of Courts (2005).
[89] Superior Council of Magistracy Decision no. 162 of 21 March 2013.
[90] ibid. 1-5.

subsequently modified in a way to allocate the selected cases to a different judicial panel.[91] This was an important shortcoming considering that the main guarantee of objectivity under the Romanian case allocation system is that cases are introduced in the system upon their order of registration and then randomly assigned to judicial panels. Another problem according to the report was that the fundamental parameters of the computer system were modified at more than fourteen courts.[92] This appears as an important shortcoming in light of the legal and normative requirement of the pre-established nature of the case allocation system. Finally, the SCM found of great concern that at two courts cases were repeatedly deleted and reintroduced in the computer system. The report concluded that these operations suggested a specific intent to assign a case to a specific judicial panel.[93] This appears as an arbitrary exercise of case allocation powers, which puts the constitutional guarantee of functional independence of judges at risk.

Unfortunately, the assessment report does not connect the observed shortcomings to the fundamental rule of law guarantees of functional independence of judges and pre-established nature of the case allocation system. Instead, the report jumps to the factual "vulnerabilities" of incompleteness of the legal- and normative framework as a main factor contributing to the observed shortcomings. For instance, at the level of courts, the report points to the lack of clear procedures covering all types of operations that the application of the computer system involves. The report also points out the lack of documentation concerning the modifications made in the computer system, such as deleting cases from the computer system as a main driving force behind the shortcomings.[94] At the level of the normative framework, the SCM points out the incompleteness of the internal regulation's provisions. For instance, the report suggested that the internal regulation of courts should specify the applicable procedure in case of errors. In addition, the evaluation suggested that the regulatory framework should clarify that when cases are re-allocated, this should be a result of a single, rather than multiple operations.[95]

Overall, the content of the studied normative instruments appears to place main emphasis on the principle of randomness and the operational rules for the computer system. As such, the Romanian normative instruments do not seem to directly contribute to the conceptualization of the functional dimension of judicial independence in the allocation of cases.

iii. Similarities and Differences

As a main similarity, our analysis indicated that in both legal orders the central judicial managerial body issues instructions for the allocation of cases, which supplement the content of the legal acts. These powers are remarkable because they allow the central management to shape the content of case allocation rules.[96] Adding further importance to the content of these non-binding instruments, in both legal orders, court presidents have an explicit obligation to follow the instructions of the judicial councils in fulfilling their duties

[91] ibid. 19.
[92] ibid. 19.
[93] id.
[94] ibid. 26-28.
[95] ibid. 28,29, 32-37.
[96] Kosař (n 59). 390-398.

regarding the allocation of cases at courts. A possible explanation for these similarities could be the emphasis on the empowerment of central judicial management during legislative reforms in both legal orders.[97] The existence and importance of these instruments underlines the important role of the central judicial managerial bodies in the allocation of cases.[98] This enforces the need for a more critical analysis of the central managerial powers in the allocation of cases in light of European liberal-democratic requirements.

A further similarity was that the normative case allocation instruments of both studied central judicial managerial bodies place explicit emphasis on new public management considerations. Here, the specific values are different. In the Hungarian legal order, the instruments of the President of the NJO mainly emphasize the contemporary value of guaranteeing the balanced workload of courts and judges, respectively the timeliness of judicial proceedings. In the Romanian legal order, the normative instrument of the SCM mainly elaborates upon detailed, technical rules related to the use of the computerized case allocation system employed at courts. A possible explanation could be the explicit emphasis during the legislative processes on the identified new public management values. Nonetheless, this shift in the content of the normative instruments is striking considering the rule of law foundations of the principle of a lawful judge, respectively courts established by law, laid down by the legal acts of both legal orders. Moreover, this shift is remarkable because it can potentially risk the guarantee of functional independence of judges in both legal orders.[99] As such, the content of these instruments too calls for a more critical analysis in light of the requirements posed by the liberal-democratic normative framework and EU membership.

C. Assessing case allocation mechanisms in light of European standards

As the second step of our analysis, we will proceed with a two-step critical evaluation of the case assignment mechanisms in the Hungarian and Romanian legal orders. First, (I) we will normatively assess the contribution of the domestic legal rules to the legitimacy of judicial throughput and upholding the rule of law. This analysis is based on the theoretical framework of this study. Second, (II) we will assess the extent to which the studied domestic legal frameworks comply with binding and non-binding European standards. This part of the analysis is based on the map of European standards developed in chapter 2. As part of our critical overview, we will also assess to what extent have compliance with European recommendations contributed to or hindered the legitimacy of judicial throughput in the two domestic legal orders.

[97] *See* chapter 3,B,III.
[98] cf. Kosař (n 59).
[99] *See* Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in Bogdandy and Sonnevend (n 30). 112.

I. Contribution to legitimacy of judicial throughput and the rule of law

Our normative assessment of case allocation mechanisms in the Hungarian and Romanian legal orders comprises two parts. First, (i) we will assess the extent to which the legal and normative mechanisms contribute to the independent and timely allocation of cases. Second, (ii) we will assess whether the specific case allocation mechanisms are functionally divided between the central and de-centralized levels of the judiciary functioning as an organization.

i. Guaranteeing independent and timely allocation of cases

We established as a first legitimacy-enhancing function of case allocation mechanisms: the simultaneous guarantee of independent and timely allocation of cases. This function entailed the existence of (1) pre-established legal or normative mechanisms; (2) incorporation of rule of law and new public management values in the content of mechanisms and (3) clear indication of the primacy of rule of law values. With respect to the first condition, we must highlight that the existence of specific legal mechanisms for the allocation of cases in both studied legal orders, seem positive in the sense that they contribute to the predictability of the case allocation mechanisms and acts as a pre-condition for accountability.

With respect to the second condition, the explicit incorporation in the studied legal orders of both the rule of law principles of a lawful judge, court established by law and the principles of timeliness of case allocation, or transparency seem to enhance the quality of case allocation processes. At a general level, the codification of both types of principles contributes to the clarity of the normative framework, beneficial from a rule of law perspective. However, the combination of values seemed problematic on closer inspection based on the third condition.

Under the third condition, the Hungarian legal framework clearly indicates the primacy of the rule of law principle of lawful judge. This seems to be a strong support for realizing a normatively sound balance in the allocation of cases. Furthermore, the clear conceptualization of the importance and primacy of the principle a lawful judge by the Constitutional Court seems as an additional guarantee. As such, at the level of formal guarantees there were no major shortcomings. In contrast, in the Romanian legal framework the indication of the primacy of the rule of law value of courts established by law did not appear adequately clear. Although the placement of this principle as a main legal principle seemed positive, the implicit nature of this value with respect to the allocation of cases makes it difficult to identify it as a clear rule of law foundation. Instead, in the allocation of cases, the main legal principle appears to be that of randomness. This leads us to some more problematic points with respect to the content of normative mechanisms in both legal orders.

Regarding the Hungarian normative mechanisms, a point of concern appears to be the disproportionate emphasis on the new public management value of balanced workload of judges – without an equal emphasis on the rule of law principle of a lawful judge. This can shift focus in practice on new public management considerations, with the potential to

dismantle the legal rule of law foundation.[100] The recent case transfer practice of the President of the NJO serves as a powerful reminder of this challenge. The binding nature for court presidents of the NJO's administrative guidelines compounds this problem.

With respect to the content of normative case allocation mechanisms in Romania, a main point of concern appears the choice of the judiciary to establish increasingly detailed rules with respect to the use of the computer software for the allocation of cases, respectively the omission to explain the importance of guaranteeing the functional independence of judges. In practice, this approach does not seem effective to prevent the arbitrary exercise of powers by court presidents. Instead, it seems to have enabled ongoing shortcomings in practice of abusing case allocation powers at the level of courts. These continuing challenges create the necessity to establish increasingly more detailed rules. However, it is difficult to realize an independent allocation of cases without an explicit and incrementally evolving conceptualization of the internal dimension of judicial independence.[101] Ultimately, the reflectiveness and thoughtfulness in the allocation of cases, which having the rule of law principle of functional independence as a main consideration and goal could enable, seems to be missing.[102] In the Romanian legal order, this is not only the central judicial management's responsibility. The legislature also has an obligation to deliver a quality legal basis. Currently, the explicit reference to the principle of randomness in the legal framework and legislative preparatory documents, without a foundational rule of law principle, falls short of this obligation.

ii. Guaranteeing the functional and safeguarded distribution of case allocation powers

As a second legitimacy function of case allocation mechanisms, we identified the functional distribution of case allocation powers among the central and de-centralized levels of the judiciary. This function entailed two conditions: (1) realizing the constrained autonomy of courts and (2) flexibility of the case allocation system by allocating central managerial powers. Generally, we must mention that the explicit incorporation of specific central and de-centralized case allocation powers in both legal orders seems positive from the rule of law perspective of predictability.

In a similar vein, the assessment under the first condition seems positive.[103] In the Hungarian legal order, we found a clear example of guaranteeing the organizational autonomy of courts through empowering court presidents with relevant case allocation competences. The explicit conditions in the legal framework with respect to the exercise of these powers seem as effective safeguards in the sense that the principle of a lawful judge remains a main consideration. In the Romanian legal order, we found a realization of the

---

[100] cf. Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in Bogdandy and Sonnevend (eds) (n 30). 33-110. Zoltan Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in Jakab and Kochenov (n 717). 456-476. *See* Kim Lane Scheppele, 'Understanding Hungary's Constitutional Revolution' in Bogdandy and Sonnevend (eds) (n 30). 112.

[101] cf. Seibert Fohr, 'Judicial Independence – The Normativity of an Evolving Transnational Principle'in Seibert-Fohr (ed) (n 15). 1291-1302.

[102] cf. Jeremy Waldron, 'Clarity, Thoughtfulness and the Rule of Law' in Geert Keil and Ralf Poscher (eds), *Vagueness in the Law: Philosophical and Legal Perspectives* (1 edition, Oxford University Press 2017). 328, 330.

[103] Fierro (n 2). 221.

autonomy of courts through the power of court presidents or court administrative boards to establish and introduce judicial panels in the system; to appoint a clerk responsible for the operation of the computer software and to control the practice of allocation of cases. [104]

However, both legal orders seem to fall short of the requirements under the second condition flexibility. A particular point of concern is the extensive and discretionary nature of central case allocation powers. As noted above, a main outcome of the exercise of these powers was a shift towards new public management considerations, to the detriment of the principle of a lawful judge. Such an outcome significantly limits the organizational autonomy of courts and can interfere with the functional independence of judges.

In summary, a main legitimacy and rule of law concern in both legal orders appears to be that the functional (decision-making) independence of judges is not the main goal and outcome of the allocation of cases. This has repercussions for the organizational dimension of the principle of independence. We have shown that from a theoretical perspective, the incorporation of timeliness – and balanced workload considerations or computerized, random case allocation methods – can be useful developments for the quality in the allocation of cases. However, (i) neither can new public management values supersede in the normative mechanisms the rule of law principle of a lawful judge, (ii) nor can the central judicial management or court presidents rely on new public management considerations as a façade to influence the outcome of cases. In the following paragraphs, we will complete our critical analysis by considering the connection of the studied domestic case allocation mechanisms to European standards in this field.

II. Compliance with European standards

Our analysis in chapter 2 of European requirements and recommendations for the quality of judicial throughput indicated salient legally binding requirements by the CJEU and the ECtHR regarding the allocation of cases. As we have shown, non-binding recommendations supplement this binding core. In the EU legal order, the European Commission develops the most important recommendations. Within the Council of Europe framework, the Recommendations of the Committee of Ministers of Council of Europe Member States, the Consultative Council of European Judges, the Venice Commission and the Committee for the Efficiency of Justice constitute the most relevant sources. We will base our assessment below on the above-mentioned sources.[105]

i. Binding core balance between independent decision-making and efficient organization

An important legally binding requirement for the allocation of cases emerged from the European Court of Human Rights, pursuant to Article 6 ECHR guaranteeing the right to a fair trial. Most prominently, in *DMD v Slovakia* and *Agrokompleks v Ukraine*, the European Court of Human Rights established a core balance between the independence and

[104] *See contra* Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 15). 836-837.
[105] *See* Table 3 European throughput quality requirements and recommendations.

timeliness in the allocation of cases. In particular, the ECtHR (1) acknowledged the importance of the contemporary-requirement of flexible (timely) allocation of cases at courts. Nevertheless, (2) the Court expects case allocation powers to be used in a transparent manner. Moreover, according to the ECtHR (3) the use of powers cannot result in giving instructions and consequently influencing the independent decision-making of individual judges.[106] Specifically, the ECtHR set the core requirements of (a) "particular clarity" of the rules based on which cases are assigned; (b) "clear safeguards" for guaranteeing "transparency" and "objectivity" in the allocation of cases and (c) the necessity to avoid "any form of arbitrariness" in the allocation of cases to judges.[107]

These core and binding requirements build upon the more general requirements of courts established by law[108] and functional independence of judges, expanded by the ECtHR under Article 6 and by the CJEU under Art 267 TFEU.[109] It remains notable that both European courts require safeguards against external influence over the judicial decision-making process, referring to the political branches of Government. In addition, European courts require safeguards against internal influence, referring to guarantees against pressures or directives from fellow judges or court presidents.

Our analysis of case allocation mechanisms in the Hungarian and Romanian legal orders indicated that currently both studied legal orders fall short in some respect of the core European requirements. The general legal case allocation rules in the Hungarian legal order aim for an objective and transparent allocation of cases and explicitly mention the rule of law principle of a lawful judge. However, the extensive and unchecked case allocation powers of the President of the NJO, and its application in practice, fail to guarantee the existence of "clear safeguards" to avoid "any form of arbitrariness" in the allocation of cases. In a similar vein, the Romanian computerized and random case allocation mechanisms comply with the requirement of objectivity. However, the lack of conceptualization of functional independence of judges fails to provide a rule of law foundation in light of which case allocation rules could attain particular clarity, and which could provide a clear safeguard against abuse of case allocation powers. Overall, operationalising objective and transparent case allocation mechanisms into clear safeguards for the functional independence of judges remains problematic in both studied legal orders.

ii. Non-binding recommendations: courts system as organization, resource- and time-efficient organizational processes

In the context of the European Union and the Council of Europe, we could identify non-binding recommendations pointing to the importance of employing swift and transparent legal mechanisms for organizing the functioning of courts, with particular

---

[106] Agrokompleks v Ukraine, App no 23465/03 (ECtHR, 6 October 2011) paras. 137, 138,139. DMD Group, A.S. v Slovakia, App no 19334/03 (ECtHR, 5 October 2010) paras. 65-70. *See* chapter 2,

[107] ibid. para. 66, 70.

[108] *See* e.g. Zand v. Austria, App no 7360/76, Commission Report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70, 80. See chapter 2,B,II,i.

[109] *See* e.g. Case C-54/96 Dorsch Consult [1997] ECR I-4961, para. 23; Case C-53/03 Syfait and Others [2005] ECR I-4609, para.29; Case C-196/09 Miles and Others [2011] ECR I-5105, para.37. Case 14/86 Pretore di Salo v Persons Unknown [1987] ECR 2545, para.7. Case 338/85 Pardini [1988] ECR 2041, para. 9. Case C-17/00 De Coster [2001] ECR I-9445, para. 17. *See* chapter 2,B,II,i.

reference to the allocation of cases at courts.[110] Several non-binding sources suggested the adoption of technical (computerized) mechanisms for the allocation of cases.[111] Moreover, several non-binding sources suggested trusting judicial councils with central oversight competences.

a) Transparency, timeliness and computerized methods in the allocation of cases

Firstly, our overview of non-binding recommendations for the allocation of cases indicated the existence of specific recommendations geared towards increased objectivity and transparency of case allocation mechanisms. For example, the European Commission explicitly highlighted increased transparency in the allocation of cases as positive developments.[112]In a similar vein, several Council of Europe advisory bodies reiterate the recommendation of employing objective, clear and pre-established criteria that would safeguard the functional independence of judges.[113]

Secondly, we could also identify a set of European recommendations focused specifically on incorporating the values of organizational efficiency and timeliness for the allocation of cases. Some recommendations explicitly advised employing computerized case allocation methods. For example, within the Council of Europe framework, the Committee for the Efficiency of Justice made several recommendations for enhancing time management at the level of the courts.[114] In addition, the European Commission in its pre-accession evaluation reports recommended balancing the workload of courts, [115] modernizing the organization of courts and specifically suggested employing a computerized case allocation system.[116]

---

[110] *See* chapter 1,C,II,ii.

[111] E.g. CCJE, Magna Carta, Article 18. European Commission, 2003 Romania Report 18,19. See above chapter 1,C,III,ii and chapter 2,B,III,ii. *See* Table 3 European throughput quality requirements and recommendations.

[112] E.g. 2002 Hungary Report, 24. 2002 Slovak Report, 24. *See* Kochenov (n 4) 296, footnote 449. *See* chapter 2,B,II,ii.

[113] Recommendation CM/Rec(2010)12. para. 22-25. Venice Commission, 'Report on the Independence of the Judicial System, Part I: The Independence of Judges' CDL-AD(2010)004, http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx (accessed 16.09.2019), para.80. CCJE, Magna Carta, para. 10. Magna Carta recommendations were compiled based on e.g. CCJE Opinion no.2 (2002) on the Funding and Management of Courts, Opinion no. 3 (2002) on ethics and liability of judges. Opinion no. 6 (2004) on Fair Trial within a Reasonable Time. Opinion no. 10 (2007) on Councils for the Judiciary in the Service of Society.

[114] *See* chapter 1,C,II,ii. E.g. Committee for the Efficiency of Justice, CEPEJ (2014)16, Revised Saturn Guidelines for Judicial Time Management; CEPEJ, 12 December 2014, https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2008)8Rev&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6 (accessed 16.09.2019). *See* also, CEPEJ Saturn Guidelines for Judicial Time Management, Comments and Implementation Examples (2012), http://www.coe.int/t/dghl/cooperation/cepej/Delais/Saturn_15_Guidelines_Plus_IRSIG_draft_121214_en.pdf (accessed 16.09.2019)

[115] European Commission, 2001 Romania Report 21, pointing out that the workload of judges remained "heavy". 2002 Romania Report 26, pointing out that "the workload of courts of appeal and tribunals remained heavy and has negative consequences for the quality of judgments." 2003 Romania Report 19. The heavy workload of courts is connected in the reports to the lack of qualified human resources in Romania. E.g. 1999 Hungary Report 12.

[116] European Commission, 2001 Romania Report 21, recommending to implement plans introducing and developing "adequate IT systems facilitating case allocation". 2003 Romania Report 18, mentioning that "in the absence of clear rules on distributing cases to judges, Court Presidents can have considerable influence over the handling of cases in the courts. The ongoing reform of the judicial system needs to address these issues as a matter

A notable finding of our analysis is the compliance by both studied legal orders with at least some European recommendations. The Hungarian legal order complied with the requirements of transparency. Whereas, the Romanian legal order codified the requirement of employing a computerized case allocation system, having the principle of random allocation of cases at its basis. However, our analysis indicated that formal compliance with these recommendations did not result in achieving the functional independence of judges as a main outcome of case allocation mechanisms. This shortcoming occurred even in the circumstances in which some European recommendations explicitly highlighted the importance of functional independence (i.e. Committee of Ministers Recommendation, Venice Commission, including a detailed explanation of the implication of the principle of a lawful judge for case allocation).

The observed shortcomings become even more urgent in light of the content of EU Justice Scoreboard. A particular point of concern is that, similar to the above-mentioned European recommendations, the EU Justice Scoreboard appears to centre its assessment around the values of timeliness and efficiency of organizational processes, and the availability of computer systems for the allocation of cases. Take, for example, the explicit measurement in the EU Justice Scoreboard of the existence of information- and communication technologies for the allocation of cases and court statistics.[117] Consider also the measurements of timeliness. For example, the Scoreboard measures: (1) the existence of time standards (i.e. time limits, timeframes and backlogs), (2) powers to set and monitor time standards (i.e. the Executive, Judiciary or the Parliament), and (3) the existence of follow-up mechanisms in case of non-compliance with standards (i.e temporary assistance by special judges, reorganization of management processes, allocation of additional financial or human resources).[118]

In contrast to the extensive timeliness assessment, the part of the EU Justice Scoreboard measuring the independence of judges does not dedicate attention to safeguards for the functional independence of judges. Attention in this section mainly concentrates on the rule of law guarantees for the personal independence of judges and the perceived independence of judges by the public at large and businesses.[119] However, this focus fails to cover the relevant dimensions of judicial independence for the allocation of cases. We must highlight, that the 2015, 2016 EU Justice Scoreboards, included "case allocation mechanisms" in their assessment of judicial independence. For instance the 2015 and 2016 Scoreboards measured the existence of (a) criteria defined by law, (b) or by the Judicial Council in an act or established court practice, (c) the existence of random /pre-defined allocation order, allocation by court president or listing office, supervision by the court president/judicial council/other independent body, or supervision by the Ministry of Justice, as well as the withdrawal or recusal of judges.[120] Nevertheless, these measures do not form

---

of priority." 2005 Romania Report 11. 2006 Romania Report 9. 2001 Romania Report 21. 2004 Romania Report 21. 2005 Romania Report 11, acknowledging the implementation of computerized case allocation methods overseen by 'leading boards within courts' as a positive development.

[117] 2017 EU Justice Scoreboard, Figures, 43-44. 2016 EU Justice Scoreboard 48-49. 2015 EU Justice Scoreboard, Figure, 21. 2014 Scoreboard, Figure 13. 2013 Scoreboard, Figure 13.

[118] 2017 EU Justice Scoreboard, Figures 46-50. 2016 Scoreboard, Figures 42-43.

[119] 2017 EU Justice Scoreboard, Figures 56-60. 2015 Scoreboard, Figure, 29 (perceived judicial independence), mentions ENCJ report.

[120] 2016 EU Justice Scoreboard, Figures 54-55. 2015 EU Justice Scoreboard, Figures 53-54. Data collected on the basis of the ENCJ case allocation report of the same year.

a consistent part of the assessment of judicial independence under the EU Justice Scoreboard.

The underdeveloped nature of judicial independence measures in the Scoreboard vis-à-vis efficiency measures can produce damaging effects in EU member states where rule of law values are not established. One concern is that EU Justice Scoreboard's focus on efficiency-measures amplifies the domestic emphasis on neo-liberal values. At its worst, the content of the Scoreboard can be used as a justification for dismantling rule of law values in the allocation of cases. Consider for example, the statements of the President of the NJO attributing the Hungarian judiciary's positive performance under the Scoreboard's timeliness measures [121] to the case allocation mechanisms which were extensively criticized by European and domestic institutions on account of putting the functional independence of judges at risk. In light of these, the current content of the EU Justice Scoreboard fails to provide adequate guidance to Member States for realizing a normatively sound balance between rule of law and new public management values in the allocation of cases.[122] This omission can be detrimental for promoting core rule of law values in Member States where this appears necessary.

b) Role of judicial councils in the allocation of cases

Several non-binding instruments explicitly recommended empowering central judicial managerial bodies in the allocation of cases.[123] Non-binding recommendations found the central managerial level particularly apt to supervise the timeliness of the case allocation system. Specifically, within the Council of European framework, the Committee for the Efficiency of Justice the CEPEJ explicitly advises *court administrators* and the *central administration of the judiciary* to be involved with the collection of and assessment of the data on time management.[124] In a similar vein, the European Commission during the pre-accession process of CEE states strongly promoted a judicial council competent of organizational processes.[125]

With respect to this recommendation, our analysis indicated formal compliance in both studied legal orders. Namely, judicial self-government bodies in both studied legal orders have competences both to determine specific conditions for the allocation of cases and to supervise the practice of case allocation at courts. Once again, a particularly striking finding of our analysis was that the empowerment of central judicial management did not automatically translate into guaranteeing the independent allocation of cases. A particularly serious concern in the Hungarian legal order is that the central powers of the President of the NJO gave rise to arbitrariness in the allocation of cases. With respect to the Romanian legal order, our analysis suggests that despite the employment of a computer system for the allocation of cases and the control and guidance by the SCM, court presidents retained significant powers and there are instances of abuse in order to influence the outcome of

[121] E.g. President of the NJO, 2016 Strategic Goals, 12. 2014 Strategic Goals, 12. 2015 Strategic Goals 14.
[122] cf. Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' [2016] Hague Journal on the Rule of Law. 40.
[123] Recommendation CM/Rec(2010)12, paras. 30-43.
[124] Id.
[125] *See* Bobek and Kosař (n 60).

cases. These occurrences in practice work to the detriment of functional independence of judges.

D. Conclusions and suggestions

Case allocation mechanisms appear to contribute to the legitimacy of judicial throughput by securing that the values of timeliness and organizational autonomy of courts supplement and strengthen the rule of law value of functional independence as a main consideration. However, our analysis indicated that currently both the Hungarian and Romanian legal orders fall short in important respects of realizing this core liberal-democratic requirement. Below we will present our suggestions concerning the two legal orders. Our starting point for the suggestions will be the question: how to address (1) unchecked control powers of judicial councils; (2) emphasis on economic-values in practice; (3) persistent challenge of judicial corruption in Romania.

i. Suggestions for case allocation in Hungary: reconsidering extensive central competences and weak legal safeguards

With respect to the Hungarian legal order, a main necessity appears to limit the legal powers of the President of the NJO in the allocation of cases.[126] Under its current form, the extensive legal powers of the President of the NJO appear to be prone to abuse, by mainly emphasizing the timeliness of deciding cases and realising a balanced workload among judges.[127] In order to safeguard that the output of the President of the NJO reflects the principle of a lawful judge, collegial constraint by the National Judicial Council appears necessary. This can be realized under the specific form to revise the content of the internal guidelines if necessary. Moreover, the above-mentioned arbitrary exercise of legal powers proves the necessity to include as a main role of the President of the NJO to not only manage the administration of courts and guarantee their balanced workload, but also to guarantee their independent functioning.[128]

Furthermore, as a main outcome in terms of normative instruments concerning the allocation of cases, the internal regulation of the central judicial management should more clearly and explicitly emphasize the legal value of a lawful judge, which represents the constitutional and legal basis of these mechanisms. We must highlight that the Hungarian Constitutional Court seemed to play an important role in protecting the European, liberal-democratic and Hungarian constitutional guarantee of functional independence of judges against the background of the 2011 judicial reforms.[129] This role appears essential for the

[126] Seibert-Fohr (ed) (n 15). 1291-1302.
[127] Kosař (n 59).
[128] Fundamental Law, Art. 25(5). *See* above Table 7 and chapter 3,B,III,i.
[129] Kim Lane Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary) Judicial Review: Between Promise and Chagrin' (2014) 23 Transnational Law and Contemporary Problems 51. 51-118. Eyal Benvenisti, 'Going Global to Preserve Domestic Accountability' in Sam Muller and others (eds), *Highest Courts and Globalisation* (Hague Academic Press 2010). 163-186.

future development of the legal framework. However, at the same time, it must be noted that the restriction concerning the Hungarian Constitutional Court's competences and applicability of its case law, as explained in chapter 3 of this analysis, work to the detriment of this role.[130]

Ultimately, from the perspective of securing rule of law quality, it appears critical that the communication by the EU institutions clearly and consistently refer to the rule of law core of the principle of a lawful judge and functional independence of judge underpinning case allocation mechanisms. Indeed, as it has been argued in this chapter, the recent experiences in Hungary with the reform of case allocation mechanisms appear a clear example of how an overly formalistic European approach remains prone to repeated political manipulation.

ii. Suggestions for case allocation in Romania: enforcing the rule of law foundations

Regarding the Romanian legal order, a more adequate conceptualization of the functional dimension of judicial independence in relation to the allocation of cases seems necessary. As our analysis demonstrates, currently, the internal dimension of functional independence is not conceptualized in the legislative preparatory documents, legal acts, and decisions of the Constitutional Court[131] or normative mechanisms by the SCM. The output of the codifiers (legal acts, legislative preparatory documents) should consider this dimension in more detail,[132] and as a matter of primacy vis-à-vis new public management considerations. Furthermore, the Constitutional Court could play an important role in conceptualizing the meaning of functional independence, and in particular internal independence as an element of the normative framework.[133] Finally, the output of the SCM (internal regulations, assessment reports) could more adequately reflect this fundamental rule of law guarantee. The initiative of the SCM to highlight 'best practices' from court presidents in the allocation of cases seems as useful for these purposes. The contribution could be two-fold. On the one hand, the written assessments by the SCM could be further developed to strengthen practices that have the functional independence of judges at their basis. On the other hand, these assessments could include the experiences of judges with the system for the allocation of cases. In both instances, the enhancement of internal independence and autonomy of judges appears necessary.[134] Nevertheless, it remains of crucial importance that judges are not penalized or subject to repercussions of any nature for actively participating in organizational matters, and potentially voice their concerns or negative experiences with the allocation of cases. This normative requirement once again

[130] *See* chapter 3,B,II,i.
[131] *See* chapter 3,B,II,ii.
[132] cf. Cristina E Parau, 'The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe' (2013) 49 Representation 267. 267-280.
[133] cf. Adam Bodnar and Lukasz Bojarski, 'Judicial Independence in Poland' in Seibert-Fohr (n 45). 670-676. *See* also chapter 3,B,II,ii.
[134] Stephen Holmes in Ronald Dworkin (ed), *From Liberal Values to Democratic Transition: Essays in Honor of János Kis* (Central European University Press 2004). 3-15.

highlights the importance of conceptualizing the organizational dimension of judicial independence.[135]

Utimately, the Romanian case study demonstrates that formal computerized case allocation mechanisms cannot replace the conceptualization of the functional independence of judges in society. The case study argued that the integration of formal case allocation methods (1) neither contributed to the conceptualization of rule of law values, (2) nor did the formalistic approach address the role of court presidents within the judicial organization. In fact, court presidents maintained important powers with regards to the allocation of cases. Moreover, the codification of computerized case allocation rules opened up new ways for the manipulation of the random allocation of cases. From the perspective of securing rule of law quality, addressing the discussed core rule of law values appears imperative. Only if judicial professionalism and integrity with regards to the allocation of cases is secured, can rule of law quality be channelled towards society.

[135] *See* chapter 1.

6. Quality of Judicial Output and Independence of the Judiciary in Hungary and Romania: Assessing judicial participation in public debate concerning reforms

The final case study examines how judicial reforms in Hungary and Romania have implemented European output-quality requirements and recommendations for the participation of the judiciary in public debate. Judicial participation in public debate in this chapter is understood as the general contribution of the judiciary and judges expressing their views in the media or public parliamentary hearings concerning judicial reform proposals. This aspect of quality of judicial output has been selected for two main reasons. On the one hand, judicial participation in public debate constitutes an important part of the European and liberal-democratic normative framework for judicial organization due to its nature to reinforce the constitutional role of the judiciary as an impartial decision-maker On the other hand, the participation of the judiciary in public debates serves as a powerful illustration of the tensions and possible challenges that the increasing openness of the judiciary poses for the neutrality expected from judicial communication.

The specific focus in this chapter will be on two mechanisms: (1) expressing the views of the judiciary on legislative proposals concerning the judiciary, (2) and explaining the meaning and the role of the independent judicial function both to judges and to the public via judicial codes of ethics, both stemming from the new public management principle of openness. Although these are not the only means for the communication of the judiciary with the public, the former has been selected because it represents the main and direct way for the judiciary to participate in the lawmaking process concerning judicial organization. The latter mechanism has been selected because of its increasing importance in light of the complex balancing questions surrounding the role of judges in modern societies.

Similar to the previous case studies, the analysis proceeds in four main steps. The first part (A) introduces the analysis by explaining the importance of communication mechanisms for the constitutional independence of the judiciary and the balancing questions they entail in the contemporary legal and societal context of EU Member States. The second part (B) contains the comparative-contextual analysis of the mechanisms through which the judiciary in Hungary and Romania participates in public debates. The third part (C) critically analyses the studied domestic mechanisms in light of the liberal-democratic normative framework and in terms of their compliance with European requirements and recommendations. The fourth part (D) concludes by summarizing the theoretical insights advanced by this analysis and proposes specific suggestions for enhancing rule of law judicial communication mechanisms in Hungary and Romania.

A. Introduction: Balancing questions for judicial participation in public debate

The incorporation of the new public management principle of openness of the judiciary towards the public is an important consideration for contemporary judicial reforms.[1] Openness entails two aspects. First, it may relate to the publicity of court decisions as well as increased access of citizens to court decisions. Second, openness may relate to the increasing transparency of the judiciary towards the general public as regards organizational matters, the role of the judiciary in the constitutional balance of powers as well as the professional values that the judiciary stands for.[2] Part of this communication might entail the participation of the judiciary in the public debate concerning judicial reforms – particularly important in the contemporary setting where judicial reforms might introduce major changes for judicial functioning based on new public management considerations. This latter will be the narrow focus of this case study.

Although the principle of openness is an important part of judicial reforms, the incorporation of this value might raise tensions with regards to the classic rule of law requirements concerning the communication of the judges with parties to a trial and the public. The classic rule of law framework encompasses the obligation to give reasons and places the judiciary as a neutral arbiter in the constitutional balance of powers.[3] However the increased communication by the judiciary gives rise to balancing questions. How to guarantee that the communication respects the neutral role of the judiciary, if the participation of the judiciary in debates regarding reforms means taking a political stance? How to secure that the judicial branch can explain the implications of management-reforms for judicial independence, and at the same time: how to reconcile this communication with the constitutional role of the judicial branch?[4] This case study will consider how these balancing questions are addressed in the Hungarian and Romanian legal orders.

B. Judicial Participation in Public Debate in Hungary and Romania

The contextual-comparative analysis is divided in two main parts. First, (I) we will describe and compare the content and context of legal mechanisms for the participation of the Hungarian and Romanian judiciaries in public debate concerning judicial reforms, and the independence of the judiciary vis-à-vis the legislature and the executive. Second, (II) we will describe and compare how the two studied domestic judiciaries maintain judicial independence as a main point of reference in practice through an analysis of strategy documents by the judiciaries and judicial codes of ethics.

---

[1] *See* Wim Voermans, 'Judicial Transparency Furthering Public Accountability for New Judiciaries' (2007) 3 Utrecht Law Review. 151-158. *See* in general David Luban, 'Bargaining and Compromise: Recent Work on Negotiation and Informal Justice' (1985) 14 Philosophy & Public Affairs 397. (Differentiating between the problem-solving and public life conception of law). *See* also Hannah Arendt, *The Human Condition* (University Of Chicago Press 1958). 22-78 (emphasizing the importance of having "public conversations" on public matters).

[2] *See* Lieve Gies, 'The Empire Strikes Back: Press Judges and Communication Advisers in Dutch Courts' (2005) 32 Journal of Law and Society.455.

[3] Charles Louis de Secondat Montesquieu, *The Spirit of the Laws* (Cambridge University Press 1989). 168.

[4] Jeffrey K Staton, *Judicial Power and Strategic Communication in Mexico* (1 edition, Cambridge University Press 2010). 186-190.

I. Legal Mechanisms and their Context

As a first step of our contextual-comparative analysis, we will present the specific legal principles and mechanisms for the communication of the judiciary in the Hungarian and Romanian legal orders, and the context of their adoption. Our analysis focuses on the judiciary's communication with the legislature, the executive and the public. We derived the legal content from the domestic legal acts on judicial functioning. Respectively, we reconstructed the context of the legal framework through an overview of the preparatory documents of domestic legislation.[5]

i. Hungary

In the Hungarian legal order, the 2011 legal act on court organization contains specific principles and rules related to (1) the possibility of the judicial branch to express its views to the legislature on intended legal reforms affecting judicial functioning and (2) openness towards the public.[6] The 2011 legal act is remarkable because it introduced important changes with respect to these mechanisms. First, the 2011 legal act transferred the central communication powers from a judicial self-governance body, composed of judges (the National Council for Justice),[7] to a single person, the President of the National Judicial Office.[8] The preparatory document of the legal act justified the transfer of competences by the necessity to create a central judicial administration that is more responsive and able to deliver effective results in a shorter period.[9] Second, one of the main aims of the 2011 legal act was to enhance the transparency of judicial functioning. This aim has been translated into new legal communication powers of the judiciary. The preparatory document argued that enhanced transparency was necessary because of the legislative choice of placing central administrative tasks with the Judiciary.[10] However, these main goals and modifications raise the question to what extent does the new legal framework guarantee the independent communication of the judiciary.

[5] *See* Annex C,D.
[6] Act CLXI of 2011 on judicial organisation. *See* Annex C.
[7] Zoltán Fleck, 'Judicial Independence in Hungary' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012). 793. The 1997 legal act, which empowered the President of the National Council for Justice, a central judicial organ composed of the Presidents of regional courts, to fulfil the representative and communication functions. The President of the Council was *ex officio* the President of the Highest Court of Hungary.
[8] *See* Chapter 3.
[9] Preparatory document T04743,61.
[10] ibid, 78.

Table 9 Legal communication mechanisms of the Hungarian Judiciary (1997-2011)

1997 legal framework	2010/2011 legal framework
Guarantee of independence of judges (Constitution Art. 50 (3))	Guarantee of independence of judges (2010 Fundamental Law)
~~National Council of Justice exercises the administration of justice; self-government bodies for the representation of judges shall participate (Constitution Art. 50(4))~~	~~Bodies of judicial self-government participate in the administration of courts~~ (2010 Fundamental Law Art. 25.5) National Judicial Council ceased to exist (Transitory Provisions Art.11(2)) ~~President of the NJO manages the administration of courts, bodies of judicial self-government shall participate~~ (Fourth amendment of the Fundamental Law modifying Art. 25(5)) President of NJO manages the administration of courts, NJC oversees the administration, judicial self-government bodies participate (Fifth Amendment of the Fundamental Law modifying Art. 25(5))
President of the NCJ represents the Council (1997 Legal act, Art. 46(1,b))	Obligation of President of NJO to represent the judiciary (2011 Legal act, Art. 103(1,b))
Power to adopt internal regulations (1997 Legal act, 37(q))	Power of the President of the NJO to adopt internal regulations (2011 Legal act, Art. 76(1,b))
~~Central Management: National Council for Justice; functioning with the support of an administrative Office (1997 Legal act, Art. 34)~~	Central management: President of the National Judicial Office and National Judicial Council (2011 Legal act, Art. 19,88)
~~Legislative initiative and power to comment on legal acts concerning judicial functioning (Art. 37(e))~~	President of the NJO has legislative initiative and power to comment on legal proposals (2011 Legal act, Art. 76(1,d-e))
	President of the NJO participates in the parliamentary legislative drafting committee meetings (2011 Legal act, Art. 76(1,f))
Obligation to report to the National Assembly (1997 Legal act, Art. 47)	Obligation to report to the National Assembly (2011 Legal act, Art. 76(8,c))
	Obligation of the President of the NJO to publish decisions on central Internet site (2011 Legal act, Art. 77(3))
	Power of National Judicial Council to adopt the judicial code of ethics (2011 Legal act as modified in 2013, Art. 103(1,e))

Explanation: strikethrough indicates that the legal provision had been repealed.

In terms of content, the 2011 legal act firstly stipulates the general principles acting as a main basis for judicial communication. As general rule of law principle, the legal act stipulates that judges are independent and they decide cases based on the law. Furthermore, judges cannot be instructed or influenced in their decision-making activity.

This principle echoes the constitutional guarantee of judicial independence and it is supplemented by two further new public management principles. The legal act stipulates that the openness of judicial functioning is guaranteed through the publicity of proceedings and judgments.[11] Moreover, the President of the NJO, the National Judicial Council and court presidents must jointly guarantee the openness of court administration.[12]

Both the specific list of participants gaining communication powers and the explicit legal obligation to guarantee a transparent judicial administration are novel elements introduced by the 2011 legal act. The legislative preparatory documents explain that the obligation to guarantee the transparency of judicial communication formed part of the broader ambition of enhancing the transparency of judicial functioning.[13] At the same time, the actors empowered with guaranteeing the openness of the judiciary administration reflect the constitutional actors participating in the administration of justice.[14]

Secondly, the legal act establishes specific mechanisms for the communication of the judiciary with the public. An important general legal communication mechanism is the power of the President of the NJO to set strategic goals for the administration of justice.[15] The President of the NJO is expected to follow these strategic goals in the administration of the judiciary in practice, but also in its communication with the executive, legislature and the public concerning judicial functioning. The legal framework establishes specific mechanisms for the purposes of the latter.

The first set of legal mechanisms concern the communication of the judiciary and the legislature concerning intended legislative reforms. In this sense, the legal act empowers the President of the NJO, whom the legal framework formally acknowledges as the representative of the judicial branch.[16] In particular, the President of the NJO: (a) may initiate the adoption of legal acts concerning judicial functioning (the National Judicial Council may propose to the President of the NJO the initiation of new legislation on the functioning of courts); (b) issues an opinion on legislative proposals concerning judicial functioning, based on the opinions of judges previously collected by the National Judicial Council; and (c) participates in parliamentary committee meetings discussing legislative proposals concerning courts.[17] The preparatory documents explicitly highlight that the consultation of Parliamentary committees with the President of the NJO is a newly introduced guarantee, serving the main aim of greater involvement of the judiciary in the preparation of legislation that affects its functioning.[18] Furthermore, the President of the NJO has an obligation to annually inform the National Assembly about the functioning and administration of courts.[19] This mechanism enables a control by the legislature on the judicial power. Following a similar logic, the President of the NJO also has the obligation

[11] Act CLXI of 2011, Art. 12 (1,2).
[12] Act CLXI of 2011, Art. 12(3).
[13] Preparatory Document T04743, 64.
[14] Fundamental Law of Hungary Art 25(5). *See* chapter 3. For an overview of the constitutional amendments leading to the current form of the provision *See* Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015). 99.
[15] Act CLXI of 2011, Art. 76 (1,b).
[16] Act CLXI of 2011, Art. 103(1,b).
[17] Act CLXI of 2011, Art. 76(1,d-f).
[18] Preparatory document T04743, 76.
[19] Act CLXI of 2011, Art. 76 (8,a-e).

to inform the judiciary about its functioning. Namely, the President of the NJO: (a) informs every six month the National Judicial Council of its activity; (b) informs every year the presidents of the Curia, regional courts and tribunals about its activity[20] and publishes on the intranet of courts its administrative decisions.[21]

The second set of legal mechanisms concern the communication of the judiciary with the Executive concerning judicial administration and legal reforms. The legal act on court organization stipulates that the President of the NJO orders, upon the request of the Ministry of Justice, the collection of information at courts necessary for the adoption or revision of existing legislation. The same obligation is applicable for the purposes of initiating new legislation. With respect to these powers, the legal act stipulates that if necessary, the President of the NJO takes into account the opinion of courts.[22]

A third set of legal mechanisms concerns the communication of the judiciary with the public concerning its organization. In this sense, the legal act stipulates that the President of the NJO must publish its regulations in the Official Journal, while the proposals and decisions must be published on the central Internet site of the judiciary and the Journal of Judges.[23] In addition, the President of the NJO must publish on the central Internet site of courts' the annual reports on the functioning of courts, respectively on the administration of courts, as well as the minutes of the hearings by the President of the NJO of candidates to judicial leadership positions.[24] Finally, the President of the NJO must issue a press release concerning decisions, which are of public interest.[25] Moreover, the communication of the courts with the public and media constitutes a matter of court administration, over which the President of the NJO has the general power to issue internal normative regulations.[26] The President of the NJO established through internal regulation the specific rules governing the communication of courts with the public. The regulation stipulates the group judges empowered with communication competences, as well as specific means and manner of communication.[27]

Accordingly, the President of the NJO mainly empowers court presidents with press communication competences. Nevertheless, court presidents may delegate

[20] Act CLXI of 2011, Art. 76(8,a-e).
[21] Act CLXI of 2011, Art. 77(5).
[22] Act CLXI of 2011, Art. 76(8,a-e).
[23] Act CLXI of 2011, Art. 77(3).
[24] Act CLXI of 2011, Art. 77(4).
[25] Act CLXI of 2011, Art. 77(6).
[26] Act CLXI of 2011 on court organisation, Art. 76 (1,b).
[27] Decision no. 8/2012. (IV. 25.) Regulation on the communication of the courts and the NJO with the press (OBH utasítás a bíróságok és az Országos Bírósági Hivatal sajtótájékoztatási tevékenységéről, valamint a bíróságok központi honlapjának sajtószolgálatáról szóló szabályzatról), (http://birosag.hu/sites/default/files/allomanyok/obh/dokumentumok/8_obh_utasitas_sajtoszabalyzat.pdf) (accessed 16.09.2019).
Decision no. 10/2012. (VI. 15.) Regulation concerning information of public interest and public complaints (OBH utasítás a közérdekű bejelentésekkel és panaszokkal kapcsolatos eljárásról szóló szabályzatról), (http://birosag.hu/sites/default/files/allomanyok/obh/dokumentumok/10_2012_obh_utasitas_panaszszab.pdf) (accessed 16.09.2019).
National Judicial Council, Decision no. 11/2012. (III. 24.) concerning the NJO regulation on communication with the press (OBT határozattal a bíróságok és az Országos Bírósági Hivatal sajtótájékoztatási tevékenységéről, valamint a bíróságok központi honlapjának sajtószolgálatáról szóló OBH utasítást).
National Judicial Council, Opinion no. 23/2012. (V. 21.) concerning the NJO Regulation on information of public interest and public complaints (OBT határozattal a közérdekű bejelentésekkel és panaszokkal kapcsolatos eljárásról szóló szabályzat tárgyában készült OBH utasítást).

communication competences to the vice-presidents of the courts, judicial college leaders, press judges and press secretaries.[28] Only judges or court staff can occupy the position of press judge and press secretary, and the President of the NJO appoints them.[29] Press judges have the main responsibility to (a) collect and disseminate information on the openness of judicial proceedings and (b) to be available for the press.[30] The press regulations designate several main means of communication, such as: publishing information on the courts' Internet page; press release; interviews; press conferences; release of information materials. All communication mechanisms, including the interviews, fall under the exclusive competence of press representatives.[31] In terms of content of communication, the press regulation of the President of the NJO highlights that judicial communication with the press should be proactive. In addition, the communication should be objective, brief, relying on facts, timely and based on the documents provided by the NJO or the courts, which can be legally shared with the public.[32] Press judges must also send all communication materials to the central press office of the NJO.[33]

Finally, as an additional legal communication mechanism with the public, a 2013 amendment of the 2011 legal act explicitly empowered the central representative body of judges, the National Judicial Council,[34] to communicate the ethical values of judges. Specifically, the National Judicial Council has the explicit legal obligation to adopt an ethical code.[35] The incorporation of this power in the legal act represents an interesting development in the broader context of judicial reforms in Hungary. Previously, the central judicial self-governing body had no such power and the adoption of the judicial code of ethics remained at the latitude of the judicial associations.

Originally, the preparatory documents for the 1997 legal act on court organization discussed the possibility to include the adoption of an ethical code in the legal framework. However, later on the inclusion of such an explicit legal obligation was not considered necessary by the legislature. Ultimately, the possibility to adopt a judicial code of ethics was left fully with the judiciary, and resulted in the adoption of a judicial code of ethics by the Hungarian Association of Judges in 2005.[36] The new legal framework has fundamentally changed this practice.

Overall, we can observe that the President of the NJO holds main communication powers with the legislature, executive and the public. The main legal mechanisms are the

[28] Press judges are judges empowered with communication competences, other than court presidents, vice-presidents and leaders of judicial colleges. Press secretaries support the activities of press judges.
[29] NJO, Press Regulation, para. 2, 4(2).
[30] Press Regulation, para. 4.
[31] Press Regulation, para. 8-15.
[32] Press Regulation, para. 6.
[33] Press Regulation, para. 4.
[34] *See* chapter 3 for the explanation of the bifurcated central judicial administration model in Hungary. Introduced through Legal Act CCXLIII of 2013, Art. 11(7) (entered into force on 1st of January 2014). T/13217.
[35] Legal Act CLXI of 2011, Sec. 103 (1,e).
[36] Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 7). 825-826. Legal Act CLXII of 2011 on the status and remuneration of judges, Art. 104/A. Constitutional Court Case no. IV/00942/2015, Decision 3003 of 2016 (I.15.) AB. A constitutional complaint was introduced based on Art. 26 (2) of the legal act on the functioning of the Constitutional Court alleging that Art. 6(5) of the code of judicial ethics was contrary to the freedom of expression of judges and the constitutional guarantee of judicial independence. The Constitutional Court deemed the complaint inadmissible on account of the judicial code of ethics not constituting a legal norm.

consultation powers with the political branches, the obligation to report to the legislature, the power to coordinate press communications, and the obligation to publish annual reports to the public. The National Judicial Council has the power to adopt a judicial code of ethics, containing the relevant values guiding the professional, personal and public conduct of judges. Finally, court presidents hold complementary communication powers with respect to the communication of a given court; under the supervision of the President of the NJO.

ii. Romania

In the Romanian legal order, the 2004 legal acts on court organization and the legal act on the Superior Council of Magistracy (SCM) contain specific legal principles and mechanisms determining the participation of the judiciary in public debate. These legal acts are relevant for our analysis because they significantly modified the manner in which the Romanian judiciary communicates with its surroundings. The main goals of the legal acts were to guarantee the transparency of judicial functioning, to empower the SCM to guarantee judicial independence in the legal order as well as to enhance the professional ethics of judges.[37] For these purposes, the Romanian legislature introduced a new and separate legal act concerning the Superior Council of Magistracy. This legislation supplements the legal act on judicial organization. Moreover, the resulting two legal acts introduced new legal mechanisms for the communication of the judiciary with its surroundings. However, these sudden and significant legal changes also raise the question: to what extent did the resulting legal framework live up to its original goals?

[37] Memorandum Law no. 307 of 2004, 1-2. Memorandum on Law no. 311 of 2004, 1.

Table 10 Legal Communication Mechanisms of the Romanian Judiciary (1992-2004)

1992 legal framework	2003/2004 legal framework
Guarantee of judicial independence (1992 Constitution, 123(2))	Guarantee of judicial independence (2003 Amendment of Constitution, Art. 124(3))
	Superior Council of Magistracy (SCM) is responsible to guarantee judicial independence (2003 Constitutional amendment, Art. 133(1); 2004 legal act on SCM, Art. 30 (1))
	SCM comments on legislative proposals (2004 Legal act on the SCM, Art. 38(3))
	SCM informs the Ministry of Justice about the necessity to initiate or modify existing legislation; the SCM approves the regulations of the Ministry of Justice concerning judicial functioning (2004 Legal act on the SCM, Art. 38 (4,5))
	SCM informs the Parliament about the administration and functioning of the judiciary (2004 Legal act on the SCM, Art. 38(6))
	SCM publishes the annual reports on the functioning and administration of the judiciary (2004 Legal act on the SCM, Art. 38(6))
	Judicial Council responsible to adopt, publish and enforce the judicial code of ethics (2004 Legal act on SCM, Art. 38(1,2)-39)
	Obligation of courts to establish a press office (2004 Legal act on court organization, 116 (1,d))
	Power of court presidents to supervise press offices (2004 Legal act on court organization, Art. 117)
	Ethical conduct forms part of the professional evaluation of judges (2004 Legal act on the SCM, Art. 39)

The general legal principles guiding the participation of the judicial branch in public debate are divided across the legal act on the functioning of courts and the legal act on the Superior Council of Magistracy. The legal act on court organization explicitly guarantees the new public management guarantee of openness of judicial proceedings. Specifically, the legal act stipulates two components of the openness principle: “judicial proceedings are public, with the exceptions foreseen by law” and “judgements are

pronounced publicly, with the exceptions foreseen by law."[38] This legal principle mirrors the constitutional principle of openness of the judicial proceedings.[39] Furthermore, through a 2013 amendment, the legal act specifically stipulates that judicial proceedings are recorded through audio-visual means. Specifically, the clerk records the minutes of court proceedings and at the end the hearings parties receive, upon request, a copy of the clerk's notes.[40]

The legal acts on court organization and the SCM do not explicitly acknowledge the openness of judicial administration as a legal principle. However, the general legal principles governing the functioning SCM implicitly guarantee the transparency of judicial administration and the participation of the judiciary in public debate. First, the legal act explicitly reinstates the constitutional role of the SCM to guarantee judicial independence.[41] Furthermore, the legal act on the SCM clarifies that the SCM is independent and subordinated only to the law. Moreover, the legal framework stipulates that members of the SCM answer to judges for their activities.[42] Collectively, these legal principles appear to provide a strong guarantee for the SCM to represent judicial independence in public debate. At the same time, these general principles seem to reinforce the explicit constitutional acknowledgement of separation of public powers and the independence of judges[43] and the constitutional role of the SCM to guarantee judicial independence.[44] Based on these general legal principles, the legal act on the SCM establishes specific legal mechanisms for the communication of the SCM and court with the legislature, executive and the public.

A first set of communication mechanisms concerns the communication of the judiciary with the legislature. The legal act on the Superior Council of Magistracy confers specific communication powers and obligations to the central administration of the judiciary. These communication competences are connected to the legal right and obligation of the SCM to notify infringements of any nature concerning the independence and impartiality of judges, or the appearance thereof.[45] In particular, the Superior Council of Magistracy is formally vested with the power to issue an opinion on the legislative proposals affecting the judiciary.[46] Moreover, the SCM is formally obliged to present its annual activity reports on the administration of the judiciary and functioning of courts to the Parliament.[47] This legal obligation appears as a specific legal mechanism guaranteeing the check by the legislature on the powers of the SCM and it was introduced by the 2004 reforms. The Constitutional Court confirmed that the transparency-related legal obligations were not in breach of the constitutional principle of judicial independence. Specifically, the obligation of the SCM to present a report to the Parliament did not violate the constitutional principle of separation of powers.[48]

---

[38] Law no. 304 of 2004, Art. 12.
[39] Constitution of Romania, Art. *See* chapter 3.
[40] Law no. 304 of 2004, Art. 13.
[41] Law no. 304 of 2004 on judicial organisation, Art. 1(2). Law no. 317 of 2004, Art. 1(1).
[42] Law no. 317 of 2004, Art. 1(2).
[43] Constitution of Romania, Art. 1(4), 124. *See* chapter 3,A,I,ii.
[44] Constitution of Romania, Art. 133. *See* chapter 3,A,I,ii.
[45] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 30 (1).
[46] Law no. 317 of 2004, Art. 38(3).
[47] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 38(6).
[48] Constitutional Court of Romania, Decision no. 375 of 2005. *See* chapter 3,A,II,ii.

A second set of communication mechanisms concerns the judiciary and the executive. The legal act on the SCM empowers the SCM to issue an opinion on the regulations adopted by the Ministry of Justice.[49] Moreover, the SCM may initiate to the Ministry of Justice the adoption or amendment of legal acts concerning judicial functioning.[50] Upon the request of the SCM or the Ministry of Justice, the general assembly of judges, comprising of all judges working at a given court,[51] might analyse proposals for legal acts. Following this assessment, the general assembly of judges communicates its opinion to the SCM.[52] Finally, the SCM also has the power to request information necessary for its functioning from the Ministry of Justice.[53]

A third set of legal mechanisms concerns the communication between the judiciary and the public. The legal act grants central communication powers to the SCM. Indeed, the SCM has a role to inform the public both about the functioning of the judiciary and its own central administrative activities through an annual report, published in the Official Journal of Romania. This report is also accessible to the public through the Internet site of the Judiciary.[54] These obligations were introduced in the legal framework during the 2004-2005 pre-accession judicial reforms, in an effort to enhance the transparency and periodic assessment of judicial administration.[55] In addition, the legal act obliges the SCM to inform the courts about its functioning. For these purposes, members of the SCM visit courts and organise meetings with judges and representatives of the civil society.[56]

The legal framework also grants de-centralized communication powers to courts. The legal act on court organization stipulates that every court must set up a communications- and public relations office.[57] This contemporary guarantee of press judges was also introduced in the legal order through the 2004 legislation in an effort to enhance the transparency of judicial functioning.[58] The communication office is in charge of guaranteeing the communication of the court or the prosecutorial services with the public and the media. The legal provision explicitly highlights that this obligation is in place to secure the principle of transparency of judicial functioning. A press secretary– who can be a judge or prosecutor, appointed by the court president, leads the office. Alternatively, the press secretary may be a graduate of journalism studies or a specialist in communication. The selection in this case is based on a competitive basis.[59] The communication office functions under the hierarchic supervision of court presidents –[60] who respond to the SCM. Moreover, the SCM also centrally regulates the communication of courts with the public by

[49] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 38 (3,4).
[50] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 38 (5).
[51] This is a representation and consultation mechanism introduced by the 2004 legal reforms. The general assembly of judges is summoned by the president of a court (alternatively by one third of judges serving at a court or the SCM) annually or if necessary and it *inter alia*: debates the functioning of courts, votes for the members of the SCM, discusses legal problems, analyzes legislative proposals, votes for the administrative leaders of a court. Law no. 304 of 2004 Art 50.
[52] Law no. 304 of 2004 on judicial functioning, Art. 51 (d,e).
[53] Law no. 317 of 2004, Art. 31.
[54] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 38 (6).
[55] http://www.cdep.ro/caseta/2004/05/25/pl04285_rp.pdf (accessed 16.09.2019), 39,40.
[56] Law no. 317 of 2004, Art. 31(2).
[57] Law no. 304 of 2004 on judicial organisation, Art. 116(1,d).
[58] Preparatory document, http://www.cdep.ro/proiecte/2003/700/30/7/em737.pdf (accessed 16.09.2019), 3.
[59] Law no. 304 of 2004 on judicial organisation, Art. 116(2).
[60] Law no. 304 of 2004 on judicial organisation, Art. 117.

issuing Press Guidelines.[61] The guidelines highlight the importance of the timeliness of communication and that "it needs to be within legal limitations" and has detailed rules concerning the content of communication at different stages of court proceedings.

Finally, an additional legal mechanism to enhance the openness and professionalism of the judiciary in the Romanian legal order is the judicial code of ethics. This legal mechanism relates to SCM's obligation to protect the professional reputation of judges[62] and a general formal role of the SCM to guarantee the observance of the law and the ethical standards for the professional activities of judges and magistrates.[63] The legal framework vests the SCM with a three-fold competence concerning judicial codes of ethics. First, the SCM has the power to adopt a code of ethics.[64] This power has been incorporated in the Romanian legal framework since 2001.[65] Second, the SCM must publish the ethical code in the Official Journal of Romania and the Internet site of the Judiciary.[66] This obligation was specifically introduced by the 2004 legislation as a means of enhancing transparency.[67] Third, the SCM has the power to enforce the judicial code of ethics. In this sense, the legal framework stipulates that the ethical conduct of judges constitutes part of the professional evaluation of judges – taking place every three years, and having as a purpose the assessment of the "efficiency, quality and integrity of the judicial activities as well as the continuous training of judges".[68] The SCM has the legal power to set up evaluation committees (composed of the President of a given court and two judges appointed by the leadership of a court) and to set specific criteria for the evaluations through internal regulations.[69] For example, the internal regulation formulates the criterion of "compliance with the standards of conduct in line with the honour and dignity of the judicial profession as established in the code of conduct' as one of the criteria used for evaluating the 'integrity' of judges". The other two criteria are the existence of 'final disciplinary sanctions' and 'impartiality.'[70]

The legal provisions related to the enforcement of the judicial code of conduct were introduced in 2005 in the legal framework and were the subject of direct exchanges between the Romanian Government and the European Commission during the EU accession process.[71] Until 2005, the legal framework also made possible the enforcement

[61] SCM, Consolidated version of the Guidelines on the relation between the judicial system of Romanian and the media. Forma consolidată a Ghidului privind relația dintre sistemul judiciar din România și mass-media, aprobat prin Hotărârea Plenului Consiliului Superior al Magistraturii nr. 482 din 1 iunie 2012, cu modificările și completările aduse prin Hotărârea Plenului Consiliului Superior al Magistraturii nr. 573 din 6 mai 2014. http://portal.just.ro/62/Documents/INFORMATII%20DE%20INTERES%20PUBLIC/Informatii%20publice/GHID%20PRIVIND%20RELATIA%20DINTRE%20SISTEMUL%20JUDICIAR%20DIN%20ROMANIA%20SI%20MASS%20MEDIA.pdf (accessed 16.09.2019).
[62] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 30 (1).
[63] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 30 (3).
[64] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 38(1).
[65] Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in Seibert-Fohr (n 15).
[66] Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 38 (2).
[67] http://www.cdep.ro/caseta/2004/05/25/pl04285_rp.pdf (accessed 16.09.2019), 39,40.
[68] Law no. 303 of 2004 on the status of judges, Art. 39.
[69] Ibid. Art. 39 (3,6).
[70] Superior Council of Magistracy, Regulation concerning the evaluation of the professional activity of judges and prosecutors, Official Journal of Romania, Part I, no. 817 of 29 November 2007, Art.6.
[71] European Commission, *see* chapter 2.

of breaches of an ethical conduct through disciplinary proceedings.[72] Since 2005, the legal framework mentions judicial evaluations by the SCM as the only enforcement manner of the ethical code. The legislative framework also specifies that the outcome of the judicial evaluation, for which the code of conduct is taken into account, is included in the personal professional file of judges. The information in the file is confidential but the file is deposited at the office of the SCM.[73]

Overall, the legal framework explicitly empowers the SCM with main communication powers and delegates local competences to court press offices. The activity of the latter group falls under the supervision of court presidents. In turn, the SCM supervises the administrative activities of court presidents. However, it remains to be seen how effectively the SCM can represent the rule of law values as part of the public debate.

iii. Similarities and differences

As a main similarity, in both legal orders we could identify specific legal mechanisms governing the participation of the judiciary in public debate. Furthermore, in both legal orders, the communication mechanisms had three main target groups: the legislature, executive, as well as the public and the media. In both instances, the main communication mechanisms of the judiciary with the legislature and the executive were granting legislative initiative to the judiciary and the power to give comments on legislative proposals. In addition, in both legal orders the representatives of the judiciary are obliged to present each calendar year the activity of the courts to the Parliament. With respect to the judiciary's communication with the public, two main legal communication means were: (1) the publication of yearly activity reports and (2) the adoption of judicial codes of ethics. The existence of these specific legal communication mechanisms appears to connect to the strong emphasis in both legal orders on the new public management principle of transparency of judicial functioning.[74]

A further main similarity in the two studied legal orders was that the central judicial administrative body received the main communication powers. This allocation of communication competences appears to be consistent with the explicit constitutional status and strong powers of central judicial administration in both legal orders.[75] However, the allocation of main communication competences with the democratically non-accountable central judicial management raises the general questions as to (1) what the constraints are

---

[72] Law no. 92 of 1992, Art.122 (it constituted judicial misconduct: frequent delay in completing paperwork, unjustified absence from work, interference with the activity of another judge, offensive attitude in the office, breach of secrecy in judicial decision-making, public political activities, activities affecting the dignity and honor of judicial profession, unjustified refusal to carry out duties, frequent negligence, breaking the code of ethics or tax evasion). *See* also Open Society Institute, Judicial Independence Report (2001), 387.

[73] Law no. 303 of 2004, Art. 42.

[74] cf. Voermans (n 1) 151-158.

[75] cf. Bogdan Iancu, 'Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania' [2010] European Constitutional Law Review 28. Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 German Law Journal. *See also* Cristina E Parau, 'Explaining Governance of the Judiciary in Central and Eastern Europe: External Incentives, Transnational Elites and Parliamentary Inaction' 67 Europe-Asia Studies. Carlo Guarnieri, 'Judicial Independence in Europe: Threat or Resource for Democracy?' (2013) 49 Representation. 350.

on these communication competences i.e. independence of the administrative body, existence of specific control mechanisms; and as to (2) what the guarantees are for the effective representation of the values of judges in the outcome of this communication.[76]

At the same time, our analysis indicated important contextual differences in terms of the details of specific communication mechanisms. A first important difference concerned the composition of the central judicial managerial body possessing communication competences. As part of the overarching judicial reforms since 2010, the Hungarian legislature has allocated main communication powers to a single person, the President of the National Judicial Office. The overarching ambition of the 2011 reforms to enhance the effectiveness of central judicial administration seems to explain this transfer. However, this transfer of communication competences from a central representative body of judges to a single person, appointed solely by the Parliament for a period of nine years, raises an important question regarding the independence of the President of the NJO. These concerns become particularly pressing from the perspectives of the representation of the views of judges and political neutrality of the content of the communication. [77] In contrast, the Romanian legislature has allocated main communication powers to the Superior Council of Magistracy – a body representing in its composition judges from all levels of the court system and with main formal guarantees for the independence resulting from the SCM's constitutional and legal role to guarantee judicial independence. However, we must highlight that the main legal constraint in both legal orders on the judiciary's communication with the political branches of Government and the public would be the independence of the central judicial managerial body, with no specific control mechanisms in place.

A second important difference concerned the detail of the communication mechanisms. In the Hungarian legal order, the communication mechanisms with the legislature and public appeared more detailed in comparison to the Romanian legal order. In particular, the President of the NJO has additional explicit legal powers to establish the central strategy for judicial administration, to participate in the meetings of the parliamentary legislative committees and to establish the internal regulation governing the communication of courts with the public. These powers appear to be consistent with the legislative aim to strengthen the transparency and effectiveness of central judicial administration. Nevertheless, the tensions for the impartial image of justice explained above remain valid also with respect to these specific mechanisms. In contrast, the Romanian legal framework provided more detail with respect to the communication of courts with the public. These detailed legal mechanisms appear to connect to the broader ambition of the 2004 legal reforms of reducing the influence of court presidents in the administration of

[76] *See* chapter 1. cf. Michal Bobek, 'The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance' 16 European Public Law. David Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice' 13 European Constitutional Law Review. 120-122.

[77] cf. Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015). 33-110. Zoltán Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford Univ Pr 2017). 456-476.

justice.[78] Nevertheless, the detailed legal regulation of court's communication with the public does not guarantee in itself that the content of communication conveys impartiality and professionalism.

Overall, our analysis indicated a strong emphasis on the new public management value of transparency and the related effective communication in both legal orders. In Hungary a main rule of law anchor for the content of the communication is the constitutional guarantee of independence of judges combined with the legal obligation of the President of the NJO to represent judges and to respect the constitutional principle of judicial independence. In the Romanian legal order, the constitutional and legal role of the SCM to guarantee judicial independence appears as a primary guarantee for relying on rule of law values as the main point of reference in the judiciary's communication. However, in both contexts it remains questionable to what extent and how these legal mechanisms and guarantees translate into an effective representation by the judiciary of rule of law values in public debate. In the next section we will further investigate this aspect.

II. Experiences in practice

As a second step of our contextual-comparative analysis, we will assess the content of communication mechanisms issued by the judicial branch of Hungary and Romania. This part of the analysis focuses on two main communication mechanisms emerging from the domestic legal frameworks: the general management strategies of the studied councils for the judiciary, and judicial codes of ethics and their preparatory documents.[79] The overall aim here is to determine how the factual and political context of reforms influences the effective representation by the judiciary of rule of law values as part of the public debate.

i. Hungary

In the Hungarian legal order, the annual general strategy document of the President of the NJO and the judicial code of conduct developed by the National Judicial Council are normative instruments giving a more specific content in practice to the communication of the judiciary with its surroundings. The analysis in this section will address how the judiciary balances the independent image of the judiciary and its commitment to effective communication (openness, publicity) through these non-binding mechanisms.

[78] cf. Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 7). 836-837. Cristina Parau, 'The Drive for Judicial Supremacy' in ibid. 641.
[79] *See* Appendices, C,D,G and H.

a) Communicating strategic goals

In line with the legal powers, the President of the NJO has been communicating the main strategy for the administration of justice since 2012. The President of the NJO presents the strategic goals as part of the annual reports concerning the functioning of the judiciary. These centralized legal powers grant effectiveness to the communication of the judiciary. However, the content of the resulting communication has become particularly important in light of events surrounding the 2011 legal reforms. As explained earlier, the President of the former judicial council publicly criticised the proposed 2011 reforms from the rule of law perspectives of statutory and functional independence of judges.[80] A question that emerges after the 2011 reforms is how critical the new central judicial management is in its communication; respectively to what extent it maintains rule of law values as the main basis of its communication.

Between 2012-2016, the President of the NJO communicated as the main strategic goal for judicial organization: "guaranteeing that independent judges deliver judgments of a high quality and within a reasonable time."[81] From the outset, this strategic goal seems to make explicit reference to the rule of law value of functional independence of judges. At the same time, this goal also presents strong new public-management components through the requirement of delivering high quality and timely judgments. This formulation of the main strategic goal suggests a balance between the two sets of values.

However, when explaining this strategic goal, the President of the NJO mainly discusses the value of timeliness of judicial proceedings. For instance, in the strategy documents the President of the NJO gives an account of the number, type and timeframe of concluded cases in the previous calendar year.[82] Moreover, since 2014, the President of the NJO highlights specific mechanisms serving the timeliness of judicial decisions, such as: judicial workshops for exchanging good practices, establishing workgroups, network of specialist judges and coordinators. In the explanation of the main strategic goal, the President emphasizes the importance of actively promoting mechanisms aiming towards increased rationalization of work processes – which the President considers a priority.[83] Furthermore, the 2014 and 2016 reports explicitly justify the importance of timeliness of judicial decisions as a main goal with explicit reference to the findings of the EU Justice Scoreboard – a non-binding information tool developed by the European Commission since 2013 in order to measure and compare the performance of Member States' courts.[84] In particular, the strategy highlights that according to the Justice Scoreboard's timeliness-indicator Hungary is a top performer among EU Member States.[85]

---

[80] *See* chapter 3.

[81] NJO, Main Strategic Goals, http://birosag.hu/obh/elnoki-beszamolok/feleves-eves-beszamolok (accessed 16.09.2019). 2016 Strategic Goals, 14-15. 2013 Strategic Goals, 13-18.

[82] 2016 Strategic Goals,12; 2013 Strategic Goals,13. 2012 Strategic Goals, 17. 2014 Strategic Goals, 13. 2015, 14.

[83] 2016 Strategic Goals, 12. 2014 Strategic Goals, 13.

[84] European Commission, EU Justice Scoreboard (http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm) (accessed 16.09.2019). For a critical assessment of the development of the content of the Scoreboard from a rule of law perspective, with particular reference to the performance of Hungary *see* Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' [2016] Hague Journal on the Rule of Law.

[85] 2016 Strategic Goals, 12. 2014 Strategic Goals, 12. 2015 Strategic Goals 14.

The strategy document highlights the main commitment of the new Hungarian central management to new public management values also through other means. For instance, in the 2012 strategy the President of the NJO emphasizes that the main strategic goal directly overlaps with the main goals of the legislature prompting the 2011 judicial reforms. In particular, the document explicitly recalls the ambition "requiring that courts deliver a unified case law within a reasonable time, irrespective of the location of individual courts."[86]

Reference to new public management values is also predominant in other parts of the strategy. In the discussed period (2012-2016), the President of the NJO derived further five goals from the main ambition of timeliness. These strategic goals are: (2,3) the optimal distribution of human, respectively, material resources; (4) guaranteeing the integrity and transparency of judicial functioning and organization; (5) simplifying the accessibility to courts; and (6) improving judicial training.[87] Similar, to the main strategic goal, these ambitions appear to mainly accentuate new public management values. Four (2,3,5,6) out of the five goals refer to new public management priorities of optimal distribution of resources, transparency, accessibility and competence. In contrast, only one of the derived goals (4 guaranteeing the integrity and transparency of judicial functioning and organization) mentions explicitly the rule of law value of judicial integrity. However, the explanation of this goal stipulates that the judiciary not only has to guarantee the classic judicial virtues of impartiality and independence but also has to prepare judges for the technical challenges of the 21st century in order to maintain public trust.[88] In doing so, this strategic goal mainly focuses on openness of judicial functioning through the central Internet site for the judiciary and through the annual reporting by court presidents on the functioning of courts. Moreover, the President of the NJO highlights anti-corruption mechanisms as means to improve integrity.

Finally, both the decisions of the President of the NJO[89] and the annual reports emphasize the contemporary values of effective and accessible communication of the judiciary. For instance, the annual reports discuss the use of press conferences, accessible – i.e. easily to understandable – communication for high profile cases and the use of social media platforms.[90] These are also the communication channels envisioned in the Press Regulation issued by the President of the NJO. In addition, the press regulation highlights that the communication should be objective, brief, relying on facts, timely and based on the

[86] 2012 First Semester, Strategic Goals, 12.
[87] 2016 Strategic Goals, 15-20.
[88] 2016 Annual Report. 16.
[89] Decision no. 8/2012. (IV. 25.) Regulation on the communication of the courts and the NJO with the press OBH utasítás a bíróságok és az Országos Bírósági Hivatal sajtótájékoztatási tevékenységéről, valamint a bíróságok központi honlapjának sajtószolgálatáról szóló szabályzatról. (http://birosag.hu/sites/default/files/allomanyok/obh/dokumentumok/8_obh_utasitas_sajtoszabalyzat.pdf) (accessed 16.09.2019).
10/2012. (VI. 15.) OBH utasítás a közérdekű bejelentésekkel és panaszokkal kapcsolatos eljárásról szóló szabályzatról.
(http://birosag.hu/sites/default/files/allomanyok/obh/dokumentumok/10_2012_obh_utasitas_panaszszab.pdf) (accessed 16.09.2019).
11/2012. (III. 24.) OBT határozattal a bíróságok és az Országos Bírósági Hivatal sajtótájékoztatási tevékenységéről, valamint a bíróságok központi honlapjának sajtószolgálatáról szóló OBH utasítást.
23/2012. (V. 21.) OBT határozattal a közérdekű bejelentésekkel és panaszokkal kapcsolatos eljárásról szóló szabályzat tárgyában készült OBH utasítást.
[90] 2016 report 171-181.

documents provided by the NJO or the courts, which can be legally shared with the public.[91] We must note that these latter specifications are not only important for the effectiveness of judicial communication. They also represent an important precondition for maintaining the classic rule of law value of impartial image of justice. Nevertheless, overall, the communication of the President of the NJO appears to mainly accentuate the new public management values of timeliness as well as transparency, accessibility and effectiveness of communication. We will consider below what main values underpin the communication of the judiciary through ethical codes. The content of the normative mechanisms will be subject to an assessment on the adequate balancing of rule of law and NPM values based on the theoretical chapters.

b) Communicating ethical values

The professional values guiding the activity of Hungarian judges are comprised in the judicial ethical code adopted by the National Judicial Council in 2014 – pursuant to its new legal power.[92] The 2014 ethical code replaced the judicial code of ethics adopted in 2005 by the Hungarian Association of Judges[93] – one of the main judicial associations in Hungary.[94] The resulting transfer of competences from the association of judges to the central management for the judiciary and the adoption of a new ethical code as part of the 2011 judicial reforms grants this mechanism particular importance in terms of the values that it communicates to both judges and the public.

The process of adopting a new judicial code of ethics gradually unfolded between 2012 and 2015. At the first stage, the President of the National Judicial Office initiated the adoption of a new ethical code in 2012.[95] The President of the NJO connected this initiative to the "key strategic goal" of enhancing judicial integrity.[96] A special working group within the National Judicial Office, composed of judges appointed by the President of the NJO developed the first draft of the new ethical code.[97]

The President of the Judicial Integrity workgroup mentioned two main grounds for the adoption of a new judicial ethical code. One argument was that not all judges could relate to the content of the 2005 ethical code since not all judges in the Hungarian legal

[91] Press Regulation, para. 6.
[92] Judicial code of ethics adopted on the 10th of November 2014 by the National Judicial Council of Hungary and entered into force on the 1st of January 2015, http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/3_etikai_kodex.pdf (accessed 16.09.2019).
[93] Previous Hungarian ethical code for judges, http://www.mabie.hu/orszagos-biroi-etikai-tanacs/etikai-kodex (accessed 16.09.2019).
[94] Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 7). 825.
[95] President of the National Judicial Office, Decision 234 of 2012 on the functioning of the 'Judicial Integrity' workgroup, http://birosag.hu/sites/default/files/allomanyok/obh/dokumentumok/234_2012_obh_hatarozat.pdf (accessed 16.09.2019).
[96] Summary of the processes leading to the adoption of the 2015 ethical code available at http://birosag.hu/obt/biroi-etika (accessed 16.09.2019). Main strategic goals of the President of the National Judicial Office available at http://birosag.hu/sites/default/files/allomanyok/obh/elnoki-beszamolok/obhe_beszamolo_2012_ifelev_teljes.pdf (accessed 16.09.2019), for a more detailed account of the competences and strategic goals of the central judicial office *see* chapter 3.
[97] National Judicial Council announcement, http://birosag.hu/obt/biroi-etika. (accessed 16.09.2019). National Judicial Council, Decision 20/2014 establishing the workgroup for developing the ethical code, http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/20.pdf (accessed 16.09.2019).

order were members of the association.[98] The second argument was that in the course of ten years since the adoption of the 2005 ethical code the organization of the judiciary and the judicial function underwent rapid changes, endorsing new values. In the opinion of the workgroup, the ethical code had to adequately reflect these changes.[99] The announcement specifically mentioned that the relation between judicial independence and the role of media and the use of Internet required novel guidance.[100] However, after the formal empowerment of the National Judicial Council in 2013 to adopt the judicial code of ethics, the NJO transferred the preparations for the adoption of a new ethical code to the NJC.

The National Judicial Council appointed a new workgroup composed of judges working at the National Judicial Office (3), judges from the National Judicial Council (3), judge-members of the association of judges (3), as well as the presidents of the first and second instance civil service tribunals. This workgroup finalized drafting the ethical code.[101] The process included three consultative sessions with judges – where judges could comment on the draft version.[102] However, the NJC did not make public the draft version and the content of observations by judges.

In terms of content, the final version of the judicial ethical code explains six fundamental values: independence, impartiality, dignity, propriety- diligence, fairness, mutual respect and cooperation and has a specific final section reflecting on the role of judges in leadership positions. Compared to the 2005 judicial code of ethics, the 2014 ethical code introduced a new structure of values. However, in terms of content, the new ethical code did not introduce major changes.[103]

The judicial code of ethics continues to place main emphasis on the rule of law values of judicial independence, impartiality, dignity and honesty. For example, the value of judicial independence makes direct reference to the functional independence of judges, applicable both outside and inside the judiciary; the principle of equality and the appearance of (factual) independence, of relevance for the independence of judges' vis-à-vis parties to a trial.[104]

However, the 2015 ethical code also introduced modifications that seem to limit judicial independence. A notable difference is that judges under the 2015 ethical code are not obliged to actively promote their independence.[105] This seems to limit the critical participation of individual judges in promoting core rule of law values. Moreover, as novel elements, the 2015 ethical code introduced specific applications of the values of dignity, propriety and mutual cooperation. These new applications concern the communication of

---

[98] Interview with dr. Túri Tamás, vice-president of the Pécs Regional Court and the President of the 'Judicial Integrity' workgroup responsible to develop the new ethical code (Interview published on the official website of the National Judicial Office), http://birosag.hu/sites/default/files/allomanyok/kozadatok/obh/interju_dr._turi_tamassal_2.pdf (accessed 16.09.2019).

[99] id.

[100] id.

[101] id.

Information on the conferences available at http://birosag.hu/obt/biroi-etika/konferenciak (accessed 16.09.2019). Media information on conferences was collected and published http://birosag.hu/obt/biroi-etika/media (accessed 16.09.2019).

[102] ibid.

[103] *See* Annex G.

[104] 2014 Ethical code, value 1.

[105] 2014 Ethical code, value 1. Compare 2005 ethical code value 1.

judges with the public and the timeliness of judicial proceedings. Under the value of dignity, the ethical code stipulates that judges must avoid "extremities" both in their conduct and their appearance; highlighting that the appearance of judges must be adequate. In addition, the diligent conduct of judges on the Internet also forms an explicit part of the dignity of the judicial profession.[106] Under the value of propriety, judges are expressly obliged to handle cases in a timely manner and use the resources of the courts in an economic fashion.[107] Finally, under mutual cooperation it is expected of judges to refrain from criticising the guidelines of superior courts in front of parties to a trial and should not highlight their opposing professional opinion.[108]

These new specific practical applications show a strong connection to the original goal of adopting a new ethical code, as formulated by the National Judicial Office in terms of establishing specific guidance related to the use of Internet and communication with the media. By extension, the content of the new judicial ethical code directly connects to the main strategic goal of the President of the NJO of enhancing judicial integrity. In this sense, the new judicial code of ethics appears as a tool for entrenching the strategic values of the new Hungarian central judicial management among judges.

ii. Romania

The main communication mechanisms of the Romanian judiciary are the strategic goals of the SCM contained in the annual activity reports and the code of conduct for magistrates. This section analyses the content of these mechanisms. Our main aim here is to assess how the judiciary can emphasize the importance of judicial independence when communicating with the public through these normative mechanisms.

a) Communicating strategic goals

In the Romanian legal order, the Ministry of Justice has the legal power to establish and communicate the strategic goals for the administration of justice.[109] In line with this power, the Ministry of Justice mainly focuses on communicating the new public management values driving the administration of courts. For example, The Romanian Ministry of Justice's 2015-2020 strategic plan for the development of the judiciary[110] highlights that "guaranteeing efficient, accessible and quality judicial functioning is a legitimate expectation from the society based on law. […] the contemporary challenges in the administration of justice require solutions based on strategic management, efficient administration of resources and innovative mechanisms." At the same time, the document explicitly emphasizes that the strategy is a result of communication between the executive, the SCM, the Highest Court of Cassation and Justice, which suggests cooperation between the public powers.

---

[106] 2014 Ethical code, value 3.
[107] ibid. value 4.
[108] ibid. value 6.
[109] Constitution of Romania, Art. 108.
[110] Ministry of Justice of Romania, Justice Strategy Plan 2015-2020, http://legislatie.just.ro/Public/DetaliiDocumentAfis/164538 (accessed 16.09.2019).

As a mirror mechanism, the SCM started adopting a multi-annual plan, which elaborates upon the main strategic goals of the SCM.[111] The content of the judiciary's strategy is more reflective of rule of law values, with explicit reference to the constitutional dimension of judicial independence. Consider the first main objective of the general plan for 2011-2016, which envisions: (1) enhancing the position of the judiciary as a public power. The objective entails several specific activities related to achieving the independence of judiciary, such as: (a) strengthening the independence of magistrates in line with European requirements; (b) enhancing the involvement of the SCM in legislative debates; (c) enhancing the financial and material conditions of courts; (d) assuming the role of representative of the judiciary in public relations. The additional objectives of the strategy also present a combination between rule of law and contemporary values. These additional objectives are: (2) enhancing the efficiency of justice; (3) enhancing the professional competency of the judiciary; (4) enhancing the responsibility of the judiciary, with specific emphasis on improving the ethical training of judges and the communication of the SCM with courts; and finally (5) developing the judiciary as a public service.[112]

Moreover, the annual activity reports of the SCM present an overview of specific activities of the SCM in reaching the goals of the plan.[113] For example, with reference to communication of the SCM with the legislature and executive, the 2016 report highlights: the follow-up concerning the legislative proposals by the SCM to the Executive regarding the legislation on judicial functioning. The report underlines the SCM's proposals concerning the transfer of financing powers to the High Court of Cassation and Justice. The report also mentions the participation of the SCM in the amendments of the criminal code and code of criminal procedure; and redesigning the "judicial map" (court system). With reference to the transparency and effective communication within the judiciary and with the public, the SCM's reports mainly mentioned technical means of communication through the Internet page and the computer systems used for the publication of all court decisions on the Internet. Furthermore, the report also mentioned the initiative of establishing a network of ethical councils available to judges and prosecutors.[114]

As a further means of communicating the importance of rule of law values for the judiciary, the annual reports of the SCM have a special section dedicated to the fulfillment of the SCM's constitutional role of protecting the independence and professional reputation of judges.[115] For instance, the 2016 report mentions that the SCM filed 36 complaints to the Judicial Inspection on media reports or public statements infringing the independence of justice.[116] These activities highlight the importance of establishing the classic rule of law values for the functioning of the judiciary. However, at the same time, these practical experiences also suggest a challenging relationship between the judiciary and the political

---

[111] SCM, Decision no. 999 of 2011 on 'Multi-annual plan for the 2011-2016 period', http://old.csm1909.ro/csm/linkuri/10_01_2012__46416_ro.PDF (accessed 16.09.2019). Strategy for enhancing the integrity of justice, http://old.csm1909.ro/csm/linkuri/25_07_2011__42672_ro.pdf (accessed 16.09.2019).

[112] SCM, Decision no. 999 of 2011 on 'Multi-annual plan for the 2011-2016 period', http://old.csm1909.ro/csm/linkuri/10_01_2012__46416_ro.PDF (accessed 16.09.2019). Strategy for enhancing the integrity of justice, http://old.csm1909.ro/csm/linkuri/25_07_2011__42672_ro.pdf (accessed 16.09.2019).

[113] Decisions of the SCM available at http://old.csm1909.ro/csm/index.php?cmd=0301 (accessed 16.09.2019).

[114] SCM 2016 Report on the Functioning of the SCM, 4-8.

[115] Decisions of the SCM available at http://old.csm1909.ro/csm/index.php?cmd=0301 (accessed 16.09.2019). Opinion on protecting judicial independence, 9 August 2017 http://old.csm1909.ro/csm/linkuri/09_08_2017__89284_ro.pdf (accessed 16.09.2019).

[116] SCM 2016 Report on the Functioning of Courts, 118-127. 2016 Report on the Functioning of the SCM, 19-28.

branches of Government, as well as with the media; and an overall lack of conventions guiding these interactions.[117]

These concerns for the effectiveness of conveying the impartial image of justice appear to be further supported by the views of judges, collected and published by the SCM in the annual reports. The reports contain a special section dedicated to the proposals of judges concerning the functioning of the judiciary. For example, the 2016 report highlights as shortcomings noted by judges: legislative instability; the lack of material and human resources; financial dependence of the judiciary on the executive; pressures on the judiciary by the media; administrative burden on judges; and lack of an effective protection of the impartial image of justice.[118] Below we will consider, whether these tensions are also reflected in the code of ethics for magistrates, and if so, how they are connected to the principle of judicial independence.

b) Communicating ethical values

In the Romanian legal order, the code of conduct of magistrates – adopted in 2005 – is the specific normative mechanism, which guides the conduct of magistrates (including both judges and prosecutors) and communicates the values of judges to the public.[119] The 2005 ethical code replaced an ethical code originally adopted in 2001,[120] which was not made public.[121] In order to improve the content of the original ethical code and secure additional transparency of judicial functioning, in 2005 the newly re-organised SCM adopted a new ethical code.[122]As such, the 2005 ethical code formed part of the overarching

[117] *See* for e.g. Vlad Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis' (2015) 13 International Journal of Constitutional Law. 262, 263. Venice Commission, CDL-AD(2012)026-e, paras. 61-66.
[118] SCM, 2016 Report on the Functioning of Courts, 128.
[119] Code of conduct Romania, adopted by the Superior Council of Magistracy on 24 August 2005, Decision Superior Council of Magistracy no. 328 of 2005, http://www.csm1909.ro/csm/linkuri/26_09_2005__823_ro.pdf (accessed 16.09.2019). *See* in general Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 7). 876,877. *See* Annex H.
[120] A non-official translation of the 2001 code of conduct for magistrates in Romania is available as an Appendix II,B of the American Bar Association, Central and Eastern European Rule of Law Initiative, Final Report on the judicial ethics training, at http://www.americanbar.org/content/dam/aba/directories/roli/romania/romania_magistrates_ethics_06_2005.authcheckdam.pdf (accessed 16.09.2019), 30-38. The 2001 ethical code was included as a training material on judicial ethics for Romanian judges organized by the American Bar Association, Central and Eastern European Rule of Law Initiative in 2005.
[121] Society for Justice (SoJust), 'The Justice System in Romania—Independent Report' (September 2006), http://www.kas.de/wf/doc/kas_11060-544-2-30.pdf (accessed 16.09.2019), 30.
[122] Adopted by the Superior Council of Magistracy, Decision no. 328 of 2005 of 24 August 2005, in accordance with the Constitution of Romania, Article 133 (5,7) and Law no. 317 of 2004 on the Superior Council of Magistracy, Art. 24(1), 39(1). Based on modifications introduced through Art. III from Title XV 'Modifying and completing Law no. 317 of 2004 on the Superior Council of Magistracy' and Law no. 247 of 2005 on 'Reforms in the fields of property and justice, and other related matters.' This decision repealed the Superior Council of Magistracy Decision no. 144 of 26 April 2005 on the Code of Conduct for Magistrates in Romania, published in the Official Journal of Romania, Part I, no. 382 of 6 May 2005.
Law no. 317 of 2004, Art. 24 (1), 39 (1). Superior Council of Magistracy, Report on the Activity of the Superior Council of Magistracy (2005), http://www.csm1909.ro/csm/index.php?cmd=24 (accessed 16.09.2019), 36-38. The report mentions that the Superior Council of Magistracy adopted the code of conduct in 2005. In terms of involvement of judges, the Report presents information on a so-called "information campaign" taking place after the code of conduct was adopted. The report recalls that as part of this campaign 1137 judges were consulted (out

judicial reforms introduced in 2004 during the EU accession process.[123] The National Strategy for the Judiciary for 2005-2007 developed by the Ministry of Justice specifically pointed out that the code of conduct would be revised in order to reduce corruption within the judiciary and prosecutorial services.[124] In parallel with the revision process led by the Superior Council of Magistracy, the American Bar Association's Central and Eastern European Law Initiative (ABA/CEELI) offered practical training sessions to 164 Romanian judges on judicial ethics.[125] The main aim of these meetings was to familiarize judges with ethical values, but also to collect the opinion of judges for the purposes of the adoption of the new ethical code.[126]

The resulting ethical code sets out as a main purpose to "define standards of ethical conduct" for judges and prosecutors, in line with the dignity and honour of these professions.[127] In order to do so, the code of ethics defines five "standards of conduct:" independence,[128] supremacy of law,[129] impartiality,[130] and professional conduct,[131] the honour and dignity of the profession.[132] The final part of the ethical code contains an overview of the functions incompatible with the judicial profession.[133] From the outset, we can observe that the structure of the code of conduct emphasizes rule of law values.

Similarly, the content of the ethical code also highlights the rule of law values of judicial independence, impartiality and supremacy of law. For instance, under the value of independence the code reminds judges that they are responsible for protecting their own independence.[134] This obligation is remarkable because it makes possible the critical participation of judges in discussions concerning the functioning of courts. Moreover, the value of independence explains the external aspect of functional independence (i.e. vis-à-vis the Executive and Legislature). The value of supremacy of the law, explicitly mentions the importance of observing the principle of equality. This value also explicitly highlights that it is the role of independent judges to uphold the rule of law.[135]

In addition, the code of conduct pays attention to contemporary ethical questions raised by the increased openness of the judiciary, respectively by the communication possibilities of judges with the public. As a general approach, the code of conduct is

---

of the approximate total of 4733 judges, http://www.csm1909.ro/csm/linkuri/19_05_2011__41161_ro.pdf (accessed 16.09.2019). In addition, the participants in the initial judicial training programme participated in meetings discussing the code of conduct in the period of May-November 2005 taking place in 10 locations.

[123] *See* chapter 3.

[124] Ministry of Justice of Romania, 'National Strategy for Judicial Reform 2005-2007' 4,15.

[125] ABA/CEELI, Final Report on the judicial ethics training. https://www.americanbar.org/content/dam/aba/directories/roli/romania/romania_magistrates_ethics_06_2005.authcheckdam.pdf (accessed 16.09.2019). The ABA/CEELI office operated in Bucharest coordinating projects in Romania between 1991-2008, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/romania.html (accessed 16.09.2019).

[126] ABA/CEELI Report, 7-11.

[127] 2005 Ethical code Romania, Article 1.

[128] ibid, part II.

[129] ibid, part III.

[130] ibid, part IV.

[131] ibid, part V.

[132] ibid, part VI.

[133] ibid, part VII.

[134] Code of Conduct for Magistrates, value 1.

[135] ibid, value 2.

restrictive concerning the communication of judges with the media. Consider the overarching obligation of judges to refrain from any activities or manifestations that could hinder the dignity and honor of the judicial function and the position of judges in society.[136] This general constraint can be useful from the perspective of guaranteeing a united and impartial image of justice. Nevertheless, the ethical code allows judges to protect their personal image in case "defamatory" statements were made against them in the media.[137] In doing so, the ethical code allows individual judges to actively protect their own professional reputation and by extension the impartial image of justice.

Overall, the ethical code conveys a commitment to classic rule of law values underpinning judicial functioning, such as independence, impartiality, subordination to law and equality. As a main rule, the public communication of judges remains restricted. However, the ethical code empowers judges to actively promote their independence and to protect the image of justice, if their professional performance is attacked.

Nevertheless, at the time of writing, the ability of the Romanian judiciary to translate the rule of law content of these communication (judicial openness) mechanisms into an effective practice remains questionable. Consider, for instance, the context of 2017 judicial reform proposals by the Ministry of Justice.[138] An important part of the proposal introduced in August 2017 concerned the transfer of judicial disciplinary competences from the SCM to the Ministry of Justice.[139] The allocation of judicial disciplinary powers is a highly complex topic in the Romanian legal context. One of the main aims of the 2004 judicial reforms was to transfer disciplinary powers from the Ministry of Justice to the judiciary – because of the systematic abuse by the executive of these powers.[140] At the same time, the transfer of disciplinary proceedings has produced mixed outcomes. For instance, the European Commission has called repeatedly on the SCM to increase the transparency and effectiveness of judicial disciplinary proceedings.[141] Ultimately, these shortcomings formed also the basis for the Ministry of Justice's legislative amendment proposal.

As an immediate reaction to the legislative amendment proposals, the SCM accentuated in a press release the threats of such transfer of powers to judicial independence.[142] Namely, the SCM highlighted the tensions created for the "institutional autonomy and functional independence of justice" by these legal modifications. Moreover, the SCM also emphasized that disciplinary proceedings might be used to put pressure on judges, hindering in this way the deliverance of quality decisions. Ultimately, the SCM rejected the legislative proposal. Moreover, more than 3000 out of the total 6500

---

[136] ibid. value 5.
[137] id.
[138] For an English summary *see*, https://www.romania-insider.com/judges-prosecutors-changes-justice-laws/ (accessed 16.09.2019).
[139] Ministry of Justice of Romania, Proposal for the modification of Law no. 317 of 2004 on the Superior Council of Magistracy, (http://www.just.ro/wp-content/uploads/2016/10/Tabel-comparativ-L-317-pt-pagina-modif-1.pdf) (accessed 16.09.2019).
[140] *See* e.g. Cristina Dallara, *Democracy and Judicial Reforms in South-East Europe: Between the EU and the Legacies of the Past* (Springer 2014). 62,63.
[141] *See* e.g. European Commission, CVM Report, 2010, 3-4.
[142] *See* https://www.csm1909.ro/PageDetails.aspx?PageId=299&FolderId=4374 (accessed 16.09.2019). For the challenges of constitutional coherence since the 2003 amendment of the Constitution cf Bogdan Iancu: 'Separations of Powers and the Rule of Law in Romania' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015) 160,161; 168,169.

magistrates (including both judges and prosecutors) in Romania signed a memorandum opposing the transfer of the judicial disciplinary board to the Ministry of Justice.[143]

The above seems an example of an effective communication, having core rule of law values at its basis. The views of judges also seem an important part of the public debate that these significant reforms warrant. However, the internal functioning of the disciplinary division of the SCM seemed to undermine the commitment of the SCM to the expressed rule of law values. Specifically, concerns over the objective and meritocratic selection of members of the disciplinary board members by the President of this division – suggesting the appointment of members who are loyal to the President of the Judicial Inspection Panel – questioned the commitment of the SCM to core judicial values. The SCM set out to investigate and decide upon the manner of selection of the Judicial Inspection Panel members. However, the members of the disciplinary board blocked the quorum for the plenary vote on this matter by not participating at the plenary meeting in question.[144]

iii. Similarities and Differences

As a main similarity, our overview indicated that the content of judicial communication mechanisms incorporates both classic rule of law and new public management values. A possible explanation for this content could be the explicit reference in the constitutional and legal framework in both studied legal orders to both sets of values.[145] At the same time, the combination of the two groups of values suggests the commitment of both domestic judiciaries not only to judicial independence and related rule of law values, but also to contemporary considerations such as timeliness and transparency.

However, the balance established between rule of law and contemporary values in the strategic and ethical communication appeared different in the two legal orders. The content of the Hungarian communication strongly supports the economic-value orientation for judicial functioning promoted by the 2011 judicial reforms. This connection is particularly striking in the strategic goals and the new content of the judicial code of ethics. The significant reorganization of the Hungarian central judicial management, including the appointment of the new President of the NJO has played an important role in generating this overlap in terms of main goals and values.[146] In contrast, the content of the Romanian judiciary's communication – both strategic and ethical – places main emphasis on core rule of law values such as judicial independence, impartiality and the principle of equality in judicial functioning. A possible explanation could be the strong emphasis on these core rule of law values as part of the 2004 reforms, alongside with the value of transparency.

---

[143] Memorandum for the withdrawal of the legislative modification proposal concerning the functioning of courts, https://www.juridice.ro/538255/memoriul-magistratilor-romani-pentru-retragerea-proiectului-de-modificare-a-legilor-justitiei.html (accessed 16.09.2019). For an analysis of another public resistance by Romanian judges, a strike in 2009 opposing the non-implementation of salary bonuses, *see* Cristina Dallara and Ramona Coman, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 7). (arguing that those actions were motivated by the self-interest of judges rather than the protection of their independence).

[144] SCM, Schedule for the Plenary Session of 30 August 2017, https://www.csm1909.ro/PageDetails.aspx?PageId=255&FolderId=4376 (accessed 16.09.2019).

[145] *See* chapter 3.

[146] cf. Sonnevend, Jakab and Csink, 'The Constitution as an Instrument Everyday Party Politics' in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015) 99.

However, conveying an impartial image of justice in practice remains problematic to date.[147] The lack of established constitutional conventions in place between the public powers in Romania appears as an important inhibiting factor from this perspective; and one that requires lengthy overall implementation processes.[148]

C. Assessing judicial communication mechanisms in light of European standards

In proceeding with the critical evaluation of judicial communication mechanisms in Hungary and Romania, we will first assess the contribution of the domestic legal rules to the legitimacy of judicial output and upholding the rule of law. Second, we will assess the extent to which the domestic legal frameworks comply with binding and non-binding European requirements and recommendations. This part of the analysis is based on the map of European requirements developed in chapter 2. At the same time, we will also assess whether compliance with European recommendations in the two legal orders have contributed, or to the contrary, have hindered the legitimacy of judicial output at the domestic level.

I. Contribution to legitimacy of judicial output and the rule of law

Our normative assessment incorporates two parts. First, (i) we will assess the legal possibilities and practice of the representation of judicial values in public debate. Second, (ii) we will assess to what extent and how the studied legal orders establish core judicial values.

i. Representation of rule of law values in public debate

We established as a first legitimacy-enabling function of judicial communication mechanisms the enablement of the participation of the judiciary (1) through specific legal mechanisms and (2) representation of contemporary rule of law values by the judiciary in practice. The existence of specific legal communication mechanisms in both studied legal orders represents a positive development from a legitimacy perspective. At the same time, the existence of these mechanisms creates a legal possibility for the judiciary to participate in the public debate and represent core judicial values in practice. This legal possibility not only contributes to enhancing the legitimacy of judicial output, but also to realizing a balance between the constitutional powers, of central importance for upholding the rule of law.

However, the placement of main communication powers with the central judicial administration in both legal orders and the resulting absence of checks on the use or abuse of these powers create challenges from this legitimacy perspective. In the Hungarian legal

[147] Ramona Coman and Cristina Dallara, 'Judicial Independence in Romania' in Seibert-Fohr (ed) (n 7).
[148] cf. Seibert-Fohr (ed) (n 7). 1291-1302.

order, the extensive communication powers conferred to the President of the NJO through the new legal framework makes judicial communication very effective. However, the lack of effective legal constraints over the content of this communication raises questions concerning the neutrality of the resulting communication.[149] The striking overlap between the content of the judicial strategic goals and ethical code and the legislature's goals triggering the 2011 judicial reforms further exacerbates this challenge.

In the Romanian legal order, the (1) legal guarantees for the independence of the SCM holding main communication powers and (2) its main role to protect judicial independence represented a solid legal basis for the neutral, yet effective communication of the judiciary. However, the lack of control mechanisms over the communication powers of the SCM remains a concern.[150] In particular, the abuse of legal powers within the SCM undermines both the content and effectiveness of this communication. A hostile media and political environment and the underlying lack of constitutional conventions for the interaction between public powers further aggravate these legal and practical challenges for the legitimacy of the judiciary's output and its contribution to the rule of law.

ii. Establishment of core judicial values

As a second legitimacy function of judicial communication mechanisms, we identified the establishment of core judicial values through judicial codes of ethics. From this perspective, the existence of judicial codes of ethics in both legal orders is beneficial for enhancing the legitimacy of judicial output. In particular, current ethical codes guarantee the openness of judicial values towards the public. Moreover, the elaboration in their content of the connection between rule of law and contemporary values is beneficial for guiding the activity of judges[151] and thus reducing the arbitrary use of powers by judges, as a rule of law gain.

However, the adoption and enforcement of ethical codes in both legal orders created challenges from a legitimacy and rule of law perspective. In terms of the adoption process, the main role conferred to judicial councils in both legal orders raises concerns as to whose values are communicated to the public: those of judges or those of the judicial council. A possible counter-balance for this concern could be the participation of judges in the drafting process and the representativeness of judicial councils through their membership of all levels of courts. However, these mechanisms do not fully answer the concerns. Especially with reference to Hungary we could observe a very detailed account of manifestations that judges must refrain from. Such content could be used to dispel internal criticism within the judiciary.[152]

The legal possibility to enforce ethical breaches as part of disciplinary proceedings or evaluation proceedings further exacerbates this concern. This can render the communication of the judiciary very effective and unified but has potential deleterious effects for the autonomy and independence of individual judges. Overall, the current

[149] cf. Sonnevend, Jakab and Csink, 'The Constitution as an Instrument Everyday Party Politics' in von Bogdandy and Sonnevend, 99.
[150] cf. Cristina Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 7), 641.
[151] cf. Anthony Hol and Marc Loth, *Reshaping Justice: Judicial Reform and Adjudication in the Netherlands* (Shaker Publishing 2004), 85,86.
[152] cf. Zoltán Fleck, 'Judicial Independence in Hungary' in Seibert-Fohr (ed) (n 7), 79.

Hungarian experiences raise the question whether the ethical code was adopted to guide judges or to restrain their autonomy. Moreover, the confluence between judicial ethics and anti- corruption[153] or accountability mechanisms, could limit the full set of functions (motivating, accountability, transfer, innovation) that judicial codes of ethics present for the legitimacy of judicial output and the incremental reduction of arbitrary use of public power. The current legal mechanisms enforcing judicial ethics in the two studied legal orders are neither fully conducive for enhancing judicial integrity nor for enhancing judicial accountability in general.[154]

In summary, based on our analysis, a main legitimacy- and rule of law challenge in both legal orders was the uncontrolled nature of central judicial management's views on legislative changes affecting the judiciary. Empowering judicial councils to represent judicial values in public debate is an important contribution for the realisation of a balance between public powers. However, judicial councils need not only to contribute but also to comply with the rule of law requirement of balance of powers.[155] With these legitimacy-considerations in mind we will turn our attention to the compliance of the domestic legal frameworks with European output quality requirements and recommendations concerning judicial communication, and their consequences.

II. Compliance with European standards

Our analysis in chapter 2 of European standards for the quality of judicial output[156] indicated salient legally binding requirements by the European Court of Human Rights. This binding core is supplemented by non-binding suggestions by the European Commission, on the EU side; and by the recommendations of the Committee of Ministers' of Council of Europe Member States, the Venice Commission and the Consultative Council of European Judges, on the Council of Europe side. The above-mentioned sources constitute the basis for our assessment.

i. Binding requirement of guaranteeing judicial participation in public debate

A salient legally binding requirement set by the European Court of Human Rights on the basis of Article 10 ECHR guaranteeing the right to freedom of speech, was the obligation for Council of Europe Member States to guarantee judicial participation in public debate.[157] As we argued before, this requirement seems to encapsulate a core balance between rule of law and new public management requirements for the communication of the judiciary. On the one hand, it promotes the effectiveness of communication by requiring the judicial branch to participate in public debate. On the other hand, it sets the classic rule

---

[153] *See* e.g. Transparency International, 'Corruption Perpections Index 2017', https://www.transparency.org/news/feature/corruption_perceptions_index_2016 (accessed 16.09.2019).
[154] cf. David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (1 edition, Cambridge University Press 2016).
[155] Cristina Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 7). 641. Seibert-Fohr. 1295.
[156] *See* chapter 2,B,III. *See* Table 4 European output quality requirements and recommendations.
[157] Kudeshkina v Russia, Appl.No. 29492/05, 26 February 2009. Morice v France, Appl. No. 29369/10, 23 April 2015. Wille v Liechtenstein, Appl. No. 28396/95, 28 October 1999.

of law expectations for this communication to show restraint, and to be carried out with moderation and propriety, echoing expectations for the impartial image of the judiciary. Furthermore, this obligation formulated by the ECtHR made particular reference to (1) public debate concerning judicial reforms and (2) to judges in leadership positions having an explicit legal obligation to publicly represent the views of the judiciary.[158]

In *Baka v Hungary*, the ECtHR explicitly found that the 2011 judicial reforms in Hungary did not fulfil these requirements, and subsequently violated the right to a fair trial and the right of freedom of speech of the former President of the judicial council. However, our analysis suggests that the legal and normative framework ensuing since the 2011 judicial reforms does not comply with this core obligation either. The main concern is the potential political-affiliation of the President of the NJO, through the circumstances and manner of appointment. This concern is combined with the lack of effective control mechanisms over the communication competences and the striking overlap between the political agenda leading to the 2011 judicial reforms and the current communication of the judicial branch question Hungary's current compliance with effectively representing impartial judicial values as part of the public debate.

With respect to the Romanian legal order, we could identify a partial compliance. On the one hand, the legal framework enabled the effective communication of the judiciary with the legislature and the executive. The independence of the SCM constrained this communication. However, the (1) lack of control mechanisms over the communication powers and (2) lack of constitutional conventions guiding the effective interaction of public powers undermines the effectiveness of the participation of the Romanian judiciary in public debate. In both instances, non-compliance with this core European requirement contributes to legitimacy and rule of law challenges in the studied legal orders.

These mixed experiences in terms of compliance with the core balance raise the question to what extent the two legal orders comply with non-binding European suggestions. The most pressing question concerns the consequences of a possible non- or partial compliance with the legally binding core requirement and simultaneous compliance with non-binding suggestions.

ii. Non-binding recommendations: role of central judicial administration and ethical codes

Our analysis indicated as a first, and overarching, legally non-binding suggestion the significant role of the central judicial administration in terms of communication with the public. The European Commission, the Committee of Ministers Recommendation, the Consultative Council of European judges all explicitly recommended for judicial councils to be mainly responsible for this task.[159] Our analysis revealed that both the Hungarian and Romanian legal orders complied with this recommendation. At the same time a striking finding of our analysis was that the emphasis in the European suggestions on empowering

[158] Baka v Hungary [GC], para. 164.

[159] E.g. Commission of the European Communities, Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reforms and fight against corruption, C (2006) 6569 final. Recommendation CM/Rec(2010)12, para. 19. CCJE, Opinion no. 10 2007, Council for the Judiciary at the Service of Society, paras. 80-86; 91-96. *See* chapter 2,B,III,ii. *See* Table 4 European output quality requirements and recommendations.

judicial councils seems to have generated the unintended consequence of allowing uncontrolled communication powers. This in turn, seems to have created a challenge in both legal orders for expressing the values of judges as part of the public debate. Ultimately, compliance with the European recommendations did not automatically enable both an effective and impartial communication.[160]

A second specific mechanism, suggested by the Committee of Ministers' of Council of European Member States and the Consultative Council of European judges, was setting up courts' spokespersons.[161] We could observe that both the Hungarian and Romanian legal orders fully complied with the recommendation. A difference consisted in whether the legal framework explicitly referred to the role of courts' spokespersons (Romania) or whether an internal regulation established this role (Hungary). Regardless, in both instances the judicial council controlled the communication by court spokespersons centrally. This resulting central control over these competences can be problematic for enabling a neutral communication.

A third overarching recommendation for enhancing the quality of judicial communication with the public was the development of judicial codes of ethics. The European Commission, Committee of Ministers' and the Consultative Council of European Judges all explicitly suggested this mechanism.[162] Both studied legal orders complied with this recommendation and explained relevant rule of law values in their content. However, as the Hungarian example illustrates that judicial code of ethics can be used as a tool to reduce the pro-activeness of individual judges in protecting their independence. Ultimately, judicial codes of ethics might contribute to the centrally controlled communication of the judiciary. Whereas, the Romanian example illustrates that the establishment of judicial codes of ethics do not automatically contribute to the internalization of these professional values by judges. A particularly pressing point revealed by this analysis was the non-compliance with the ethical values by the members of the judicial council.

Overall, the above experiences exemplify that compliance with non-binding European recommendations contributed to the effectiveness of judicial communication and the incorporation of rule of law values in the legal and normative framework. However, our analysis indicates that compliance with these European recommendations did not automatically translate into a practice of having the neutrality and independent image of the judiciary as a main point of reference for the judiciary's participation in public debate.

The direct domestic compliance with these non-binding recommendations has become particularly important in light of the EU Justice Scoreboard measurements.[163] We can find relevant measurements of the communication of domestic judiciaries under the quality of justice systems indicator. Namely, the Scoreboard measures the (a) role of judicial councils in public communication, (b) availability of court spokespersons, (c)

---

[160] cf Anja Seibert-Fohr, 'European Standards for the Rule of Law and Independent Courts' (2012) Journal für Rechtspolitik 161.

[161] E.g. Recommendation CM/Rec(2010)12, para. 19.

[162] E.g. Recommendation CM/Rec(2010)12, para. 72-74. Magna Carta, para. 18. *See* also CCJE, 'Opinion no 3 on the principles and rules governing judges' professional conduct'19 November 2002.

[163] European Commission, EU Justice Scoreboard (http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm) (accessed 16.09.2019). For a critical assessment of the development of the content of the Scoreboard from a rule of law perspective Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' [2016] Hague Journal on the Rule of Law. 40.

training in communication, (d) ethical training of judges, (e) availability of monitoring of courts' activities – with specific reference to annual reports.[164] The judicial independence indicators do not measure corresponding rule of law elements of the communication, i.e. whether the judiciary or courts represent core judicial values as part of this communication. Instead, the evolving measurement of judicial independence considers the perceived independence of the judges and structural guarantees for judicial independence, i.e. proposing and appointing authorities, evaluation of individual judges, transfer and dismissal of judges.[165]

In doing so, the EU Justice Scoreboard indicators represent a striking overlap between the above-analysed European recommendations, and continue to support the economic-value orientation of EU instruments for guiding domestic judicial reforms.[166] In its current form, the EU Justice Scoreboard seems to promote the same deleterious effects for conveying an impartial communication of domestic judiciaries, as other non-binding instruments. Viewed from the perspective of constitutional independence of the judiciary, the content of the Scoreboard also seems to be in discordance with its ambition to promote judicial independence. The explicit reliance by the Hungarian judiciary on the Justice Scoreboard as a means to justify efficiency-oriented judicial reforms, disregarding or pushing to the periphery the constitutional value of judicial independence, should serve as a warning sign, calling for further improvement of the content of this instrument.

Finally, two related recommendations by the Committee of Ministers's of Council of Europe Member States and the Consultative Council of European Judges concerned the (1) the inclusion of judges in the development of ethical codes[167] and (2) the separation of judicial ethics from judicial disciplinary proceedings.[168] We must highlight that the Hungarian and Romanian legal orders formally complied with the first recommendation, but did not provide transparent information in this sense. Moreover, there is non-compliance in both legal orders with the second recommendation, creating challenges for the autonomy of individual judges.

---

[164] EU Justice Scoreboard 2017 Figure 26 (official in charge of explaining judicial decisions to the press, press guidelines), Figure 41 (continuous training : judgecraft, mangement, IT, judicial ethics). EU Justice Scoreboard 2016, Figure 18 (availability of online information about the justice system to the public), Figure 24 (relations between courts and media/press: officials in charge of explaining judicial decisions to the press, press guidelines), Figure 35 (continuous training: judgecraft, management, IT, judicial ethics). 2015 Scoreboard, Figure 18 (availability of monitoring of court activities: including the indicator of availability of annual reports), Figure 26 (availability of online information about the judicial system for the general public), Figure 27 (communication between courts and press/media: official in charge, press guidelines), Figure 28 (availability of training for judges on press communication), 2014 Scoreboard, Figure 13 availability of monitoring of courts' activities (including the publication of annual reports). 2013 Scoreboard, Figure 11 availability of monitoring courts' activities (including the publication of annual reports), Figures 23,24 judicial independence perception.

[165] *See* e.g. EU Justice Scoreboard 2017 (perceived and structural independence). 2016 Scoreboard, Figure 49, 50 (structural independence: composition and competences of councils for the judiciary). 2015 Scoreboard Figures 48, 49 structural independence (composition and powers of councils for the judiciary). 2014 Scoreboard, Figure 29 measured only perceived judicial independence.

[166] cf. Elaine Mak and Sanne Taekema (n 163), 40.

[167] Recommendation CM/Rec(2010)12, para. 73.

[168] Consultative Council of European Judges, Magna Carta, para. 18.

D. Conclusions and suggestions

The participation of the judiciary in public debate appears as a manifestation of the shared European value of the rule of law, and of particular importance for achieving a normatively and qualitatively sound balance of constitutional powers. However, our analysis shows that currently both the Hungarian and Romanian legal orders fall short of European and liberal-democratic requirements. Remarkably, the main shortcoming in both legal orders appears to be a result of an inadequate balancing act between the neutral and effective communication of the judicial branch. The exact form of the shortcoming is context-specific. Nevertheless, this fundamental similarity in terms of the main challenge between a (former) top performer and bottom performer in terms of judicial reforms in the CEE region adds urgency to considering the liberal-democratic and European core rule of law values underpinning the communication of the judiciary with its surroundings in the assessment of these reforms. What is more, our analysis indicated that following specific legal mechanisms suggested by European instruments did not automatically contribute to realizing an effective and independent communication of the domestic judiciaries. In the following paragraphs, we will propose some suggestions for realizing a normatively and factually sound balance between the neutral and effective communication of the judiciary.

i. Improving the legal framework: reconsidering formal enforcement mechanisms and uncontrolled communication powers

Our first set of recommendations concerns the domestic legal frameworks governing the communication of the judiciary with its surroundings. With reference to Hungary, a main legal consideration is to ensure that the communication of the judiciary is impartial. In this sense, the communication powers of the President of the NJO would require a more stringent control;[169] with particular reference to the general strategy, where no control is applicable. Furthermore, realizing a more balanced interaction among participants foreseen in the legal principles (President of the NJO, court presidents, and court spokespersons) would seem beneficial.[170] Finally, the enforcement of the ethical code as part of disciplinary proceedings led by the National Judicial Council should be repealed.

With reference to Romania, the introduction of specific control mechanisms over the communication powers of the judiciary seems imperative for the realisation of a balance between public powers.[171] Moreover, the inclusion of the code of conduct as part of the performance evaluation of individual judges should be repealed. Finally, the contribution of the Constitutional Court in further conceptualizing the constitutional dimension of judicial independence seems beneficial, given the ongoing challenges in practice in securing cooperation among public powers based on mutual respect.[172]

From the perspective of securing rule of law quality, it would be necessary in both legal orders to establish the constitutional independence and neutral communication of the

[169] cf. Kosař (n 154). 389-431.
[170] For a criticism of the constitutional delimitation of these competences *see* e.g. Sonnevend, Jakab and Csink, 'The Constitution as an Instrument Everyday Party Politics' in von Bogdandy and Sonnevend (ed) (n 92). 99.
[171] cf. Cristina Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed) (n 15), 641.
[172] cf. Adam Bodnar and Lukasz Bojarski, 'Judicial Independence in Poland' in ibid. 670-676. *See* also chapter 3.

judiciary within the constitutional balance of powers, rather than in isolation. Another key condition would be to establish judicial professionalism and integrity not only as the basis of judicial functioning but also as the basis judicial communication. Technical communication stragies cannot replace this step.

ii. Improving normative communication mechanisms

Our second set of suggestions concerns the normative communication mechanisms of strategic documents and judicial codes of ethics. Firstly, in the Hungarian legal order, the general strategy document should elaborate more clearly on the connection between the rule of law and new public management values. Moreover, it should more clearly indicate the input collected from judges or how the strategy accommodates the experiences of judges. The strategic document of the Romanian judiciary should contain more details with respect to further enhancing the integrity and professionalism of the Superior Council of the Magistracy.

Secondly, a key element for the effectiveness of judicial codes of ethics in practice in both legal orders appears to be not only the involvement of judges in their development, but also the continued engagement of judges in discussing their individual experiences in light of the ethical code.[173] In particular, in Romania the initiative of establishing judicial integrity counsels, developed in cooperation with the Dutch Council for the Judiciary, deserves a follow-up.[174] However, the hierarchical structure – i.e. through the appointment and control by court presidents or the council for the judiciary – should be avoided.[175] Considering the potential ethical breaches by the SCM, extending ethical training for the judicial inspection panel and the members of central administration would be beneficial.[176] Establishing such initiatives appears useful also in the Hungarian context.

Finally, supplementing the content of judicial codes of ethics with an explanatory section of each value could have a positive effect in both legal orders.[177] Recent initiatives in Romania in this sense seem beneficial.[178] It would also seem beneficial to follow this trend among Hungarian judges. However, we would advise against the frequent modification of judicial ethical codes given the fundamental nature in any given liberal-democratic legal order of the principle of judicial independence on which these normative instruments expand.[179]

Ultimately, it must be emphasized that judicial codes of ethics in particular can have an important role from the perspective of securing rule of law quality. These codes

---

[173] *See* e.g. ABA/CEELI, Final Report on the judicial ethics training, 7-11.
[174] *See* Superior Council of Magistracy Judicial Integrity Programme, http://integritate.ifep.ro/ (accessed 16.09.2019).
[175] Kosař (n 154). 121-141. *See* also Chapter 3.
[176] SCM 2016 Report on the Functioning of the SCM, 4-8.
[177] *See* e.g. NvVR, 'Guidelines for the Impartiality and Ancillary Positions in the Judiciary' (January 2014), http://www.rechtersvoorrechters.nl/media/matters_of_principle/Rechters-voor-Rechters_Matters-of-Principles.pdf (accessed 16.09.2019). 129-219.
[178] *See* Superior Council of Magistracy Judicial Integrity Programme, http://integritate.ifep.ro/ (accessed 16.09.2019).
[179] Lorne Sossin and Meredith Bacal, 'Judicial Ethics in a Digital Age' (2013) 46 University of British Columbia Law Review. Nathanael J Mitchell, 'Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media' (2012) Utah Law Review.

may contribute to establishing a rule of law culture within the judiciary. Moreover, ethical codes may contribute to communicating the professional values and integrity of judges to society. In light of this important rule of law role, moving beyond a formal approach and towards a more substantive approach with regards to judicial codes of ethics, as proposed above, seems critical from the perspective of establishing the judiciary as a rule of law institution in Hungary and Romania.

Conclusions: The importance of observing core rule of law requirements and the context of judicial reforms

After more than a decade since EU accession, the enthusiasm of Central and Eastern European member states towards core European Union values seems to have dissipated. In the Hungarian legal order, the results of the April 2018 elections granted a two-thirds parliamentary majority to Fidesz-KDNP. This majority allows the governing party to modify any legislation and the Constitution, without considering the opposition.[1] These powers could lead to yet unprecedented threats to judicial independence. Indeed, in June 2018 the Hungarian Parliament adopted the seventh amendment of the Fundamental Law.[2] With respect to the judicial branch the constitutional amendment introduced two important modifications. First, the seventh modification completely separated administrative courts from ordinary courts and established a separate Highest Administrative Court in the court system.[3] Second, the amendment of the Fundamental Law expanded the considerations that judges must take into account when interpreting legislation, including the preamble of the given legislation and the values established in the legislative preparatory documents.[4] The research in this study focused on the analysis of the content of legislative preparatory documents concerning the functioning of the judiciary. With regards to these sources, the study documented that the detailed explanations predominantly expressed new public management values, such as efficient use of human resources, timeliness of the judicial proceedings, balanced workload between courts, which created tensions for the rule of law values of irremovability and independent decision-making of judges. To the extent that legislative preparatory documents in other areas would present this construction, the new provision of the Fundamental Law would represent a further point of tension for the decision-making autonomy of judges in Hungary.

These recent modifications appear to put in action the more extensive judicial reform plans revealed in 2017. On that instance, the aim to establish a separate highest administrative court, packed with former Governmental employees, was announced.[5] Moreover, a possible legislative proposal revealed a plan to replace the current judicial self-governing bodies (National Judicial Office and National Judicial Council) established in 2011 with the central administration of the Judiciary by the Ministry of Justice.[6] In the current political context of Hungary, characterized by the political desire to capture the judiciary, these structural modifications could be a serious affront to the personal and functional independence of judges. Ultimately, these recent developments, along with *inter*

[1] *See* Fundamental Law of Hungary, Article S(2), T(4).
[2] Seventh Amendment to the Fundamental Law, Official Journal of Hungary no. 97, June 28, 2018, 4714-4717.
[3] Fundamental Law of Hungary, Article 25.
[4] Fundamental Law of Hungary, Article 28 entering into force on the 1st of January 2019.
[5] *See* http://www.kormany.hu/hu/igazsagugyi-miniszterium/hirek/a-jogallamisagot-vedi-majd-a-legfelsobb-kozigazgatasi-birosag (accessed 16.09.2019). *See* also Uitz Renáta, 'Editorial – The Perils of Defending the Rule of Law Through Dialogue' 15 European Constitutional Law Review 1 (2019), 13-16. Venice Commission CDL-AD(2019), Opinion on the Law on Administrative Courts and on the Law on the Entry into Force of the Law on Administrative Courts and Certain Transitional Rules, 19 March 2019.
[6] *See* chapter 3,B,III.

alia threats to academic freedom and civil society, have contributed to the European Parliament starting a rule of law investigation and triggering an Article 7 TEU procedure against Hungary.[7]

Since 2015, Poland has undergone a similar series of devastating modifications of the judicial organization aimed at controlling judges and having the effect of undermining judicial independence. In doing so, similar to Hungary, Poland became another example of a CEE EU member state with initial exemplary performance in terms of integrating rule of law values and judicial independence during the EU accession process overshadowed by recent setbacks in this field. With due regard to differences in the political context, the theoretical framework developed in this study, explaining the simultaneous integration of rule of law and new public management values, can be useful for analyzing developments in Poland. Employing similar means as Hungary, first, the Polish Constitutional Court was packed, then, its competences were modified.[8] The modification of the ordinary court system, the Supreme Court, and the council for the judiciary has followed.[9] These events, combined with the open resistance of the Polish Government towards fundamental EU values, have led the European Commission to activate the EU Rule of Law Framework.[10] Following the unsuccessful cooperation under the Rule of Law Framework,[11] the European Commission triggered an Article 7 TEU procedure against Poland in December 2017.[12] Notably, the content of judicial reforms in Poland formed part of the evolving case law by the CJEU on judicial independence that was analysed in this study.[13]

At the same time, in the Romanian legal order, the robust judicial reform processes that have started in August 2017[14] raise challenges for *inter alia* the independent decision-making and freedom of speech of judges. One concern is that the amended accountability mechanisms (i.e. material liability of judges, investigation of criminal offences) would be used to exert political pressure on the independent decision-making of judges. Indeed, the revised legal act on the status of judges transfers the competence to start procedures against

---

[7] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Report on a proposal calling on the Council to determine pursuant to Article 7(1) 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 (2017/2131NL), 11 April 2018, http://www.europarl.europa.eu/resources/library/media/20180411RES01553/20180411RES01553.pdf (accessed 16.09.2019). *See* also Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), para 9.

[8] *See* e.g. Thomas Thadeusz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgements of the Polish Constitutional Tribunal in Cases K34/15, K35/15 and beyond' [2016] Common Market Law Review 1753. 1754.

[9] Venice Commission, CDL-AD(2017)031-e Poland – Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, 3-25.

[10] Communication from the Commission to the European Parliament and the Council A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final.

[11] *See* Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3. 11-17.

[12] European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, Proposal for a Council decision on the determination of a clear risk of serious breach by the Republic of Poland of the rule of law, COM(2017)835 final, 20 December 2017.

[13] Case C-619/18 R, Commission v Poland EU:C:2018:852. *See* chapter 2.

[14] Law 207 of 2018 amending and completing Law 304 of 2004 on judicial organisation entered into force on 20 July 2018; Law 234 of 2018 amending and completing Law 317 of 2004 on the Superior Council of Magistracy entered into force on 11 October 2018, Law 242 of 2018 amending and completing Law 303 of 2004 on the status and remuneration of judges entered into force 15 October. Emergency Ordinance 92 of 2018 delayed the early retirement scheme with one year and introduces further changes to the revocation procedure.

judges – who in bad faith or in gross negligence committed judicial errors – from the Superior Council of Magistracy to the Ministry of Finances. The former retains only consultative powers.[15] In addition, amendments of the legal act on court organization aim to establish a new Section within the Prosecutor's Office Attached to the High Court of Cassation and Justice for the investigation of criminal offences within the judiciary.[16] Furthermore, legislative amendments introduced an early retirement scheme for judges and extended the grounds for revoking SCM Members. The joint effect of these mechanisms could be deleterious for the personal independence of judges. Furthermore, the amended version of the act on the status of judges imposes a specific obligation on judges to "refrain from defamatory manifestation and expression, in any way, against the other powers of the state – legislative and executive" in the exercise of their duties.[17] In contrast, no such legal obligation is imposed on the legislative and executive powers. A specific threat here is the blocking from the public debate of the opinion of judges relating to the adequate functioning of the judicial system.

Upon the Constitutional Court's acceptance of these revised versions of the proposed legislations; the legal amendments were set to enter into force in June 2018.[18] However, the President of Romania refused to sign the legislation and transferred the reform package for review by the Venice Commission.[19] At the same time, the Cooperation and Verification Mechanism report has warned Romania against relapses in guaranteeing judicial independence[20] – a condition under which Romania and Bulgaria remain explicitly subject to ongoing supervision by the European Commission.[21]

Following the results of the European Parliament elections in May 2019, the Hungarian Government announced that the proposed administrative courts would not be established. In a similar vein, the Romanian Government indicated its willingness to reconsider the 2018 reforms. However, these announcements only signal that the proposed legislative modifications may not take effect, and do not resolve the underlying threats for judicial independence and the rule of law in these countries. At the same time, these more recent events and the legal changes documented in detail in this study, point out that European rule of law frameworks are vulnerable in crucial respects to political manipulation.[22]

This study set out to address this broader concern by focusing on the specific question of how the Hungarian and Romanian legal orders have implemented European rule of law requirements and recommendations for judicial organization and what can be learnt from these experiences for balancing rule of law and new public management values.

---

[15] Law 303 of 2004, 2018 March 26 modifications, Art. 26(8). http://www.cdep.ro/comisii/suasl_justitie/pdf/2018/rp418_17.pdf (accessed 16.09.2019). Art. 96.

[16] Law 304 of 2004, Art. 88supra 1 – supra 9.

[17] Law 303 of 2004, Art. 9(3).

[18] Constitutional Court of Romania, Decision no. 45 of 2018.

[19] *See* http://www.presidency.ro/en/media/press-releases/request-to-the-venice-commission-by-president-of-romania-mr-klaus-iohannis (accessed 16.09.2019). *See* Venice Commission CDL-AD(2018)017.

[20] 2017 November Cooperation and Verification Mechanism Report Romania, 2-3. 2017 Technical Report Romania, 4-6. 2018 Cooperation and Verification Mechanism Report Romania, 3,4. 2018 Technical Report Romania, 4-11.

[21] *See* Introduction, C.

[22] For a detailed overview concerning the depth of these challenges *see* Maurice Adams, Ronald Janse, 'Rule of Law Decay: Terminology, Causes, Methods, Markers and Remedies' (2019) 11 Hague Journal on the Rule of Law 1, 1-18.

As established at the beginning of this study, the incorporation of new public management values[23] in the legal framework governing judicial organization in EU Member States is paramount for the legitimate functioning of judiciaries in liberal-democracies[24] and for fulfilling the role of national judges as de-centralized EU judges effectively upholding EU law.[25]

The theoretical framework demonstrated that European binding requirements establish core rule of law requirements for the organization of Member State's judiciaries. Where applicable, the incorporation of new public management values is a result of a balancing act.[26] Importantly, core rule of law values are maintained as a main point of reference. Overall, with regards to non-binding European recommendations, it is possible to establish the binding core rule of law values as a basis of these recommendations. In a similar vein, non-binding European recommendations set new public management requirements in relation to the rule of law core. However, the content of the studied non-binding recommendations has a more prominent focus on new public management values and overall adopts an approach focusing on formal-institutional mechanisms. Given the possible legal effects of these recommendations, especially in CEE states, this content could hinder rather than promote the principle of judicial independence and securing rule of law quality.[27]

The in-depth contextual-comparative case studies showed the core balance to be missing in Hungary and Romania. Indeed, the case studies demonstrate that the main challenge for the Hungarian and Romanian legal orders is not how to combine rule of law and new public management values, but rather the more fundamental task of how to establish and secure core rule of law values.[28] In both legal orders, the chapters argue that the simultaneous affirmation of rule of law and new public management principles goes beyond creating tensions between the two types of values, and result in specific risks for judicial independence. This imbalance in the two studied legal orders goes against core European rule of law values of securing merit-based judicial selections, the principle of a lawful judge; as well as the values of effective participation of the judiciary in public debate allowing for the representation the professional rule of law values shared by judges.

In this sense, the analysis confirmed the initial hypothesis posed in this study according to which the simultaneous integration of rule of law and new public management values in the legal frameworks of Hungary and Romania would lead to a different layout of judicial organization than the one experienced in established liberal-democracies. Importantly, this lack of balancing act results in negative effects for the three studied

---

[23] *See* Introduction, A.

[24] cf. Elaine Mak, *De rechtspraak in balans. Een onderzoek naar de rol van klassiek-rechtsstatelijke beginselen en 'new public management'-beginselen in het kader van de rechterlijke organisatie in Nederland, Frankrijk en Duitsland*, (Wolf Legal Publishers 2007), Chapter 1, 23-53. Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances*, (Intersentia 2007) 9-33. Daniela Piana, *Judicial Accountabilities in New Europe* (Ashgate 2010) chapter 1. *See* introduction, A.

[25] Tobias Nowak, Fabian Amtenbrink, Mark Hertogh and Mark Wissink, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (Eleven International Publishing 2012). Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (2014), 173-235. *See* Introduction, B.

[26] *See chapter 2.*

[27] *See* chapter 2,B,I,ii; II,ii; III,ii and C.

[28] cf. Anja Seibert-Fohr, 'Judicial Independence: The normativity of an evolving legal principle' in Seibert-Fohr (n 19), 1291-1302,

dimensions of judicial independence, namely the independent status of judges, securing independent decision-making processes and the constitutional independence of the judiciary vis-à-vis the legislative and executive branches.

This finding was overarching with respect to all three dimensions of the legitimacy of judicial functioning and addressed the personal, functional, constitutional and organizational dimensions of judicial independence.[29] Moreover, this finding holds in two case studies, representing two legal orders experiencing rule of law challenges of a different nature. Hungary represents an initial good performer that later experienced rule of law backsliding. While, Romania represents an EU Member State experiencing persistent rule of law challenges, as evidenced by ongoing oversight by the European Commission.[30]

The comparative analysis also contributed with explanatory factors behind this challenging implementation process. Indeed, the case studies revealed that the quality of the legal framework, political factors, including an ambition to control the judiciary but also lack of conventions guiding the interaction between public institutions, and judicial corruption contribute to difficulties in translating European rule of law standards for the organization of the two studied judiciaries. The analysis including legislative preparatory documents, constitutional texts, legal acts, Constitutional Court decisions, policy documents as well as internal regulations and reports by the judiciary proved instrumental for uncovering the full extent and nature of the threats to judicial independence.

However, this study moved beyond the above-described factors and helped us identify two separate ways in which the incorporation of new public management values threatens judicial independence. One concern is that new public management values are used as a guise to dismantle rule of law guarantees for judicial functioning. This was most prominent concerning the Hungarian case study. Here, legislative preparatory documents had a strong emphasis on new public management values, such as ensuring a balanced workload between courts, selecting adequately qualified judges and effective communication of the judiciary with its surroundings.[31] These new public management values were dominant in judicial policy documents, such as the communication rules by the President of the NJO, the decisions reallocating cases, and the decisions annulling judicial selection processes.[32] In doing so, these new public management values posed a threat to the rule of law values of guaranteeing the neutrality of the judicial branch, merit-based judicial selections and the equality among candidates for the judicial office as well as the principle of a lawful judge. According to the Constitutional Court of Hungary the decisions by the President of the NJO may only rely on legal principles and values incorporated in the legal and constitutional framework.[33] However, the extensive and explicit incorporation of new public management values in the legislative preparatory documents left a wide possibility to the President of the NJO to create tensions for rule of law values – with a potential to use efficiency-oriented values in a way to threaten the functional independence of judges.

The other concern was that the legal framework mainly focuses on legal instruments inspired by new public management values, and rule of law values remain

[29] *See* chapter 1,B.
[30] *See* Introduction, C.
[31] *See* chapters 4,5,6 B,I,i.
[32] *See* chapters 4,5,6 B,II,i and D.
[33] Constitutional Court of Hungary, Decision no. 3154 of 2017 (VI. 21.) AB, 23. *See* chapter 3,A,II,i.

underdeveloped. This concern was more visible with respect to the Romanian case study. In this case, legislative preparatory documents emphasized rule of law values, such as the personal independence and irremovability of judges, as well as the independent decision-making by judges and reducing arbitrariness in the allocation of cases. However, the legal texts and judicial documents mainly focused on new public management values, such as the organization of competitive judicial selection processes, the principle of random allocation of cases as well as the communication by the Superior Council of Magistracy on behalf of the judiciary with other public powers and the public.[34] The discussed new public management principles were also accompanied by detailed procedural rules. Nonetheless, this approach and related mechanisms left a reduced room to integrate fundamental rule of law values, such as the meaning of good reputation and integrity of candidates for the judicial office in Romania, the autonomy of individual judges and establishing the domain for the judiciary vis-à-vis the executive and legislative branches.[35]

Based on these findings, the study argues that there are two interrelated key conditions for upholding judicial independence and related rule of law values for judicial organization in Member States with fragile rule of law frameworks. One condition concerns securing core rule of law requirements present in legally binding EU and Council of Europe requirements.[36] This exercise must move beyond the integration of formal mechanisms and should be based on broader pluralistic political processes as well as further internal judicial processes. From the perspective of this study, dimensions of judicial independence that still required to be integrated in the legal and broader legal-cultural, political, and societal frameworks of Hungary and Romania appear to be the personal independence and irremovability of judges, independent decision-making process and autonomy of judges within the judicial organization and the constitutional independence of the judiciary.

The other condition is considering legal developments in their broader political, societal and judicial-cultural context.[37] With regards to this condition, from the perspective of the present study it remains imperative that legislative preparatory documents, legal sources, judicial organizational documents and Constitutional Court decisions explicitly explain and consider the core balance between values of different nature. Provided these two conditions are met, a third, interrelated, condition should fall into place, namely the context-specific incorporation of new public management values while maintaining their rule of law foundations. This final condition contributes to the legitimate functioning of judiciaries. However, only if the first two conditions are established can the longer path of securing rule of law quality be followed.

From a comparative perspective, these results of the Hungarian and Romanian case studies align with experiences concerning the modification of judicial organization in

---

[34] *See* chapters 4,5,6, B,I,ii.
[35] *See* chapters 4,5,6, C and D.
[36] cf. Dimitry Kochenov, 'The Missing EU Rule of Law?' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016). *See* Tables 2,3,4.
[37] cf. Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading Democracy and the Rule of Law?* (Springer-Verlag 2006). 1-9 Zoltán Fleck, 'Judicial Independence in Hungary' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012). Michel Rosenfeld, Wojciech Sadurski and Roberto Toniatti, 'Central and Eastern European Constitutionalism a Quarter Century after the Fall of the Berlin Wall: Introduction to the Symposium' (2015) 13 International Journal of Constitutional Law 119. 119-123. Manuel Gutan and Bianca Selejan-Gutan, *Europeanization and Judicial Culture in Contemporary Democracies* (Hamangiu 2014). *See* Introduction, A. Chapters 4,5,6, B.

other post-communist EU member states. Reference is made here to Poland, Bulgaria, Slovakia, and to some extent, Czechia.[38] The experience shared in this region mostly points to the insufficiency of formal mechanisms for securing rule of law quality. A special point of concern is that formal-institutional frameworks proved to be fragile when facing political pressure.[39] Indeed, as it has been also pointed out in this study, the significant empowerement and isolation of the judiciary did not secure the institutionalization and internalization of judicial independence. Without these, the culture of judicial independence and the establishment of the judiciary as a rule of law institution within the constitutional balance of powers cannot be secured. Ultimately, the above remain essential for securing the principle of judicial independence and rule of law quality in line with the liberal democratic normative framework and legally binding core rule of law EU requirements.

The above-mentioned experiences also have implications for judicial reforms in Serbia, Montenegro, Albania and other countries seeking accession to the EU. Indeed, the predominantly formal-institutional approach of the recommendations, which remained a part of the accession framework,[40] could contribute to similar rule of law fragilities uncovered in CEE member states. That is not to say that the more prominent and separate position of the rule of law in the enlargement framework is not a positive development.[41] However, from the perspective of this study, it appears essential for this rule of law-focus to be combined with clear and consistent references to the core rule of law requirements concerning judicial organization.[42]

Finally, the above-mentioned insights have implications for the practical and academic discussions surrounding the EU mechanisms for protecting the values enshrined in Art. 2 TEU. From the perspective of this study, the developing field of EU judicial organization-[43] and rule of law mechanisms should focus on the conditions of consistently promoting core rule of law values for judicial organization and observing the context of reforms. Promising examples in this sense are the judgments of the CJEU in the AJPS and Polish cases. Indeed, the evolving case law by the CJEU on the basis of the second sub-paragraph of Art. 19(1) TEU could be a powerful tool for protecting judicial independence

---

[38] For a detailed comparison *see* David Kosař, Jiři Baroš and Pavel Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', (2019) 15 European Constitutional Law Review 427, 443-461. The contribution proposes the separation of powers as a theoretical framework for understanding legal difficulties in CEE states. *See* also, Bojan Bugarič, 'Central Europe's descent into autocracy: A constitutional analysis of authoritarian populism' (2019) 17 International Journal of Constitutional Law 2, 597-616.

[39] David Kosař, Jiři Baroš and Pavel Dufek (n 36), 461. *See also* Kriszta Kovács, Kim Lane Scheppele, 'The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union', (2018) 51 Communist and Post-Communist Studies 189-200, 191-194.

[40] Lisa Louwerse, Eva Kasotti, 'Revisiting the European Commission's Approach Towards the Rule of Law in Enlargement' (2019) 11 Hague Journal on the Rule of Law 223, 231-238. *See* also Kalypso Nicolaïdis & Rachel Kleinfeld, 'Rethinking Europe's "Rule of Law" and Enlargement Agenda: The Fundamental Dilemma', Sigma Paper OECD no. 49 (2012), 11.

[41] *See* e.g. Commission Communication, 'Enlargement Strategy and Main Challenges 2012-2013' COM(2012)600 final, 10 October 2012. Commission Communication, 'Enlargement Strategy and Main Challenges 2013-2014' COM(2013)700, 16 October 2013, 6. Commission Communication, 'EU Enlargement Strategy' COM(2015) 611final, 10 November 2015, 3.

[42] *See* Table 2 European requirements and recommendations for the quality of judicial input, Table 3 European requirements and recommendations for the quality of judicial throughput, Table 4 European requirements and recommendations for the quality of judicial output.

[43] *See* chapter 2,B, chapters 4,5,6,C.

in accordance with the rule of law.[44] Although useful to address severe violations, it must be mentioned that the judicial protection of the CJEU would not be enough to secure rule of law quality in CEE states. As mentioned previously, that remains the task of broader democratic, judicial-organisational processes.[45]

Within the EU Rule of Law Framework, the contextualized approach would allow the European Commission to activate the Rule of Law Framework vis-à-vis Member States that do not display an open opposition towards core EU values, nevertheless, legal reforms systematically go against fundamental rule of law requirements.[46] Nonetheless, the legal force and soundness of dialogue-based European instruments should not be overstated.[47] Indeed, from the perspective of this study, the primary focus for enhancing rule of law quality should be the national level. In this longer process, for instance, the more stringent observation of the rule of law foundations for judicial-organizational mechanisms in the evolving content of the EU Justice Scoreboard would make this information tool more useful for Member States experiencing rule of law challenges.[48]

Only if the above-mentioned conditions are closely observed at both the national and EU level, could the principle of judicial independence and related rule of law values be progressively integrated in the legal framework and its specific context in Hungary and Romania, and contribute to the successful continuation of the European integration project.

[44] *See* chapter 2,D. Case C-64/16 Associação Sindical dos Juízes Portugueses ECLI:EU:C:2018:117. Case C-619/18 R, Commission v Poland EU:C:2018:852. cf. Matteo Bonelli, Monica Claes, 'Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary', 14 European Constitutional Law Review 2018, 622,623. Laurent Pech and Sébastien Platon, 'Judicial Independence under threat: The Court of Justice to the rescue in the *ASJP* case', 55 Common Market Law Review 2018, 1832,1833. With reference to the ECtHR, *see* also Andreas Føllesdal, 'Independent Yet Accountable: Stress Test Lessons for the European Court of Human Rights' (2017) 24 Maastricht Journal of European Comparative Law 4, 484-510.

[45] *See e.g.* Silvia Suteu, 'The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?' (2019) 15 European Constitutional Law Review, 488, 488-518.

[46] cf. Pech and Scheppele (n 4), Part IV.

[47] cf. Uitz (n 5), 7-16. For a critical analysis concerning the Venice Commission, *see* Bogdan Iancu, '*Quod licet Jovi non licet bovi*? The Venice Commission as Norm Entrepreneur' (2019) 11 Hague Journal on the Rule of law 1, 189-221.

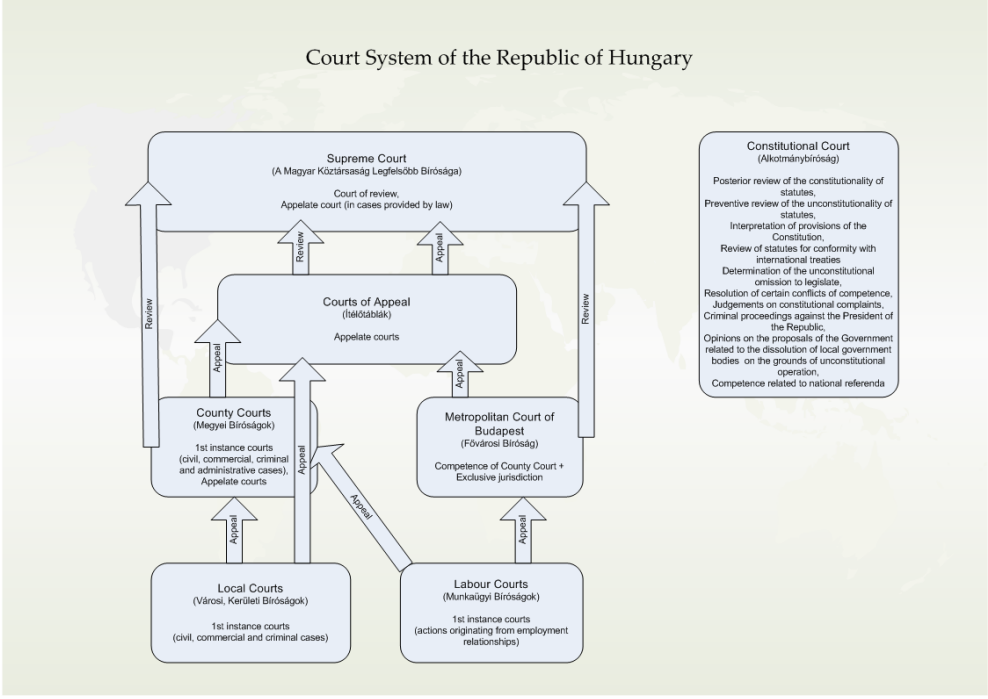
[48] cf. Elaine Mak and Sanne Taekema, 'The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application' (2016) Hague Journal on the Rule of Law, 40. *See* chapters 4, 5, 6.

Appendices

Annex A. Court System of Hungary

Types and levels of Courts:

- Constitutional Court of Hungary (Magyarország Alkotmánybírósága)
- Curia (Kúria)[1]
- Regional Courts (Ítélőtáblák)
- County Courts (Megyei Bíróságok)
- Metropolitan Court of Budapest (Fővárosi Bíróság)
- Local Courts (Városi, Kerületi Bíróságok)
- Labour Courts (Munkaügyi Bíróságok)
- Administrative Courts



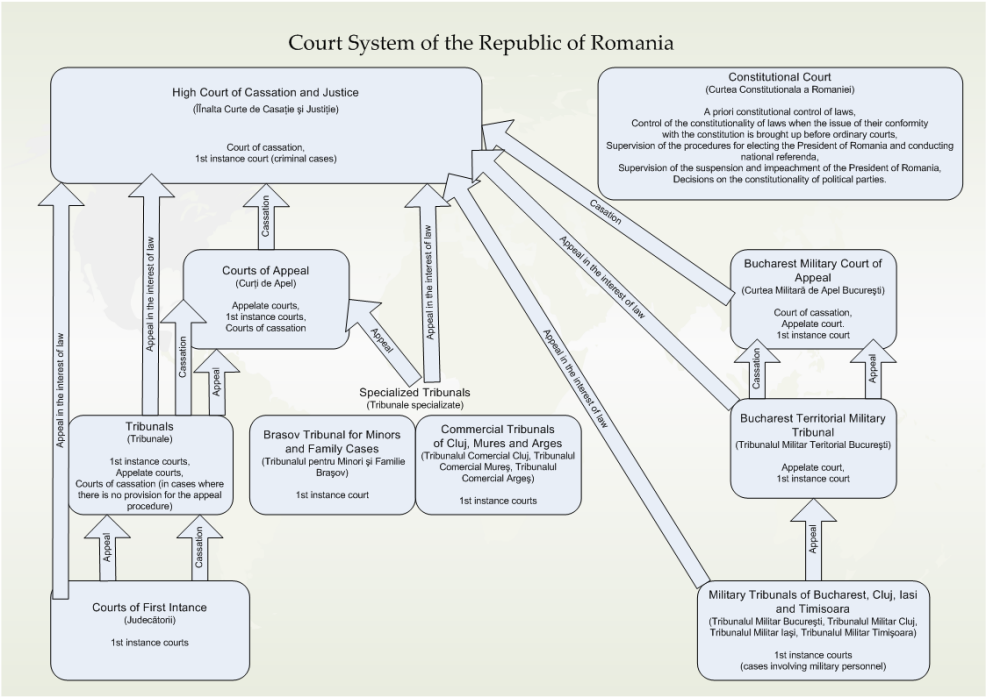
Source (2015): http://www.aca-europe.eu/index.php/en/tour-d-europe-en (accessed 16.09.2019)

[1] The Supreme Court of Hungary has been renamed Curia and its competences modified through the 2011 reforms.

Annex B. Court System of Romania

Types and levels of Courts:

- Constitutional Court of Romania (Curtea Constituțională a României)
- High Court of Cassation and Justice (Înalta Curte de Casație si Justiție)
- Courts of Appeal (Curți de Apel)
- Bucharest Military Court of Appeal (Curtea Militară de Apel Bucuresti)
- Tribunals (Tribunale)
- Bucharest Territorial Military Court (Tribunalul Militar Teritorial)
- Brasov Tribunal for Minors and Family Law (Tribunalul pentru Minori si Familie Brasov)
- Commercial Tribunals of Cluj, Mures and Arges (Tribunalul Comercial Cluj, Mures si Arges)
- Courts of First Instance (Judecătorii)



Source (2007): http://www.aca-europe.eu/index.php/en/tour-d-europe-en (accessed 16.09.2019)

Annex C. Primary and Secondary Sources on Judicial Functioning in Hungary

Type	Source	Language
Fundamental Law 2011	https://goo.gl/tnmwb6	English (Official Translation)
Preparatory Document – Fundamental Law T/2627	http://www.parlament.hu/irom39/02627/02627.pdf	Hungarian
Constitutional Court Decisions	http://hunconcourt.hu/case-law/translations	Hungarian (selected English translation available)
Act CLXI of 2011 on Court Organization 2011	National Assembly of Hungary (adopted 28 November 2011)	Hungarian
Legislative Preparatory Documents on 2011 Legal Act on Court Organization	National Assembly of Hungary (available at http://www.parlament.hu/irom39/04743/04743.pdf)	Hungarian
Act CLXII on the Legal Status and Remuneration of Judges 2011	National Assembly of Hungary (adopted on 28 November 2011)	Hungarian
Preparatory Documents for the Legal Act on the Status of Judges 2011	National Assembly of Hungary (available at: http://www.parlament.hu/irom39/04744/04744.pdf)	Hungarian
Annual Reports of the Judicial Council	Reports by the President of the National Judicial Office (available at: http://birosag.hu/obh/elnokenek-beszamoloi)	Hungarian
Pre-accession Regular Reports and Documents	European Commission (available at: http://aei.pitt.edu/view/eusubjects/H017006.html)	English
European Parliament Rule of law Evaluation	European Parliament (available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0227+0+DOC+XML+V0//EN)	English
Venice Commission Reports	Venice Commission (available at: http://www.venice.coe.int/webforms/documents/?country=17&year=all)	English

Annex D. Primary and Secondary Sources on Judicial Functioning in Romania

Type	Source	Language
Constitution of Romania 2003	Constitution of Romania, republished in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. The Constitution was modified and completed through Law no. 429 of 2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003. The Law on the revision of the Constitution was approved through the national referendum of 18-19 October 2003. The Constitutional Court confirmed the results of the national referendum through Decision no. 3 of 22 October 2003. (available at: http://www.cdep.ro/pls/dic/site.page?id=371&idl=2&par1=2)	Romanian/ English (official translation)
Preparatory Documents 2003 Constitutional Amendment	Parliament of Romania, Preparatory Documents for Legal Act no 227 of 2003 on the amendment of the Constitution (Available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=3883&tot=1) Law no 429/2003 on the revision of the Constitution of Romania, Official Gazette of Romania, Part I, no. 758 of 29 October 2003 (available at http://www.cdep.ro/pdfs/reviz_constitutie_en.pdf)	Romanian/English (official translation)
Constitutional Court Decisions	Constitutional Court	Romanian
Law on judicial organization 2004	Parliament of Romania, Official Journal: Law no. 304 of 2004 on the organization of the judiciary, Official Gazette of Romania, Part I, no. 576 of 29 June 2004.	Romanian
Preparatory documents for 2004 Law on Judicial Organization	Parliament of Romania (available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5239).	Romanian
Law on the status of judges 2004	Parliament of Romania, Official Journal: Law no. 303 of 2004 on the status of judges, republished in the Official Gazette of Romania, Part. I, no. 653 of 22 July 2005; initially published in the Official Gazette of Romania, Part I, no. 576 of 29 June 2004	Romanian
Preparatory documents for the 2004 Law on the Status of Judges	Parliament of Romania(available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5248).	Romanian
Law on the Superior Council of Magistracy	Parliament of Romania, Official Journal: Law no. 317 of 2004 concerning the Superior Council of Magistracy, initially published in the Official Gazette of Romania, Part I, no. 599 of 2 July 2004. Republished in the Official Gazette of Romania Part I, no. 827 of 13 September 2005; republished in the Official Gazette of Romania, Part I, no. 628 of 1 September 2012.	Romanian
Preparatory documents SCM law	Parliament of Romania (available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=5547&cam=2).	Romanian
Judicial Council Decisions	Superior Council of Magistracy (available at: http://www.csm1909.ro/DecisionsV1.aspx).	Romanian
Pre-accession reports and instruments	European Commission (1998-2006) (available at: http://aei.pitt.edu/view/eusubjects/H017006.html).	English
Reports under the Cooperation and Verification Mechanism	European Commission (2007 and onwards) (available at: http://ec.europa.eu/cvm/progress_reports_en.htm).	English
Venice Commission Opinion	Venice Commission, Opinion CDL-AD(2012)026 On the compatibility with constitutional principles and the rule of law of the actions taken by the Government and the Parliament of Romania (available at http://www.venice.coe.int/webforms/documents/?country=25&year=all)	English

Annex E. Legal excerpts Hungary

Fundamental Law of Hungary – excerpts

Article B
(1) Hungary shall be an independent, democratic rule of law State.

Article XXIV
(1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities. Authorities shall be obliged to give reasons for their decisions, as provided for by an Act.

THE STATE
Courts

Article 25
(1) Courts shall administer justice. The supreme judicial organ shall be the Curia.
(2) Courts shall decide on:
a) criminal matters, civil disputes and on other matters specified in an Act;
b) the lawfulness of administrative decisions;
c) the conflict of local government decrees with any other legal regulation, and on their annulment;
d) the establishment of non-compliance of a local government with its obligation based on an Act to legislate.
(3) In addition to Paragraph (2), the Curia shall ensure uniformity of the application of the law by the courts and shall take uniformity decisions which shall be binding on the courts.
(4) The organization of the judiciary shall have multiple levels. Separate courts may be established for specific groups of cases.
(5) The central responsibilities of the administration of the courts shall be performed by the President of the National Office for the Judiciary. The National Council of Justice shall supervise the central administration of the courts. The National Council of Justice and other bodies of judicial self-government shall participate in the administration of the courts.
(6) The President of the National Office for the Judiciary shall be elected by the National Assembly from among the judges for nine years on the proposal of the President of the Republic. The President of the National Office for the Judiciary shall be elected with the votes of two-thirds of the Members of the National Assembly. The President of the Curia shall be a member of the National Council of Justice further members of which shall be elected by judges, as laid down in a cardinal Act.
(7) An Act may provide that in certain legal disputes other organs may also act.
(8) The detailed rules for the organization and administration of courts, for the legal status of judges, as well as the remuneration of judges shall be laid down in a cardinal Act.
Article 26
(1) Judges shall be independent and only subordinated to Acts; they shall not be instructed in relation to their judicial activities. Judges may only be removed from office for the

reasons and in a procedure specified in a cardinal Act. Judges may not be members of political parties or engage in political activities.
(2) Professional judges shall be appointed by the President of the Republic, as provided for by a cardinal Act. Only persons having reached the age of thirty years may be appointed judge.
Except for the President of the Curia and the President of the National Office for the Judiciary, the service relationship of judges shall terminate upon their reaching the general retirement age.
(3) The President of the Curia shall be elected by the National Assembly from among the judges for nine years on the proposal of the President of the Republic. The President of the Curia shall be elected with the votes of two-thirds of the Members of the National Assembly.

Article 27
(1) Unless otherwise provided in an Act, courts shall adjudicate in chambers.
(2) Non-professional judges shall also participate in the administration of justice in the cases and ways specified in an Act.
(3) Only professional judges may act as a single judge or as the president of a chamber. In cases specified in an Act, court secretaries may also act within the powers of a single judge; in the course of such activity of the court secretary, Article 26(1) shall apply to him or her.

Article 28
In the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes, which are in accordance with common sense and the public good.

Annex F. Legal excerpts Romania

Constitution of Romania – excerpts

TITLE I
General Principles

ARTICLE 1 (Romanian State)
(1) Romania is a sovereign, independent, unitary and indivisible National State.
(2) The form of government of the Romanian State is a Republic.
(3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.
(4) The State shall be organized based on the principle of the separation and balance of powers -legislative, executive, and judicial - within the framework of constitutional democracy.
(5) In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory.

TITLE II
Fundamental Rights, Freedoms and duties

ARTICLE 21 (Free access to Justice)
(1) Every person is entitled to bring cases before the courts for the defence of his legitimate rights, liberties and interests.
(2) The exercise of this right shall not be restricted by any law.
(3) All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term.
(4) Administrative special jurisdiction is optional and free of charge.

TITLE III
Public Authorities

CHAPTER VI
Judicial authority

SECTION 1
Courts of law

ARTICLE 124 (Administration of Justice)
(1) Justice shall be rendered in the name of the law.
(2) Justice shall be one, impartial, and equal for all.
(3) Judges shall be independent and subject only to the law.

ARTICLE 125 (Statute of Judges)
(1) The judges appointed by the President of Romania shall be irremovable, according to the law.
(2) The appointment proposals, as well as the promotion, transfer of, and sanctions against judges shall only be within the competence of the Superior Council of Magistracy, under the terms of its organic law.
(3) The office of a judge shall be incompatible with any other public or private office, except for academic activities.

ARTICLE 126 (Courts of law)
(1) Justice shall be administered by the High Court of Cassation and Justice, and the other courts of law set up by the law.
(2) The jurisdiction of the courts of law and the judging procedure shall only be stipulated by law.
(3) The High Court of Cassation and Justice shall provide a unitary interpretation and implementation of the law by the other courts of law, according to its competence.
(4) The composition of the High Court of Cassation and Justice, and the regulation for its functioning shall be set up in an organic law.
(5) It is prohibited to establish extraordinary courts of law. By means of an organic law, courts of law specialized in certain matters may be set up, allowing the participation, as the case may be, of persons outside the magistracy.
(6) The judicial control of administrative acts of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed, except for those regarding relations with the Parliament, as well as the military command acts. The administrative courts, judging contentious business have jurisdiction to solve the applications filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional.

ARTICLE 127 (Publicity of debates)
Proceedings shall be public, except for the cases provided by law.

ARTICLE 128 (Use of mother tongue and interpreter in court)
(1) The legal procedure shall be conducted in Romanian.
(2) Romanian citizens belonging to national minorities have the right to express themselves in their mother tongue before the courts of law, under the terms of the organic law.
(3) The ways for exercising the right stipulated under paragraph (2) , including the use of interpreters or translations, shall be stipulated so as not to hinder the proper administration of justice and not to involve additional expenses to those interested.
(4) Foreign citizens and stateless persons who do not understand or do not speak the Romanian language shall be entitled to take cognizance of all the file papers and proceedings, to speak in court and draw conclusions, by means of an interpreter; in criminal law suits, this right is ensured free of charge.

ARTICLE 129 (Use of appeal)
Against decisions of the court, the parties concerned and the Public Ministry may exercise ways of appeal, in accordance with the law.

ARTICLE 130 (Police in the courts)
Courts of law shall have police forces at their disposal.

SECTION 3
Superior Council of Magistracy

ARTICLE 133 (Role and Structure)
(1) The Superior Council of Magistracy shall guarantee the independence of justice.
(2) The Superior Council of Magistracy shall consist of 19 members, of whom:
a) 14 are elected in the general meetings of the magistrates, and validated by the Senate; they shall belong to two sections, one for judges and one for public prosecutors; the former section consists of 9 judges, and the latter of 5 public prosecutors;
b) 2 representatives of the civil society, specialists in law, who enjoy a good professional and moral reputation, elected by the Senate; these shall only participate in plenary proceedings;
c) the Minister of Justice, the president of the High Court of Cassation and Justice, and the general public prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.
(3) The president of the Superior Council of Magistracy shall be elected for one year's term of office, which cannot be renewed, from among the magistrates listed under paragraph (2) a) .
(4) The length of the term of office of the Superior Council of Magistracy members shall be 6 years.
(5) The Superior Council of Magistracy shall make decisions by secret vote.
(6) The President of Romania shall preside over the proceedings of the Superior Council of Magistracy he takes part in.
(7) Decisions by the Superior Council of Magistracy shall be final and irrevocable, except for those stipulated under article 144 (2).

ARTICLE 134 (Powers)
(1) The Superior Council of Magistracy shall propose to the President of Romania the appointment of judges and public prosecutors, except for the trainees, according to the law.
(2) The Superior Council of Magistracy shall perform the role of a court of law, by means of its sections, as regards the disciplinary liability of judges and public prosecutors, based on the procedures set up by its organic law. In such cases, the Minister of Justice, the president of the High Court of Cassation and Justice, and the general Public Prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice shall not be entitled to vote.
(3) Decisions by the Superior Council of Magistracy as regards discipline may be contested before the High Court of Cassation and Justice.
(4) The Superior Council of Magistracy shall also perform other duties stipulated by its organic law, in order to accomplish its role of guarantor for the independence of justice.

Annex G. Content of Hungarian judicial code of ethics

2005 Ethical code	2014 Ethical code
Judges subject to the law; **must actively protect independence** (Art.1) Freedom from pressure of political or any other nature (Art.2)	Independence (Value 1) Judges decide cases free from pressures of any nature, while observing the principle of equal treatment of parties; through their professional activities, judges avoid even the appearance of benefitting anyone in particular, or having a partial procedure or decision; judges enjoy the freedom to decide cases in line with their conscience – within the limits of substantive and procedural law. Judges must avoid unnecessary connections to or influence from the legislative and executive powers, in an obvious way for outsiders.
Media or public criticism cannot influence judicial decisions (Art.3) Judicial impartiality, with specific emphasis on the constitutional principle of equality (Art.4)	Impartiality (Value 2) Judges do not conduct political activities, do not take part in political meetings and events, and they refrain in public from manifestations of a political nature; judges cannot be members of organizations or be associated in any way with organizations whose purpose or activities are against the law, are discriminatory or violates public confidence in the judiciary. Judges cannot undertake any tasks or activities, which by their nature or origin would influence their independence or hamper the judicial work; Judges cannot support any business, charitable or civilian organization with a political activity.
Obligations in private life: give evidence of prudence and irreproachable conduct, refrain from any activities that could interfere with the dignity of the profession (Art.12) Judiciary and the media: judges must actively inform the public, must provide all necessary information about a case either to the public or to the judges responsible to inform the public (Art.8)	Dignity (Value 3) In fulfilling professional duties and in private life, judges shall have a conduct that strengthens public trust in the judicial profession; **judges avoid extremities both in conduct and appearance; the appearance of a judge must be always appropriate and worthy of the judicial profession; In public, judges do not place themselves in a situation that unworthy of the judicial profession.** Judges are patient and polite vis-à-vis parties to a trial, in addition to the necessary determinacy; judges avoid unnecessary or offensive remarks, and arrogance; Judges impose that parties to a trial respect the judiciary and each other. Judges organise their friend and family relationships and past time activities in a manner that it is in line with the dignity and impartiality of the judicial profession – as well as avoid any appearance otherwise. Judges aim to settle their private life problems in a calm, prudent and fair manner. **Judges shall exercise due diligence when using the World Wide Web. Judges only share information or audio- and video-recordings regarding themselves or their family members that are in accordance with the dignity of the judicial profession. The opinion of judges shared on the Internet cannot impair the authority of the courts, the dignity of the judicial profession or the applicable rules of making declarations.**
Judges must seek continuous professional improvement (Art.7)	Propriety (Value 4) **Judges seek to solve the assigned cases in a timely and reasonable manner.** **Judges shall seek to use the material resources of the courts in their intended and economic manner.** Judges shall continually improve their general and professional knowledge through self-development and training.
Communication with parties: with respect, in a professional manner, refraining from offensive or arrogant remarks (Art. 5) Prohibition to disclose, without prior authorization, information obtained through deciding cases (Art.10) Obligation to solve problems in private life in line with the dignity and appearance of the judicial profession (Art. 14)	Honesty (Value 5) The judicial office shall not be used to obtain personal benefits; In the course of exercising their own rights, judges comply in all circumstances with the applicable legal rules. In the course of judicial proceedings, judges shall avoid any public contact with the parties to a trial that would give rise to an appearance of impartiality. Judges shall not allow other persons exercising legal professions to consult clients in their home. Judges shall not reveal or use in an unlawful way information obtained through exercising their professional function; Judges shall not request or provide confidential information; Judges refrain from any manifestations that would influence judicial proceedings or their outcome. Judges shall voluntarily fulfil final or enforceable legal obligations. Judges shall respect intellectual property.

2005 Ethical code	2014 Ethical code
Conducting judicial activity: with diligence, confidence, avoiding complacency (Art. 6) Obligation to maintain appropriate professional and personal connections with colleagues (Art.11) Prohibition of publicly criticize judicial decisions; possibility to criticize decisions as part of academic activities (Art. 9) Prohibition to participate in private businesses or non-profit organizations, where benefits could be associated with judicial status (Art.13) Prohibition of political activities or membership in political organizations (Art. 15) Possibility to participate in charities or not-for-profit organizations, if no political goals (Art. 16) Prohibition to participate in organizations or groups with illegal or discriminatory aims, or conduct activities contrary to the public confidence enjoyed by the judicial profession (Art. 17)	Mutual respect and Cooperation (Value 6) Judges shall respect every person's dignity, free from prejudice and discrimination; judges shall impose respect from parties to a trial and their legal counsel. When exercising the judicial profession, judges shall seek to establish professional cooperation and mutual respect with members of public authorities and their colleagues. **Judges shall not criticise the guidelines of the superior courts before the parties; judges shall not highlight their opposing professional opinion.** Judges shall refrain in their decisions from offensive criticism of lower courts' decisions and from dismantling the dignity of the judicial profession. Judges shall not criticise the decisions of their colleagues. Judges shall only criticise constructively the decisions of their colleagues as part of academic activities. Judges shall not use any linguistic means suggesting partiality, compassion. Judges shall abstain from any manifestations indicating that their colleagues do not fulfil their professional obligations, or decide cases serving political or any other purposes.
	Responsibilities of judges in leadership positions (Value 7) Judges in leadership positions shall refrain from a conduct that would violate the dignity of the staff; judges fulfil their tasks by showing example and in line with the legal and moral requirements expected from their colleagues. In conducting administrative duties, they shall be consistent and fair. Ensure that their conduct is in line with the dignity of the judicial profession. In addition to ensuring the aims and interests of the court, they shall seek to establish effective cooperation with other organizational units, and they shall seek the timely and accurate exchange of necessary information.

Annex H. Content of the Romanian code of conduct for magistrates

Values of the 2005 judicial code of ethics	Content
Independence (Value 1)	Judges and prosecutors should actively promote their independence. Judicial independence entails the values of "objectivity", "impartiality", "based on law" and being free from influences of any nature, including political pressure. Judges and prosecutors can always address the SCM about possible pressures or infringements of judicial independence; judges cannot support persons with political ambitions or use their professional prestige in any way that would support political activities. Judges cannot participate in collecting funds for political purposes. Judicial activities cannot be used to deliver a political message. Judges cannot participate in public events of a political nature. However, judges have the possibility to publish academic or literary works; to express their opinion in the media. Expressing political opinion or undermining the image of justice is prohibited. Judges have the possibility to serve on examination committees or committees preparing national legislation or international legal documents; and the possibility to participate in civil societies or academic associations.
Supremacy of Law (Value 2)	Obligation of judges to "promote the supremacy of law, to uphold the rule of law and to protect the fundamental rights and freedoms of citizens"; obligation to respect the equality of citizens and treat them indiscriminately, obligation to protect the dignity and physical and moral integrity of participants to a specific trial.
Impartiality (Value 3)	Obligation to fulfil professional activity objectively and free from any influences. Responsibility to protect the appearance of impartiality. Obligation to abstain in case of incompatibilities. Possibility to provide legal assistance to a family member or spouse. However, the use of judicial status to influence the outcome of cases is prohibited. Family circumstances cannot influence the professional activity of judges. Prohibition to interfere with judicial activity of family members.
Professional conduct (Value 4)	Obligation to conduct professional activities with "competence" "correctness (honesty)" and to respect the administrative tasks established through internal regulations. Obligation to deliver professional output with "due diligence" and to respect the deadlines established by law, or otherwise act within a "reasonable time." Obligation to impose "order and solemnity" during trials. Obligation to adopt a dignified attitude and to require such attitude from trial participants. Information from case files can only be used for professional activities. Prohibition to remove documents of a confidential nature from court buildings. Obligation to allow the consultation of court documents by other parties in situations prescribed by law. Obligation of judges fulfilling managerial positions: to organize the activity of the auxiliary personnel, and give evidence of "initiative and responsibility"; obligation to prioritize in organizational decisions the interests of the courts and the good administration of justice; prohibition to use judicial managerial decisions in a way to influence the outcome of cases.
Honour and dignity of the profession (Value 5)	Obligation to refrain from any activities or manifestations that could hinder the dignity and honour of the judicial function and the position of judges in society; professional relations must be based on "respect and good faith", irrespective of seniority; prohibition to express opinion on the "professional and moral probity" of fellow-judges. In relations with the media: possibility to express opinion in public, exercising right to reply when "defamatory" claims were made in the media; obligation to refrain from any actions, which through "their nature, financing or execution" could in any way infringe the fulfilment the judicial activities with "impartiality", "correctness (honour)" and "within the legal timeframes".
Functions incompatible with the judicial profession	Prohibition to combine judicial function with any other professional function; with the exception of an academic position. Possibility to act as professional trainer for judges. Prohibition to participate in "pyramid schemes", "gambling" or "investment systems", which do not benefit from transparent funding. Obligation to abstain from exercising professional function in instances when personal interests conflict with the general interest of the good administration of justice.

Bibliography

Books and book chapters

Adams M and Heirbaut D (eds), *The Method and Culture of Comparative Law. Essays in Honour of Mark van Hoecke* (Hart Publishing 2014)

Adams M, Meuwese A, Hirsch Ballin E (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge University Press 2017)

Adams M, Hirsch Ballin E and Meuwese A, 'The Ideal and the Real in the Realm of Constitutionalism and the Rule of Law: An Introduction' in Maurice Adams, Anne Meuwese, Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge University Press 2017)

Alexy R, *A Theory of Constitutional Rights* (Oxford University Press 2010)

Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002)

Arato A, Halmai G, Kis J 'Opinion on the Fundamental Law of Hungary' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012)

Alter K, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories in Legal Integration' in Anne Marie Slaughter, Alec Stone and Joseph Weiler, *The European Court of Justice and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998)

Arendt H, *The Human Condition* (University Of Chicago Press 1958)

Bárd K, 'Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics' in András Sajó, *Judicial Integrity* (Brill 2004)

Benvenisti E, 'Going Global to Preserve Domestic Accountability' in Sam Muller and others (eds), *Highest Courts and Globalisation* (Hague Academic Press 2010)

Besselink LFM, 'The Context of Public Law' (De Context van het Staatsrecht) Inaugural address Universiteit van Amsterdam 07 September 2012

Besselink, L, ' The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives' in Jakab A and Kochenov D, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017)

Bobek M, 'Judicial Selection, Lay Participation and Judicial Culture in the Czech Republic: A Study in a Central European (Non)Transformation' in Sophie Turenne (ed), *Fair Reflection of Society in Judicial Systems - A Comparative Study* (Springer 2015).

Bodnar A and Bojarski L, 'Judicial Independence in Poland' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Bogdandy A von, Sonnevend P (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015)

Bokhorst AM and Witteveen WJ, ' Als gezag verdiend moet worden…' in Dennis Broeders (ed), *Speelruimte Voor Transparentere Rechtspraak* (Amsterdam University Press 2013)

Bryce J, *Studies in History and Jurisprudence*, vol I (Oxford University Press 1901)

Burbank SB and Friedman B (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (SAGE 2002)

Burca GD and Scott J (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing 2000)

Carp R, 'A constitutional principle under scrutiny: the immovability of judges – Romanian regulations in comparative perspectives' in Ramona Coman and Jean-Michel de Weale (eds), *Judicial Reforms in Central and Eastern Europe* (Vanden Broele 2007)

Cercel C, *Towards a Jurisprudence of State Communism. Law and the Failure of Revolution* (Routledge 2018)

Claes M, *The National Courts' Mandate in the European Constitution* (Hart 2006)

Closa C and Kochenov D (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)

Coman R and Dallara C (eds), *Handbook on Judicial Politics* (Editura Institutul European Iasi 2010)

Coman R and Dallara C, 'Judicial Independence in Romania' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Coman R and de Weale J-M (eds), *Judicial Reforms in Central and Eastern Europe* (Vanden Broele 2007)

Craig P and Búrca G de, *EU Law: Text, Cases, and Materials* (6th edition, Oxford University Press 2015)

Czarnota AW, Krygier M and Sadurski W (eds), *Rethinking the Rule of Law after Communism* (Central European University Press 2005)

Dallara C, *Uniunea Europeană și Promovarea Statului de Drept în România, Ucraina și Serbia (The European Union and the Promotion of the Rule of Law in Romania, Ukraine and Serbia)* (Iași ed 2009)

——, *Democracy and Judicial Reforms in South-East Europe: Between the EU and the Legacies of the Past* (Springer 2014)

Dallara C and Piana D (eds), *Networking the Rule of Law: How Change Agents Reshape Judicial Governance in the EU* (Routledge 2016)

Deleanu I, *Instituții și Proceduri Constituționale in Dreptul Român [Institutions and Procedures in Romanian Law]* (CH Beck 2006)

Dupré C, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart 2003)

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1978)

—— (ed), *From Liberal Values to Democratic Transition: Essays in Honor of János Kis* (Central European University Press 2004)

Eckes C, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press 2019)

Engels JWM, *De Rechsstaat Herdacht* (WEJ Tjeenk Willink 1989)

Evers J (ed), *Kwalitatief Interviewen: Kunst Én Kunde* (LEMMA 2007)

Federico G Di, 'Judicial Independence in Italy' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Fix-Fierro H, *Courts, Justice, and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing 2003)

Fleck Z, *Bíróságok Mérlegen* [Courts on Balance] (Pallas Akadémia 2008)

——, 'Judicial Independence and Its Environment in Hungary' in Jiří Přibáň and Pauline Roberts (eds), *Systems of Justice in Transition: Central European Experiences since 1989* (Ashgate 2003)

——, 'Judicial Independence in Hungary' in Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Fleming JE (ed), 'Four Puzzles About the Rule of Law: Why? What? Where? And Who Cares?', *Getting to the Rule of Law* (Nomos, New York University Press 2011)

Føllesdal A, 'Legitimacy Criticism of International Courts: Not Only Fuzzy Rhetoric?' in W. Sadurski, M. Sevel and K. Walton (eds), *Legitimacy: The State and Beyond* (Oxford University Press 2019)

Franken H, *Onafhankelijk en verantwoordelijk: een paradox in de positie van de rechter?* (Gouda Quint 1997)

Garapon A and Epineuse H, 'Judicial Independence in France' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Gee G, 'The Persistent Politics of Judicial Selections' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Gerards J and Fleuren J (eds), *Implementation of the European Convention on Human Rights and of the Judgements of the ECtHR in National Case-Law* (Intersentia 2014)

Guarnieri C and Pederzoli P, *The Power of Judges: A Comparative Study of Courts and Democracy* (CA Thomas ed, Oxford University Press 2002)

Gubrium JF and Holstein J, *Handbook of Interview Research: Context and Method* (SAGE Publications 2001)

Guțan M and Selejan-Guțan B, *Europeanization and Judicial Culture in Contemporary Democracies* (Hamangiu 2014)

Halmai G, 'The Early Retirement Age of the Hungarian Judges', in Fernanda Nicola, Bill Davies (ed) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017)

Harris D, O'Boyle M, Bates EP, Buckley CM, *Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights* (4th edition, Oxford University Press 2018)

Hirschl R, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004)

——, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (1st edition, Oxford University Press 2014)

Hol A and Loth M, *Reshaping Justice: Judicial Reform and Adjudication in the Netherlands* (Shaker Publishing 2004)

Holmes S, 'Judicial Independence as Ambiguous Reality and Insidious Illusion' in Ronald Dworkin (ed), *From Liberal Values to Democratic Transition: Essays in Honor of Janos Kis* (Central European University Press 2004)

Hörcher F and Lorman T (eds), *A History of the Hungarian Constitution. Law Government and Political Culture in Hungary* (I.B. Tauris 2018)

Huntington S P, *The Third Wave: Democratization in the Late Twentieth Century (University of Oklahoma Press 1991)*

Iancu B: 'Separations of Powers and the Rule of Law in Romania' in Bogdandy A von, Sonnevend P (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015)

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

Jaremba U, *National Judges as EU Law Judges: The Polish Civil Law System* (Brill 2014)

Keil G and Poscher R (eds), *Vagueness in the Law: Philosophical and Legal Perspectives* (1st edition, Oxford University Press 2017)

Kochenov D, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008)

Koopmans T, *Courts and Political Institutions a Comparative View* (Cambridge University Press 2003)

Kosař D, *Perils of Judicial Self-Government in Transitional Societies* (1st edition, Cambridge University Press 2016)

Kuijper PJ, Amtenbrink F, Curtin D, Witte B de, McDonnel A, Bogaert S van den, *Law of the European Union* (5th edition, Kluwer Law International 2018)

Krygier M, 'The Rule of Law. Legality, Teleology, Sociology' in Gianluigi Palombella (ed), 'The Rule of Law. Legality, Teleology, Sociology', *Relocating the Rule of Law* (Hart Publishing 2009)

Krygier M, 'Four Puzzles About the Rule of Law: Why? What? Where? And Who Cares?' in Fleming (ed), 'Four Puzzles About the Rule of Law: Why? What? Where? And Who Cares?', *Getting to the Rule of Law* (New York University Press 2011)

Krygier M, 'The Rule of Law. An Abuser's Guide', in Andras Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Publishing 2006)

Kuijer M, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Wolf Legal 2004)

Langbroek PM and Fabri M (eds), *The Right Judge for Each Case: A Study of Case Assignment and Impartiality in Six European Judiciaries* (Intersentia 2007)

Lange R de, 'Judicial Independence in the Netherlands' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Loth M, ‘Courts in Quest of Legitimacy: A Comparative Approach’ in Marijke Malsch and Niels van Manen (eds), *De Begrijpelijkheid van de Rechtspraak* (Boom Juridische Uitgevers 2007)

Ligi T, ‘Judicial Independence in Estonia’, in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Mak E, *De Rechtspraak in Balans* (Wolf 2007)

——, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (2013)

——, *The T-Shaped Lawyer and Beyond. Rethinking Legal Professionalism and Legal Education for Contemporary Societies* (Eleven International Publishing 2017)

Malsch M and Manen N van (eds), *De Begrijpelijkheid van de Rechtspraak* (Boom Juridische Uitgevers 2007)

McLaughlin K, Osborne SP and Ferlie, *New Public Management: Current Trends and Future Prospects* (Routledge 2002)

Mill JS, *A System of Logic, Ratiocinative and Inductive*, vol I (Cambridge University Press 2012, first published in 1843)

Montesquieu C de, (Cohler AM, Miller BC, Stone HS (eds)) *The Spirit of the Laws* (Cambridge University Press 1989, first published in 1748)

Motoc I and Kaufman C, ‘Romania: Romania and the European Convention on Human Rights: A dialogue of judges’ in Iulia Motoc and Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016)

Motoc I and Ziemele I (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016)

Muller S, Richards S (eds), *Highest Courts and Globalisation* (Hague Academic Press 2010)

Ng GY, *Quality of Judicial Organization and Checks and Balances* (Intersentia; METRO, the Maastricht Institute for Transnational Legal Research 2007)

Nowak T, Amtenbrink F, Hertogh M and Wissink M, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (Eleven International Publishing 2011)

Ott A and Inglis K (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (Cambridge University Press 2002)

Palombella G (ed), 'The Rule of Law. Legality, Teleology, Sociology', *Relocating the Rule of Law* (Hart Publishing 2009)

Palombella G and Walker N (eds), *Relocating the Rule of Law* (Hart Publishing 2009)

Parau C, 'The Drive for Judicial Supremacy' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012)

Piana D, *Judicial Accountabilities in New Europe* (Ashgate 2010)

Pollitt C and Bouckaert G, *Public Management Reform: A Comparative Analysis - New Public Management, Governance, and the Neo-Weberian State* (3rd edn, Oxford University Press, USA 2011)

Přibáň J and Roberts P (eds), *Systems of Justice in Transition: Central European Experiences since 1989* (Ashgate 2003)

Rácz A, 'Judicial Independence in Eastern Europe with special reference to Hungary' in András Sajó (ed), *Judicial Integrity* (Brill Academic Publishers 2004).

Raz J, *The Authority of Law: Essays on Law and Morality* (2nd edition, Oxford University Press 2009)

Russell PH and O'Brien DM (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press 2001)

Sadurski W, Czarnota A and Krygier M (eds), *Spreading Democracy and the Rule of Law?* (Springer-Verlag 2006)

Sajó A (ed), *Judicial Integrity* (Brill Academic Publishers 2004)

Sajó A (ed), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Publishing 2006)

Sana G, 'Article 47 of the EU Charter of Fundamental Rights and its Impact on Judicial Cooperation in Civil and Commercial Matters' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer 2011)

Scharpf FW, *Governing in Europe: Effective and Democratic?* (Oxford University Press, USA 1999)

Scheltema M, 'De Rechsstaat' in Johannes Wilhelmus Maria Engels, *De Rechsstaat Herdacht* (WEJ Tjeenk Willink 1989)

Scheppele KL, 'Declarations of Independence: Judicial Reactions to Political Pressures' in Burbank SB and Friedman B (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (SAGE 2002)

Seibert-Fohr A (ed.), *Judicial Independence in Transition* (Springer 2012)

Selejan-Guțan B, *The Constitution of Romania: A Contextual Analysis* (1 edition, Hart Publishing 2016)

Selznick P, 'Legal Cultures and the Rule of Law' in Czarnota AW, Krygier M and Sadurski W (eds), *Rethinking the Rule of Law after Communism* (Central European University Press 2005)

Shapiro M, *Courts: A Comparative and Political Analysis* (University Of Chicago Press 1986)

Shaw J, 'Constitutionalism and Flexibility in the EU: Developing a Relational approach' in Grainne De Burca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart Publishing 2000)

Shetreet S and Dechênes J (eds), *Judicial Independence: The Contemporary Debate* (1st edition, Springer 1985)

Slaughter AM, Stone A and Weiler J (eds), *The European Court of Justice and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998)

Smilov D, 'EU Enlargement and the Constitutional Principle of Judicial Independence', in Krygier M, Czarnota A, Sadurski W (eds), *Spreading Democracy and the Rule of Law? The impact of EU Enlargement on Democracy, the Rule of Law and Constitutionalism in Post-Communist Legal Orders* (Springer 2006)

Snyder F, 'Soft Law and Institutional Practice in the European Community', *S. Martin (ed), The Construction of Europe* (Kluwer 1994)

Sólyom L and Brunner G, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press 2000)

Sonnevend, P and Jakab A, Csink L, 'The constitution as an instrument of everyday party politics: the basic law of Hungary' in Bogdandy A von, Sonnevend P (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Nomos Verlagsgesellschaft 2015)

Staton JK, *Judicial Power and Strategic Communication in Mexico* (1st edition, Cambridge University Press 2010)

Stawa G, 'Recruitment Professional Evaluation and Career of Judges in Austria' in Giuseppe di Federico (ed), *Recruitment, Professional Evaluation and Career of Judges and*

Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain (Lo Scarabeo 2005)

Ștefan O, *Soft Law in Court - Competition Law, State Aid, and the Court of Justice of the European Union* (Kluwer Law International 2012)

Szente Z, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in Jakab A and Kochenov D (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017)

Tamanaha B, *On the Rule of Law* (Cambridge University Press 2004)

Tatham AF, *Central European Constitutional Courts in the Face of EU Membership: The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff 2013)

Tănăsoiu C, 'Romania in the European Union: Political Developments and the Rule of Law After Accession' in Bogdandy A von and Sonnevend P (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (UK ed edition, Beck/Hart 2015)

Tóth GA (eds), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012)

Visser M de, *Constitutional Review in Europe: A Comparative Analysis* (Hart 2014)

Waldron J, 'Clarity, Thoughtfulness and the Rule of Law' in Geert Keil and Ralf Poscher (eds), *Vagueness in the Law: Philosophical and Legal Perspectives* (1st edition, Oxford University Press 2017)

Weatherill S, *Cases & Materials on EU Law* (12 edition, Oxford University Press 2016)

Witte B de, Mayoral JA, Jaremba U, Wind M, Podstawa K (eds), *National Courts and EU Law: New Issues, Theories and Methods* (Edward Elgar Pub 2016)

Wittgenstein L. (Hacker P and Schulte J (eds)), *Philosophical Investigations* (4th edition, Wiley-Blackwell 2009)

Yourow H C, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers 1996)

Journal Articles

Maurice Adams M, Janse R, 'Rule of Law Decay: Terminology, Causes, Methods, Markers and Remedies' (2019) 11 Hague Journal on the Rule of Law 1

Bánkuti M, Halmai G and Scheppele KL, 'Disabling the Constitution' (2012) 23 Journal of Democracy 138

Barents R, 'EU Procedural Law and Effective Legal Protection' (2014) 51 Common Market Law Review 1438-1445

Bartole S, 'Final Remarks: The Role of the Venice Commission' (2000) 26 Review of Central and East European Law 351

Beers DJ, 'Judicial Self-Governance and the Rule of Law' (2012) 59 Problems of Post-Communism 50

Belavusau U, 'Commission v Hungary: On Age Discrimination and Beating Dead Dogs' (2013) 50 Common Market Law Review 1145

Bell J, 'Judicial Cultures and Judicial Independence' (2001) 4 The Cambridge Yearbook of European Legal Studies

——, 'Reflections on Continental European Supreme Courts' (2004) 24 Legal Studies 156

Bobek M, 'Fortress of Judicial Independence and Mental Transitions of the Central European Judiciary' (2008) 14 European Public Law

——, 'The Administration of Courts in the Czech Republic: In Search of a Constitutional Balance' 16 European Public Law 2 (2010)

Bobek M and Kosař D, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15 German Law Journal 1257

Bonelli M, Claes M, 'Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 European Constitutional Law Review 2018

Bovens M, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal

Brzezinski MF and Garlicki L, 'Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat' (1995) 31 Stanford Journal of International Law 13

Bugarič B, 'Central Europe's descent into autocracy: A constitutional analysis of authoritarian populism' (2019) 17 International Journal of Constitutional Law 2

Cappelletti M, '"Who Watches the Watchmen?"" A Comparative Study on Judicial Responsibility' (1983) 31 The American Journal of Comparative Law 1

Carp R, 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism' (2014) 10 Utrecht Law Review

Chronowski N and Varju M, 'Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law' 8 The Hague Journal on the Rule of Law

Claes M and Visser, de M, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100

Closa C, Kochenov D and Weiler JHH, 'Reinforcing the Rule of Law Oversight in the European Union' RSCAS 2014/25 Robert Schuman Centre for Advanced Studies Global Governance Programme- 87

Coman R, 'Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' (2014) 66 Europe-Asia Studies 892

Contini F and Mohr R, 'Reconciling Independence and Accountability in Judicial Systems' 3 Utrecht Law Review

Dijkstra S, 'The Freedom of the Judge to Express His Personal Opinions and Convictions under the ECHR' (2017) 13 Utrecht Law Review 1

Douglas-Scott S, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 Common Market Law Review 629 631-652

Emery Y and De Santis LG, 'What Kind of Justice Today? Expectations Of "Good Justice", Convergences And Divergences Between Managerial And Judicial Actors And How They Fit Within Management-Oriented Values' (2014) 6 International Journal for Court Administration 63

Fabbrini F and Larik J, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' [2016] Yearbook of European Law 1. 3-15

Fabri M and Langbroek PM, 'Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries' (2007) 1 European Journal of Legal Studies

Føllesdal A, 'Independent Yet Accountable: Stress Test Lessons for the European Court of Human Rights' (2017) 24 Maastricht Journal of European Comparative Law 4

Galanter M, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 Journal of Empirical Legal Studies 459

Garlicki L, ‘Constitutional Courts versus Supreme Courts’ (2007) 5 International Journal of Constitutional Law 44

Garoupa N and Ginsburg T, ‘Guarding the Guardians: Judicial Councils and Judicial Independence’ (2009) 57 American Journal of Comparative Law 103

Gerards J, ‘Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning’ (2014) 14 Human Rights Law Review 148

Gerring J, ‘Is There a (Viable) Crucial-Case Method?’ (2007) 40 Comparative Political Studies 231. 237-238

Gerring J and Cojocaru L, ‘Selecting Cases for Intensive Analysis: A Diversity of Goals and Methods’ (2016) 45 Sociological Methods & Research 392

Gies L, ‘The Empire Strikes Back: Press Judges and Communication Advisers in Dutch Courts’ (2005) 32 Journal of Law and Society 455

Guarnieri C, ‘Judicial Independence in Europe: Threat or Resource for Democracy?’ (2013) 49 Representation

Guțan M, ‘The Challenges of the Romanian Constitutional Tradition I. Between Ideological Transplant and Institutional Metamorphoses’, (2013) 25 Journal of Constitutional History 223

Gyöngyi PM, ‘Fundamental Principles of the European Union and Judicial Reforms in New Member States: Assessing Judicial Reforms in Hungary’ (2013) No. 8 Academy of European Public Law Series

Gyulavári T and Hős N, ‘Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts’ 42 Industrial Law Journal 289. 289-297

Hammergren L, ‘Twenty-Five Years of Latin American Judicial Reforms: Achievements, Dissapointments, and Emerging Issues’ (2008) IX The Whitehead Journal of Diplomacy and International Relations

Hirschl R, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53 American Journal of Comparative Law

Iancu B, ‘Post-Accession Constitutionalism with a Human Face: Judicial Reform and Lustration in Romania’ (2010) European Constitutional Law Review 28

——, ‘Perils of Sloganised Constitutional Concepts Notably that of ‘Judicial Independence’’ (2017) European Constitutional Law Review 13

——, ‘*Quod licet Jovi non licet bovi*? The Venice Commission as Norm Entrepreneur’ (2019) 11 Hague Journal on the Rule of law 1

Janse R, ‘The evolution of the political criteria for accession to the European Community 1957-1973’ (2018) 24 European Law Journal 57

——, ‘Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement’ (2019) 17 International Journal of Constitutional Law 1

Jakab A and Sonnevend P, ‘Continuity with Deficiencies: The New Basic Law of Hungary’ (2013) 9 European Constitutional Law Review (EuConst) 102

Jaremba U and Mak E, ‘Interviewing Judges in the Transnational Context’ [2014] Law and Method

Kochenov D, ‘The EU Rule of Law: Cutting Paths Through Confusion’ (2009) 2 Erasmus Law Review 1

Kosař D, ‘Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice’ 13 European Constitutional Law Review

——, ‘Policing Separation of Powers: A New Role of the European Court of Human Rights?’ 8 European Constitutional Law Review 33

——, ‘Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design’ (2017) 13 Utrecht Law Review

Kosař D and Lixinski L, ‘Domestic Judicial Design by International Human Rights Courts’ 109 The American Journal of International Law 713

Kosař D (Guest Editor), ‘Judicial Self-Governance in Europe’ (2018) 19 German Law Journal 7

Kosař D, Šipulová K, ‘The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the rule of law’ 2018 Hague Journal on the Rule of Law 1-28

David Kosař D, Baroš J and Dufek P, ‘The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism’, (2019) 15 European Constitutional Law Review 427

Kovács K and Tóth, GA ‘Hungary’s Constitutional Transformation,’ 7 European Constitutional Law Review 183 (2011)

Kovács K, Scheppele KL, ‘The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union’, (2018) 51 Communist and Post-Communist Studies 189

Körtvélyesi, Zs, Majtényi B, ‘Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary’ (2017) 18 German Law Journal 07

Krajewski M, ‘Who is Afraid of the European Council? The Court of Justice’s Cautious Approach to the Independence of Domestic Judges’ 14 European Constitutional Law Review 2018

Kuijer M, ‘The Right to a Fair Trial and the Council of Europe’s Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings’ (2013) 13 Human Rights Law Review 777

Larkins C, ‘Judicial Independence and Democratization: A Theoretical and Conceptual Analysis’ (1996) 44 American Journal of Comparative Law. 605-626.

Levison S, ‘Identifying “Independence”’ (2006) Boston University Law Review 1297

Louwerse L, Kasotti E, ‘Revisiting the European Commission’s Approach Towards the Rule of Law in Enlargement’ (2019) 11 Hague Journal on the Rule of Law 223

Luban D, ‘Bargaining and Compromise: Recent Work on Negotiation and Informal Justice’ (1985) 14 Philosophy & Public Affairs 397

Majone G, ‘Europe’s “Democratic Deficit”: The Question of Standards’ (1998) 4 European Law Journal 5

Mak E, ‘Annotatie: EHRM 5 Oktober 2010, Nr. 19334/03, DMD Group, A.s.t. Slowakije’ (2011) European Human Rights Cases 23

——, ‘Understanding Legal Evolution through Constitutional Theory: The Concept of Constitutional (In-)Flexibility’ (2011) 4 Erasmus Law Review

——, ‘Why Do Dutch and UK Judges Cite Foreign Law?’ (2011) 70 The Cambridge Law Journal 420

——, ‘The European Judicial Organization in a New Paradigm: The Influence of Principles of “New Public Management” on the Organization of the European Courts’ 14 European Law Journal 718

Mak E and Taekema S, ‘The European Union’s Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application’ (2016) Hague Journal on the Rule of Law

Mayer F, ‘The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System’ [2003] Jean Monnet Working Paper No.9/2003

Mitchell NJ, ‘Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media’ (2012) Utah Law Review

Müller LF, ‘Judicial Independence as a Council of Europe Standard’ (2009) 52 German Yearbook of International Law 461

Nicolaïdis K & Kleinfeld R, ‘Rethinking Europe’s “Rule of Law” and Enlargement Agenda: The Fundamental Dilemma’, Sigma Paper OECD no. 49 (2012)

Noutcheva G and Bechev D, ‘The Successful Laggards: Bulgaria and Romania’s Accession to the EU’ (2008) 22 East European Politics & Societies 114

Parau CE, ‘The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe’ (2013) 49 Representation 267

——, ‘Explaining Governance of the Judiciary in Central and Eastern Europe: External Incentives, Transnational Elites and Parliamentary Inaction’ 67 Europe-Asia Studies

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

Pech L and Platon S, ‘Judicial Independence under threat: The Court of Justice to the rescue in the *ASJP* case’, 55 Common Market Law Review 2018

Perju V, ‘The Romanian Double Executive and the 2012 Constitutional Crisis’ (2015) 13 International Journal of Constitutional Law

Pernice I, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?’ (1999) 36 Common Market Law Review 703

——, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’ (2008) 15 Columbia Journal of European Law 349

Resnik J, ‘Managerial Judges’ (1982) 96 Harvard Law Review

Rosenfeld M, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ 74 California Law Review

Rosenfeld M, Sadurski W and Toniatti R, ‘Central and Eastern European Constitutionalism a Quarter Century after the Fall of the Berlin Wall: Introduction to the Symposium’ (2015) 13 International Journal of Constitutional Law 119

Schauer F, ‘Authority and Authorities’ (2008) 94 Virginia Law Review 1931

Scheppele KL, ‘Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary) Judicial Review: Between Promise and Chagrin’ (2014) 23 Transnational Law and Contemporary Problems 51

——, ‘The Rule of Law and the Frankenstate: Why Governmental Checklists Do Not Work’ (2013) 26 Governance: An International Journal of Policy, Administration and Institutions 559

——, ‘Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary) Judicial Review: Between Promise and Chagrin’ (2014) 23 Transnational Law and Contemporary Problems 51

Schmidt VA, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'' (2013) 61 Political Studies 2-22

Seibert-Fohr A, ‘Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle’ (2009) 52 German Yearbook of International Law 405

——, ‘European Standards for the Rule of Law and Independent Courts’ (2012) Journal für Rechtspolitik 161

Selejan-Guțan B, ‘Romania: Perils of a “Perfect Euro-Model” of Judicial Council’, (2018) 19 German Law Journal 7

——, ‘The Constitutional Court and Others in Romanian Constitutionalism – 25 Years After’ (2017) 11 Vienna Journal on International Constitutional Law 4

Selznick P, ‘“Law in Context” Revisited’ (2003) 33 Journal of Law and Society 177

Sossin L and Bacal M, ‘Judicial Ethics in a Digital Age’ (2013) 46 University of British Columbia Law Review

Spernbauer M, ‘Benchmarking, Safeguard Clauses and Verification Mechanisms - What’s In a Name? Recent Developements in Pre- and Post-Accession Conditionality and Compliance with EU Law’ (2008) 3 Croatian Yearbook of European Law and Policy 273

Spielmann D, ‘Whither the Margin of Appreciation?’ (2014) 67 Current Legal Problems 49

Suteu S, ‘The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?’ (2019) 15 European Constitutional Law Review 488

Szente Z, ‘The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014’ (2016) 1 Constitutional Studies 1

Tănăsescu SE, Popescu RD, ‘Romania High Judicial Council – Between Analogy of Law and Ethical Trifles’ 36 Transylvanian Review of Administrative Sciences 165 (2012)

Terhechte JP, ‘Judicial Ethics for a Global Judiciary - How Judicial Networks Create Their Own Codes of Conduct’ 10 German Law Journal 506

Thadeusz T, ‘Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgements of the Polish Constitutional Tribunal in Cases K34/15, K35/15 and beyond’ [2016] Common Market Law Review 1753

Tóth GA, ‘Constitutional Markers of Authoritarianism’, 11 Hague Journal on the Rule of Law 2019

Uitz R, ‘Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?’ (2007) XIII Juridica International

——, ‘Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary’ (2015) 13 International Journal of Constitutional Law

——, ‘Editorial – The Perils of Defending the Rule of Law Through Dialogue’ (2019) 15 European Constitutional Law Review 1

Ulfstein G, ‘Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties’ 2019 The International Journal of Human Rights 1-18

Vachudova MA and Spendzharova AB, ‘The EU’s Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession’ European Policy Analysis

Vincze A, ‘Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment Baka v. Hungary’ 21 European Public Law

Voermans W and Albers P, ‘Councils for the Judiciary in EU Countries’ http://www.drb.de/fileadmin/docs/sv_councils_for_the_judiciary_voermans_albers_2003.pdf

Vörös I, ‘Contextuality and Universality: Constitutional Borrowings on the Global Stage - The Hungarian View’ (1999) 1 University of Pennsylvania Journal of Constitutional Law 651

Legislation and Legislative Preparatory Documents

European Union

Treaty on European Union Official Journal C 202, 7.6.2016

Treaty on the Functioning of the European Union Official Journal C 202, 7.6.2016

Treaty on the Functioning of the European Union, Protocol No. 3 On the Statute of the Court of Justice of the European Union Official Journal C 202, 7.6.2016

Charter of Fundamental Rights of the European Union Official Journal C 202, 7.6.2016

Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950 as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 14

Hungary

Magyarország Alaptörvénye (Fundamental Law of Hungary) Official Journal 100 of 2018 June 29, 5106
Act XX of 1949 The Constitution of Hungary as amended 1989-1990 and subsequent amendements Official Journal 150 2009 October 23 38614-38633

Act LXVI of 1997 on the organization of courts Official Journal 66 1997 July 23

Act CLI of 2011 on the Constitutional Court Official Journal 136 2011 November 21 32722-32738

Act CLXI of 2011 on the organization and administration of courts Official Journal 143 2011 December 2 34046-34087

Legal Act CLXII of 2011 on the status and remuneration of judges Official Journal 143 2011 December 2 34088

Legal Act LXVI of 1997 on judicial organization Official Journal 66 1997 July 23

Explanatory document of the Fundamental Law T/2627

Preparatory document T04743 for Legal act CLXI of 2011

Romania

Constituția României (Constitution of Romania) Official Journal nr 767 of 31 October 2003 Part I

Law no. 47 of 1992 on the Constitutional Court Official Journal nr 807 of 3 December 2010 Part I

Law no. 92 of 1992 on court organization Official Journal nr 197 of 13 August 1992

Law no. 303 of 2004 on the status and remuneration of judges Official Journal nr 826 of 28 June 2005

Law no. 304 of 2004 on the organization of the judiciary Official Journal nr 827 of 13 September 2005

Law no. 317 of 2004 concerning the Superior Council of Magistracy Official Journal 628 of 1 September 2012

Preparatory Documents Law no. 303 of 2004

Preparatory Documents Law no. 304 of 2004

Preparatory Documents Law no. 317 of 2004

Table of Cases

Court of Justice of the European Union

Case C-407/98 Abrahamson and Anderson [2000] ECR I-5539

Joined Cases C-404/15 and C-659/15 Aranyosi and Căldăraru EU:C:2016:198

Case C-64/16 Associação Sindical dos Juízes Portugueses ECLI:EU:C:2018:117

Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas
Opinion of Advocate General Saugmandsgaard Øe delivered on 17 May 2017 ECLI:EU:C:2017:395

Case C-286/12 Commission v Hungary

Case C-286/12 European Commission v Hungary, View of Advocate General Kokott of 2 October 2012 ECLI:EU:C:2012:602

Case C-403/16 El Hassani v Minister Spraw Zagranicznych EU:C:2017:960

Case C-619/18 R, Commission v Poland EU:C:2018:852

Case C-619-18 European Commission v Republic of Poland, Opinion of Advocate General Tanchev delivered on 11 April 2019 ECLI:EU:C:2019:325

Case C-24/92 Corbiau [1993] ECR I-1277

Case C-17/00 De Coster [2001] ECR I-9445

Case C-54/96 Dorsch Consult Ingernieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH, [1997] ECR I-4961

Case C-103/97 Kollensperger and Atzwanger [1999] ECR I-551

Cases C-9/97 and 118/97 Jokela and Pitkaranta [1998] ECR I-6267

Case C-503/15 Margarit Panicello EU:C:2017:126

Case C-196/09 Miles and Others [2011] ECR I5105

Case C-685/15, Online Games and Others EU:C:2017:452

Case 338/85 Pardini [1988] ECR 2041

Case C-216/18 PPU, Minister of Justice and Equality v LM (Deficiencies in the System of Justice)

Case C-216/18 PPU, Minister of Justice and Equality v LM (Deficiencies in the System of Justice) Opinion of Advocate General Tanchev delivered on 28 June 2018 EU:C:2018:517

Case C-14/86 Pretore di Salo v Persons Unknown [1987] ECR 2545

Case C-517/09 RTL Belgium [2010] ECR I14093

Case C-516/99 Schmid [2002] ECR I-4573

Case C-53/03 Syfait and Others [2005] ECR I4609

Case C-222/13 TDC A/S v Erhvervsstyrelsen

Case C-506/04 Wilson v Conseil de l'ordre des avocats du barreau de Luxembourg ECLI:EU:C:2006:587

Case C-506/04 Wilson v Conseil de l'ordre des avocats du barreau de Luxembourg, Opinion of Advocate General Stix-Hackl delivered on 11 May 2016 ECLI:EU:C:2006:311

European Court of Human Rights

Agrokompleks v Ukraine, Appl no 23465/03 (ECtHR, 6 October 2011)

Axen v the Federal Republic of Germany, Appl no 8273/78, 8 December 1983

B v the United Kingdom, Appl no 36337/97; 35974/97, 24 April 2001

Baka v Hungary, Appl no 20261/2012 (ECtHR [GC], 23 June 2016)

Belilos v. Switzerland, Appl no 10328/83 (ECtHR, 29 April 1988)

Bochan v Ukraine, Appl no 7577/02, 3 May 2007

Brudnicka v Poland, 2005-II Eur. Ct. H.R. 153

Bugan v Romania Appl no 13824/06, Merits 12 February 2013

Campbell and Fell v UK, Appl no. 7819/77, 7878/77 (ECtHR, 28 June 1984)

Coëme and Others v. Belgium, Appl nos 32492/96, 32547/96, 33209/96

Cuscani v UK, Appl no 32771/96 (ECtHR, 24 September 2002)

Daktaras v Lithuania, Appl.No. 42095/98

Denisov v Ukraine [GC], Appl. No. 76639/11

Diennet v France, Appl no 18160/91, 26 September 1995

Di Giovanni, Appl. No. 51160/06, 9 July 2013

DMD Group, A.S. v Slovakia, Appl no 19334/03 (ECtHR, 5 October 2010)

Flux v Moldova no.2, Appl. No. 31001/03, 3 July 2007

Fruni v Slovakia, Appl. No. 8014/07, 21 June 2011

Garcia Ruiz v Spain, 1999-I;31 EHRR 22

Guja v Moldova, Appl. No. 14277/04, 12 February 2008

Hakansson and Sturesson v Sweden, Appl no 11855/85, 21 February 1990

Hauschildt v. Denmark, 24 May 1989, para 48, Series A no. 154

Helle v Finland 1997-VIII, 26 EHRR 159

Henryk Urban and Ryszard Urban v Poland, Appl. No. 23614/08, 30 November 2010

Hiro Balani v Spain A 303-B (1994) 19 EHRR 566

Incal v. Turkey, 9 June 1998, Reports of Judgments and Decisions 1998-IV

JB and Others v Hungary, Appl. No. 45434/12

Kayasu v Turkey, Appl. Nos. 64119/00 76292/01, 20 November 2008

Kudeshkina v Russia, Appl.No. 29492/05, 26 February 2009

Lindner v Germany, Appl no 32813/96 (ECtHR, 9 March 1999)

Luka v Romania, Appl. No. 34197/02 (ECtHR, 21 July 2009)

Moiseyev v Russia, Appl. No. 62936/00, 9 October 2008

Morice v France, Appl. No. 29369/10, 23 April 2015

Parlov-Tkalcic v Croatia, Appl no 24810/06, 22 December 2009

Piersack v Belgium, Appl no. 8692/79 (ECtHR, 1 October 1982)

Pretto and Others v Italy, Appl no 7984/77, 8 December 1983

Ruiz Torija v Spain 1994 Series A no.303-A

Schuler-Zgraggen v Switzerland, Appl no 14518/ 89, 24 June 1993

Sramek v Austria, App no 8790/79 (ECtHR, 22 October 1984)

Stallinger and Kuso v Austria, Appl no 14696/89; 14697/89, 23 April 1997

Stran Greek Refineries and Stratis Andreadis v Greece, Appl. No. 301-13, 9 December 1994

Sunday Times v United Kingdom, Appl. No. 6538/74, 26 April 1979

Suominen v Finland, Appl. No. 37801/97, Merits 1 July 2003

Sutter v Switzerland, Appl no 8209/78, 22 February 1984

Szusz v Austria, Appl no 20602/92, 24 November 1997

Thorgeir Thorgeirson v. Iceland, 25 June 1992, para 51, Series A no. 239

Werner v Austria, Appl no 21835/93, 24 November 1997

Wille v Liechtenstein, Appl. No. 28396/95, 28 October 1999

Zand v. Austria, Appl no 7360/76, Commission Report of 12 October 1978, Decisions and Reports (DR) 15

Hungary

Constitutional Court of Hungary, Decision no. 53 of 1991 (X.31.) AB
Constitutional Court of Hungary, Decision no. 38 of 1993 (V. 11.) AB

Constitutional Court of Hungary, Decision no. 59 of 1993 (XI. 29.) AB
Constitutional Court of Hungary, Decision no. 28 of 1995 (V. 19.) AB
Constitutional Court of Hungary, Decision no. 6 of 1998 (III. 11.) AB
Constitutional Court of Hungary, Decision no. 19 of 1999 (VI. 25.) AB
Constitutional Court of Hungary, Decision no. 1 of 2008 (I. 11.) AB
Constitutional Court of Hungary, Decision no. 21 of 2010 (II. 25.) AB
Constitutional Court of Hungary, Decision no. 166 of 2011(XII. 20.) AB
Constitutional Court of Hungary, Decision no. 33 of 2012 (VII.17.) AB
Constitutional Court of Hungary, Decision no. 13 of 2013 (VI. 17.) AB
Constitutional Court of Hungary, Decision no. 36 of 2013 (XII.5.) AB
Constitutional Court of Hungary, Decision no. 4 of 2014 (I. 30.) AB
Constitutional Court of Hungary, Decision no. 3003 of 2016 (I. 15.) AB
Constitutional Court of Hungary, Decision no. 12 of 2017 (VI. 19.) AB
Constitutional Court of Hungary, Decision no. 33 of 2017 (XII. 6.) AB
Constitutional Court of Hungary, Decision no. 3154 of 2017 (VI. 21.) AB

Romania

Constitutional Court of Romania, Decision no. 39 of 1996
Constitutional Court of Romania, Decision no. 73 of 1996
Constitutional Court of Romania, Decision no. 96 of 1996
Constitutional Court of Romania, Decision no. 339 of 1997
Constitutional Court of Romania, Decision no. 322 of 2001
Constitutional Court of Romania, Decision no. 148 of 2003
Constitutional Court of Romania, Decision no. 375 of 2005
Constitutional Court of Romania, Decision no. 901 of 2009
Constitutional Court of Romania, Decision no. 972 of 2012
Constitutional Court of Romania, Decision no. 196 of 2013
Constitutional Court of Romania, Decision no. 3 of 2014
Constitutional Court of Romania, Decision no. 80 of 2014
Constitutional Court of Romania, Decision no. 63 of 2017
Constitutional Court of Romania, Decision no. 33 of 2018
Constitutional Court of Romania, Decision no. 45 of 2018

Institutional Documents

European Union

Council Decision of 28 January 2002 on the principles, priorities and intermediate objectives and conditions contained in the Accession Partnership with Romania 2002/92/EC Official Journal L 044 14.02.2002 p.82-91.

Council Decision of 19 May 2003 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Romania 2003/397/EC Official Journal L145 12.6.2003 p.21-39.

Commission of the European Communities, Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reforms and fight against corruption, C (2006) 6569 final.

European Commission, Reports on Progress Towards Accession by Each of the Candidate Countries. Composite Paper COM (98) 712 final, 17 December 1998.

European Commission, Reports on Progress Towards Accession by Each of the Candidate Countries. Composite Paper COM (99) 500 final, 13 October 1999. Bulletin of the European Union Supplement 2/99.

European Commission, Report on Progress Towards Accession by Each of the Candidate Countries. Enlargement Strategy Paper COM (2000) 700 final, 8 November 2000.

European Commission, Making a Success of Enlargement. Strategy Paper and Report of the European Commission on the Progress Towards Accession by Each of the Candidate Countries COM (2001) 700 final, 13 November 2001.

European Commission, Towards the Enlarged Community. Strategy Paper and Report of the European Commission on the Progress Towards Accession by Each of the Candidate Countries COM (2002) 700 final, 9 October 2002.

European Commission, Comprehensive Monitoring Report of the European Commission on the State of the Preparedness for EU Membership of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia COM (2003) 675 final, 5 November 2003.

European Commission, Regular Report from the Commission on Bulgaria's Progress Towards Accession COM 98 (707) final, 17 December 1998, Bulletin of the European Union Supplement 12/98.
European Commission, Regular Report from the Commission on Bulgaria's Progress Towards Accession 2001 SEC (2001) 1744 final, 13 November 2001.
European Commission, European Commission, Regular Report from the Commission on Bulgaria's Progress Towards Accession SEC (2002) 1744 final, 9 October 2002.

European Commission, Regular Report from the Commission on the Czech Republic's Progress Towards Accession COM (98) 708 final, 17 December 1998, Bulletin of the European Union Supplement 13/98.
European Commission, Regular Report from the Commission on the Czech Republic's Progress Towards Accession SEC(2002)1402 final, 9 October 2002.

European Commission, Regular Report from the Commission on Estonia's Progress Towards Accession SEC (2002)1402 final, 9 October 2002.

European Commission, Regular Report from the Commission on Hungary's Progress Towards Accession COM (99) 505 final, 13 October 1999.

European Commission, Regular Report from the Commission on Hungary's Progress Towards Accession SEC (2002) 1404 final, 9 October 2002.

European Commission, Regular Report from the Commission on Latvia's Progress Towards Accession SEC (2002) 1405 final, 9 October 2002.

European Commission, Regular Report from the Commission on Lithuania's Progress Towards Accession SEC(2002) 1406 final, 9 October 2002.

European Commission, Regular Report from the Commission on Poland's Progress Towards Accession COM (98) 701 final, 17 December 1998. Bulletin of the European Union Supplement 6/98.
European Commission, Regular Report from the Commission on Poland's Progress Towards Accession SEC (2002) 1408 final, 9 October 2002.

European Commission, Regular Report from the Commission on Romania's Progress Towards Accession SEC (2001) 1753 final, 13 November 2001.
European Commission, Regular Report from the Commission on Romania's Progress Towards Accession SEC (2002) 1409 final, 9 October 2002.
European Commission, Regular Report from the Commission on Romania's Progress Towards Accession SEC (2003) 1211 final, 5 November 2003.
European Commission, Regular Report from the Commission on Romania's Progress Towards Accession SEC (2004) 1200, 6 October 2004.
European Commission, Comprehensive Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania. Communication from the Commission. COM (2005) 534 final, 24 October 2005.

European Commission 2008 Report on Romania's Progress on Accompanying Measures Following Accession COM (2008) 494 final, 23 July 2008.
European Commission 2009 Report on Romania's Progress on Accompanying Measures Following Accession COM (2009) 70 final, 12 February 2009.
European Commission 2010 Report on Romania's Progress on Accompanying Measures Following Accession COM (2010) 401 final, 20 July 2010.
European Commission 2011 Report on Romania's Progress on Accompanying Measures Following Accession COM (2011) 80 final, 18 February 2011.
European Commission 2011 Report on Romania's Progress on Accompanying Measures Following Accession COM (2011) 460 final, 20 July 2011.
European Commission, Commission Staff Working Document Romania: Technical Report SWD (2017) 701 final, 15 November 2017.
European Commission, Commission Staff Working Document Romania: Technical Report SWD (2018) 551 final, 13 November 2018.

Luxembourg European Council, 12,13 December 1997, Presidency Conclusions, SN 400/97.

European Commission, EU Justice Scoreboard. A tool to promote effective justice and growth COM (2013) 160 final, 27 March 2013.

European Commission, EU Justice Scoreboard. A tool to promote effective justice and growth COM (2014) 155 final, 2014.
European Commission, EU Justice Scoreboard. A tool to promote effective justice and growth COM (2015) 116 final, 2015.
European Commission, EU Justice Scoreboard. A tool to promote effective justice and growth COM (2016) 199 final, 2016.
European Commission, EU Justice Scoreboard. A tool to promote effective justice and growth COM (2017) 167 final, 2017.

European Commission. Communication from the Commission to the European Parliament and the Council A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final.

European Parliament, 'Resolution of 5 July 2011 on the Revised Constitution of Hungary' (P7_TA(2011)0315) 5 July 2011.

European Parliament, 'Resolution of 16 February 2012 on recent political developments in Hungary' (P7_TA(2012)0053), 16 Feburary 2012.

European Parliament, 'Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012)' (2012/2130(INI)), P7_TA(20130315, A7-0229/2013), 3 July 2013.

European Parliament, 'Resolution of 10 June on the Situation in Hungary' (2015/2700 RSP) 10 June 2015.

European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Draft Report on a proposal calling on the Council to determine pursuant to Article 7(1) 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 (2017/2131NL), 11 April 2018.

Council of Europe

Committee of Ministers Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency, Responsibilities.

Consultative Council of European Judges (CCJE), Magna Carta of Judges (2010).

Consultative Council of European Judges (CCJE), Opinion no.2 (2002) on the Funding and Management of Courts.
Consultative Council of European Judges (CCJE), Opinion no. 3 (2002) on ethics and liability of judges.
Consultative Council of European Judges (CCJE), Opinion no. 6 (2004) on Fair Trial within a Reasonable Time.
Consultative Council of European Judges (CCJE), Opinion no. 10 (2007) on Councils for the Judiciary in the Service of Society.

European Commission for the Efficiency of Justice (CEPEJ), Saturn Guidelines for Judicial Time Management, Comments and Implementation Examples (2012) (available at: http://www.coe.int/t/dghl/cooperation/cepej/Delais/Saturn_15_Guidelines_Plus_IRSIG_draft_121214_en.pdf).

European Commission for the Efficiency of Justice (CEPEJ) 2014 Revised Saturn Guidelines for Judicial Time Management.

Venice Commission, 'Judicial Appointments' Report, CDL-AD(2007)028-e (available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)028-e).

Venice Commission, 'Report on the Independence of the Judicial System, Part I: The Independence of Judges' CDL-AD(2010)004 (available at: http://www.venice.coe.int/webforms/documents/CDL-AD(2010)004.aspx).

Venice Commission CDL-AD(2006)036rev, 'Remedies to Excessive Length of Proceedings' Report, (available at: http://www.venice.coe.int/webforms/documents/CDL-AD(2006)036rev.aspx).

Venice Commission, CDL-AD(2012)001, 'Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Court of Hungary.'

Venice Commission, CDL-AD(2012)020, 'Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary.'

Venice Commission, CDL-AD(2013)012, 'Opinion to the Fourth Amendment to the Fundamental Law of Hungary.'

Hungary

President of the NJO Decision no. 8/2012 Regulation on the communication of the courts and the NJO with the press
President of the NJO, Case Transfer Decisions (2012-2013) (42 decisions)
President of the NJO, Strategic Goals (Annual Reports 2012-2016)
President of the NJO, Annual Reports (2012-2016)
President of the NJO, Regulation no. 6 of 2015 on the administration of courts
National Judicial Council, Decision no. 58 of 2012 of 17 September 2012 on Principles governing the appointment of competent court

Hungarian Judicial Code of Ethics (2005)
Hungarian Judicial Code of Ethics (2015)

Romania

Ministry of Justice of Romania, National Strategy for Judicial Reform 2005-2007
Ministry of Justice of Romania, National Judicial Strategy 2015-2020
Superior Council of Magistracy of Romania, Annual activity reports (2011-2016)
Superior Council of Magistracy, Internal Rules of Courts (2015)
Superior Council of Magistracy, Internal Rules of Courts (2005)
Superior Council of Magistracy, Judicial Inspection, Report no. 1696/IJ/1128/DIJ/2013, 'Report on the verifications carried out by the management of courts concerning the compliance with the legal provisions on the registration and random allocation of cases at courts'

Romanian Judicial Code of Ethics (2005)
American Bar Association CEELI, Final Report on the judicial ethics training in Romania (2005)

Bulgaria

Bulgarian judicial code of ethics, (available at http://vssold.justice.bg/en/aktove/judicial_system_code_of_ethics_eng.pdf)

Slovakia

Slovakian judicial code of conduct (available at http://www.sudnarada.gov.sk/data/files/697.pdf)

The Netherlands

NvVR, Guidelines for the Impartiality and Ancillary Positions in the Judiciary January 2014 (available at https://www.rechtspraak.nl/SiteCollectionDocuments/Matters-of-principle.pdf)

Press Guidelines of the Dutch Judiciary (2013), (available at https://www.rechtspraak.nl/SiteCollectionDocuments/Press-Guidelines.pdf)

The Dutch Judiciary and the Media (available at https://www.rechtspraak.nl/SiteCollectionDocuments/The-Judiciary-and-the-Media-in-the-Netherlands.pdf)

Reports

Eötvös Károly Research Institute, 'Judicial Independence, Accountability, Judicial Reforms' (2008), (available at http://www.ekint.org/ekint_files/File/tanulmanyok/biroi_fuggetlenseg.pdf)

European Network of Councils for the Judiciary (ENCJ), Justice Society and the Media, Report 2011-2012 (available at http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_justice_society_media_def.pdf)

Open Society on the councils for the judiciary Open Society Institute, 'Monitoring the EU accession process: Judicial Independence '(2001) (available at: https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf)

Open Society Institute EU Accession Monitoring Programme, *Monitoring the EU Accession Process: Judicial Capacity* (OSI 2002)

Wetenschapelijk Raad voor het Regeringsbeleid (WRR), 'De toekomst van de nationale Rechtsstaat' (The future of the national Rule of Law), The Hague, 2002. 42-57.

Speech

Baka András Parliamentary speech no. 90 of 24th of March 2011.

Summary

Judicial independence and rule of law challenges in Central and Eastern European (CEE) states call for reflecting on how CEE states can integrate European rule of law values for judicial organization in their legal framework. At a theoretical level, these developments call for reflecting on what studying these experiences can add to our understanding of balancing rule of law and new public management values, which underpin the legitimate functioning of judiciaries in liberal-democracies as well as the role of national judges as de-centralized EU judges effectively implementing EU law. The present study addressed these questions through an in-depth contextual-comparative analysis of two Central and Eastern European member states exemplifying rule of law challenges of a different nature.

The first part of this study laid down the theoretical framework. Relying on constitutional and rule of law theories, the first chapter showed how classic rule of law and new public management-inspired values for judicial organization and judging combine at a conceptual level, as well as how this exercise contributes to the legitimacy of judicial input, throughput and output and to upholding the ideal of the rule of law in liberal-democracies. Having this conceptual framework at its basis, the second chapter maps how the content of legally binding and non-binding European Union and Council of Europe sources concerning judicial organization have evolved and the extent to which these sources reflect the content of the liberal-democratic normative framework. The chapter demonstrates that the case law by the CJEU and the ECtHR refer to core dimensions of personal, functional and constitutional dimensions of judicial independence. In addition, the evolving case law of both the CJEU and the ECtHR establish a core balance between rule of law and new public management values, notably in the fields of judicial selection, case allocation and participation of the judiciary in public debate. Non-binding sources rely on this core balance and they suggest specific legal mechanisms, the implementation of which is optional. The chapter argues that with this construction, the content of European requirements and recommendations reflect the content of the liberal-democratic normative framework while also creating a common European core, which at the same time allows for diversity in terms of context-specific integration of these values in the national legal frameworks.

The second part of the study critically tests and refines the theoretical framework through evaluating experiences with implementing European requirements in Hungary and Romania. The third chapter introduces the contextual-comparative analysis by explaining the key elements of the constitutional frame of reference for judicial organization in Hungary and Romania consisting of the content of the Constitution, interpretation by the Constitutional Court and the constitutional role of judicial councils. Chapters 4, 5 and 6 contain the three in-depth case studies addressing judicial selections, case assignment methods, and the participation of the judiciary in the public debate concerning court reforms. The three case studies represent all three dimensions of judicial functioning and they discuss the personal, functional, constitutional and organizational dimensions of judicial independence.

With regards to Hungary, the case studies argue that the incorporation in the legislative framework of the new public management principles of effective human resource management, balanced workload between courts and effective communication of the judiciary with its surroundings and connected powers of the President of the National

Judicial Office (NJO), threaten judicial independence in practice. A particular problem is the revision and veto powers of the President of the NJO in all these fields. The analysis of the documents issued by the President NJO demonstrated that in practice, the President NJO relied on the new public management values to override selection decisions, to issue compulsory guidance on the allocation of cases and to control the communication of the judiciary.

Concerning Romania, the case studies argue that the incorporation in the legal framework of the new public management values of competitive judicial selection processes, randomness in the allocation of cases and the effective communication of the judiciary are not sufficient to secure the establishment of core rule of law values. The meaning of the rule of law value of merit-based selections for occupying judicial office, the meaning and place of internal independence and decision-making autonomy of judges and the internalization of shared professional values of judges represent areas that need to be developed.

In both legal orders, the chapters argue that the simultaneous affirmation of rule of law and new public management principles goes beyond creating tensions between the two type of values, and result in specific risks for judicial independence.

This imbalance in the two studied legal orders goes against the core European balance between effective and merit-based judicial selections; guaranteeing the timeliness of judicial proceedings and the principle of a lawful judge; as well as the effective participation of judges in public debate and the representation the professional rule of law values shared by judges.

At the same time, all three case studies move beyond an explanatory comparative analysis and contribute with specific suggestions for integrating the core European balance between rule of law and new public management values. Chapters 4,5 and 6 conclude *inter alia* that the control powers of the Council for the Judiciary in Hungary should be extended, in both legal orders the decision-making autonomy and internal independence of judges should be affirmed, and both legal orders should allow for the participation of judges in establishing and further developing professional values.

Finally, Chapter 7 concludes this study, by showing that there are two main ways through which the simultaneous affirmation of rule of law and new public management values for judicial organization threatens judicial independence in Hungary and Romania. One possible threat is the reliance on new public management values as a guise for the introduction of judicial reforms meant to undermine judicial independence, as demonstrated with respect to Hungary. Another threat is the explicit incorporation of new public management values in a legal framework where rule of law values are not affirmed. This incorporation may shift the focus of judicial reforms to new public management values with detrimental effects for judicial independence, as indicated by the analysis concerning Romania. The ability to address both kind of situations is imperative for securing the common values at the heart of the European Union and for continuing the integration process.

With this in-depth analysis concerning the content of European Union and Council of Europe rule of law requirements and recommendations for judicial organization and the legal frameworks in Hungary and Romania, the research provides conclusions and guidelines for academics, legislators, and judges.

Samenvatting

Uitdagingen in Midden- en Oost-Europa (MOE) omtrent de onafhankelijkheid van de rechter en de democratische rechtsstaat roepen op tot een reflectie op de wijze waarop MOE-landen Europese beginselen van de democratische rechtsstaat kunnen integreren in de rechterlijke organisatie binnen hun rechtssystemen. Vanuit een theoretisch oogpunt, roepen deze ontwikkelingen op tot een reflectie op hoe het bestuderen van voorgenoemde gebeurtenissen kan bijdragen aan onze opvatting over het in evenwicht brengen van de beginselen van de democratische rechtsstaat vis-à-vis zogeheten 'new public management' idealen, die ten grondslag liggen aan zowel het legitiem functioneren van de rechterlijke macht binnen liberale democratieën, als de rol van nationale rechters in hun hoedanigheid als gedecentraliseerde EU rechters die het EU recht effectief toepassen. Dit onderzoek ziet op het beantwoorden van deze vraagstukken middels het uitvoeren van een gedetailleerde, contextueel-vergelijkende analyse betreffende twee MOE-lenden die beiden op hun eigen manier kampen met het waarborgen van algemene rechtsstatelijke idealen.

Het eerste deel van dit onderzoek richt zich op het uiteenzetten van het theoretische kader. In het eerste hoofdstuk, berustende op constitutionele en rechtsstatelijke theorieën, wordt aangetoond hoe klassieke rechtsstatelijke beginselen en nieuwe management idealen die hun oorsprong vinden in de moderne organisatie samenkomen wanneer men de rechterlijke organisatie en besluitvorming processen conceptualiseert. Daarnaast komt in dit hoofdstuk aan bod hoe deze conceptualisering bijdraagt aan zowel de legitimiteit van rechterlijke input, doorvoersnelheid en output, als aan het waarborgen van het rechtsstatelijke ideaal in liberale democratieën. Voortbouwende op dit theoretisch kader, zet het tweede hoofdstuk vervolgens de evolutie uiteen die juridisch bindende en niet-bindende bronnen van de Europese Unie en Raad van Europa betreffende de rechterlijke organisatie inhoudelijk hebben doorgemaakt en in hoeverre deze bronnen overeenkomen met de inhoud van het liberaal-democratische normatieve toetsingskader. In dit hoofdstuk wordt aangetoond dat de jurisprudentie van zowel het Hof van Justitie van de Europese Unie (HvJ-EU) als het Europees Hof voor de Rechten van de Mens (EHRM) verwijzen naar kernaspecten van persoonlijke, functionele en constitutionele aard betreffende de onafhankelijkheid van de rechter. Voorts wordt geconstateerd dat de dynamische jurisprudentie van het HvJ-EU en het EHRM een evenwicht tussen rechtsstatelijke beginselen en 'new public management' idealen aanvaardt; met name, in het kader van rechterlijke selectieprocedures, de allocatie van zaken binnen de rechterlijke organisatie en de deelname van de leden van de rechterlijke macht aan het publieke debat. Niet-bindende bronnen vertrouwen op dit cruciale evenwicht wanneer zij specifieke juridische mechanismen suggereren, waarvan de implementatie optioneel is. Het hoofdstuk zet tot slot uiteen dat middels deze constructie, Europese vereisten en aanbevelingen inhoudelijk de kern van het liberaal-democratische normatieve toetsingskader weerspiegelen, waarnaast tegelijkertijd een gemeenschappelijke Europese standaard wordt gecreëerd, die diversiteit *in concreto* toelaat bij de implementatie van voorgenoemde idealen in de nationale rechtssystemen.

Het tweede deel van het onderzoek ziet op het kritisch testen en nuanceren van het theoretisch kader aan de hand van een evaluatie van de ervaringen van Hongarije en Roemenië bij het implementeren van Europese criteria. Het derde hoofdstuk introduceert de contextueel-vergelijkende analyse door middel van het toelichten van de kernelementen van het constitutionele referentiekader betreffende de rechterlijke organisatie in Hongarije en

Roemenië, dat de inhoud van de constitutionele documenten, de interpretatie daarvan door het constitutioneel gerechtshof en de rol van rechterlijke raden omvat. Hoofdstukken 4, 5 en 6 bespreken de drie gedetailleerde casus betreffende rechterlijke selectieprocedures, de allocatie van zaken binnen de rechterlijke organisatie en de deelname van de leden van de rechterlijke macht aan het publieke debat, met het oog op rechterlijke hervorming. De drie casus zien op de drie facetten van rechterlijk functioneren en bespreken het persoonlijke, functionele en constitutionele aspect van de onafhankelijkheid van de rechter.

Met betrekking tot Hongarije, tonen de casus aan dat de implementatie in het rechtssysteem van de 'new public management' beginselen van het effectieve beheer van personeelszaken, het evenwichtig verdelen van de werklast binnen de rechtelijke organisatie en van effectieve communicatie van de rechterlijke macht jegens haar omgeving en aanverwante competenties van de President van de 'National Judicial Office' (NJO) een gevaar vormen in de praktijk voor de onafhankelijkheid van de rechterlijke macht. De herziening- en veto competenties van de President van de NJO vormen daarbij in het bijzonder een probleem met betrekking tot alle voorgenoemde subcategorieën. De analyse van de documenten gepubliceerd door de President van de NJO toont aan dat, in de praktijk, de President van de NJO de 'new public management' waarden aanhaalde als grondslag voor het weerleggen van uitkomsten van selectieprocedures, om dwingend advies omtrent de allocatie van zaken binnen de rechterlijke organisatie te geven en om de communicatie van de rechterlijke macht naar buiten toe te filteren en dicteren.

Wat betreft Roemenië, tonen de casus aan dat de implementatie in het rechtssysteem van de 'new public management' waarden van competitieve rechterlijke selectieprocedures, arbitraire allocatie van zaken binnen de rechterlijke organisatie en van de effectieve communicatie van de rechterlijke macht naar buiten toe onvoldoende zijn om de kernbeginselen van de rechtsstaat te waarborgen. De betekenis van het rechtsstatelijk ideaal van competentie-gebaseerde rechterlijke selectieprocedures, de betekenis en het belang van interne onafhankelijkheid en autonome besluitvorming en de incorporatie van gedeelde professionele rechterlijke waarden zijn allen voorbeelden van facetten die om hervorming vragen.

De hoofdstukken zetten het argument uiteen dat in beide rechtssystemen de erkenning van zowel rechtsstatelijke- als 'new public management' beginselen verder rijkt dan het simpelweg creëren van spanningen tussen deze twee verschillende typen waarden en resulteert in een bijzonder gevaar voor de rechterlijke onafhankelijkheid. Dit onevenwicht dat zich voordoet binnen de twee rechtssystemen die zijn behandeld in dit onderzoek staat haaks op de centrale Europese balans betreffende effectieve en competentie-gebaseerde rechterlijke selectieprocedures; het garanderen van een tijdig proces en waarborgen van het beginsel van een bevoegde rechter; en betreffende de effectieve deelname van rechters aan het publieke debat en een gedeelde opvatting van professionele rechtsstatelijke waarden binnen de rechterlijke organisatie.

Tegelijkertijd, bieden alle drie casus meer dan enkel een vergelijkende analyse en toelichting, gezien zij allen een contributie zijn aan het debat omtrent specifieke suggesties voor het integreren van de centrale Europese balans tussen rechtsstatelijke- en 'new public management' beginselen. Hoofdstukken 4, 5 en 6 concluderen *inter alia* dat de controlerende functie van de 'Council for the Judiciary' in Hongarije uitgebreid zou moeten worden; dat in beide rechtssystemen die in dit werk zijn behandeld de autonomie van het besluitvormingsproces en de interne onafhankelijkheid van de rechterlijke macht bevestigd dienen te worden; en dat beide rechtssystemen de deelname van rechters aan de totstandkoming en ontwikkeling van professionele waarden dienen te omarmen.

Tot slot, wordt in hoofdstuk 7 de eindconclusie van dit onderzoek uiteengezet, middels het toelichten van twee prominente aanpakken waarbij de affirmatie van zowel rechtsstatelijke- als ‘new public management’ beginselen betreffende de rechterlijke organisatie een gevaar vormt voor de rechterlijke onafhankelijkheid in Hongarije en Roemenië. Één voorbeeld van een dergelijk gevaar is het berusten op ‘new public management’ beginselen als een dekmantel voor het introduceren van rechterlijke hervorming die ziet op ondermijnen van de rechterlijke onafhankelijkheid, waar de situatie in Hongarije een voorbeeld van is. Een ander voorbeeld van een voorgenoemd gevaar is het expliciet opnemen ‘new public management’ beginselen een rechtssysteem waarin rechtsstatelijke beginselen niet zijn aanvaard. Een dergelijke incorporatie zou de focus van rechterlijke hervorming kunnen verschuiven naar ‘new public management’ beginselen, hetgeen schadelijk zou zijn voor het waarborgen van rechterlijke onafhankelijkheid, zoals aangetoond in dit onderzoek in de analyse betreffende Roemenië. Het aanpakken van deze twee verschillende gevaren wanneer deze zich mogelijk voor zouden kunnen doen is cruciaal in zowel het kader van het waarborgen van de gemeenschappelijke waarden die ten grondslag liggen aan de Europese Unie, als het voortzetten van het Europese integratieproces.

Middels deze gedetailleerde analyse betreffende de Europese Unie en Raad van Europa rechtsstaat-criteria en aanbevelingen met betrekking tot de rechterlijke organisatie en rechtssystemen in Hongarije en Roemenië, biedt dit onderzoek conclusies en richtlijnen die waardevol zijn voor de rechtswetenschap, beleidmakers en de rechterlijke macht.

Curriculum vitae

Petra Mária Gyöngyi holds a Bachelor of Laws degree from the University of Babeș-Bolyai and an LL.M. in Human Rights Law from the Central European University. Currently, she is a postdoctoral fellow at the University of Oslo, participating in the 'Judges Under Stress – The Breaking Point of Judicial Institutions' project. Previously, she was a trainee at the European Court of Human Rights, and worked at the Erasmus School of Law as a PhD researcher and at Maastricht University as a lecturer. She held visiting research positions at The Research Institute on Judicial Systems in Bologna (IRSIG-CNR) and at the PluriCourts Centre of Excellence at the University of Oslo.