Who safeguards the guardians? A subjective right of judges to their independence under Article 6(1) ECHR

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Abstract

Time for the ECtHR to interpret Article 6 ECHR to encompasses a subjective right for domestic judges to their own independence – overview of the existing case law on the principle of judicial independence – such a right currently not present in case law – judges are obliged to frame their complaints, while at their heart independence-related, in terms of other substantive Convention rights – Court cannot properly address one of the fundamental aspects of these cases – lower protection for the domestic judges – other international legal orders do include such a subjective right to a judge's independence – several arguments for the ECtHR to similarly acknowledge such a right under the Convention – little difficulties to integrate such a right in the existing case law.

INTRODUCTION

In their 2009 article *Guarding the guardians*, Nuno Garoupa and Tom Ginsburg discussed the emergence of judicial councils as important actors in the selection and discipline of judges.[1] In this contribution, they were critical of the prevailing opinion that a majority of judges in such councils would improve the quality of the judiciary and stressed the need for politically accountable judges. The article can be seen as an example of the increasing attention towards questions of accountability of judges and the search for a balance between judicial independence and judicial accountability.[2]

Over a decade later, the international landscape has changed considerably. In countries all over the world,[3] measures have been introduced that may safely be described as a deliberate attempt to destroy the judicial independence as part of a broader strategy to dismantle the existing system of checks and balances. Gathered under the common denominator of rule of law backsliding,[4] these measures include lowering the retirement age of judges,[5] court-packing,[6]

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[1] N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 57 *AJIL* (2009) p. 103.

[2] Among others: D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Routledge 2010); F. Contini and R. Mohr, 'Reconciling independence and accountability of judicial systems', 2 *Utrecht Law Review* (2007) p. 26.

[3] See for example in Venezuela: J. M. Casal, 'The Constitutional Chamber and the Erosion of Democracy in Venezuela', 80 *Heidelberg Journal of International Law* (2020), p. 913.

[4] One of the first sources on the issue of rule of law backsliding: L. Pech and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3.

[5] This has happened in Hungary and more recently in Poland. The latter has given rise to two infringement proceedings before the ECJ. See judgments: Case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*; Case C-192/18, *Commission* v *Poland (Independence of ordinary courts)*.

[6] On this issue: D. Kosař and K. Šipulová, 'How to fight court-packing', 6 *Constitutional Studies* (2020) p. 133.

(ab)using disciplinary proceedings,[7] and generally increasing the power of the political branches over the judiciary. Even though Hungary and especially Poland are mentioned everywhere as the *enfants terribles* in Europe at the moment, similar concerns have also been raised with regard to other countries, like Romania[8] or Malta.[9]

In such a climate, the question may very well be rephrased to who can safeguard the domestic judges instead of who guards them. Clearly, this is a very broad question which can be discussed from a multitude of different angles, based on the nature of the measures in question (political or legal, binding or non-binding), or the level from which they originate (national or international). This article will only deal with one distinct aspect of this question, namely whether it is time for the European Court of Human Rights (ECtHR) to acknowledge a subjective right of a judge to his or her independence under the European Convention on Human Rights (ECHR). Such a right could offer an important new form of international protection for judges whose independence is threatened by national actors. While this question has so far received limited attention in legal doctrine,[10] it may be expected to become increasingly pressing in the current climate.

This article is structured as follows. The next section will provide a brief overview of the existing case law on the notion of judicial independence, enshrined in Article 6 ECHR, concluding that at this point in time it does not provide for a subjective right of judges to their independence. The third section will give an overview of how certain judges have nonetheless attempted to enforce their own independence before the Court via other Convention rights. Section four will broaden the scope and look whether such a subjective right for judges exists in other international legal orders, examining the case law of the UN Human Rights Committee, the Inter-American Court of Human Rights and the European Court of Justice. The fifth and final substantive section will then shift the focus back to the ECtHR and argue that it should acknowledge a subjective right to a judge's independence under Article 6 ECHR. Section six will conclude.

THE EXISTING CASE LAW ON JUDICIAL INDEPENDENCE UNDER ARTICLE 6 ECHR

Judicial independence is generally understood as a prerequisite for any state claiming to be governed by the rule of law. Judges must be able to form a decision strictly on the basis of considerations pertaining to the law and justice, free from fear or favour, and untethered from any interests that are irrelevant to the case.[11] It is incumbent upon the (constitutional) legislature

[7] On this issue: K. Gajda-Roszczynialska and K. Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', 12 *Hague Journal on the Rule of Law* (2020), p. 451.

[8] See, for example, EP Resolution of 13 November 2018, OJ 2020 C 363/8. See also: ECJ 18 May 2021, Cases C-83/19 a.o., *Asociaţia "Forumul Judecătorilor din România" a.o.* v *Inspecţia Judiciară a.o.*

[9] See, for example, EP Resolution of 18 December 2019, not yet in Official Journal. Accessible via: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0103_EN.html. See also: ECJ 20 April 2021, Case C-896/19, *Repubblika* v *Il-Prim Ministru*.

[10] See only: P. Ducoulombier, 'Le droit subjectif du juge à la protection de son indépendance: chaînon manquant de la protection de l'État de droit en Europe?', in L. Branko, I. Motoc, P. Pinto de Albuquerque, R. Spano and M. Tsirli (eds.), *Procès équitable: perspectives régionales et internationales* (Anthemis 2020) 153; L.-A. Sicilianos, 'The Subjective Right of Judges to Independence: Some Reflexions on the Interpretation of Article 6, Para. 1 of the ECHR', in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano* (Springer 2019) 547. That article by judge Sicilianos is based heavily on an earlier concurring opinion by him in the case of ECtHR (GC) 23 June 2016, No. 20261/12, *Baka* v *Hungary*.

[11] R. Macdonald and H. Kong, 'Judicial Independence as a Constitutional Virtue', in M. Rosenfeld and A. Sajó (eds.), *Oxford Handbook on Comparative Constitutional Law* (OUP 2012) p. 831, at p. 832.

of each state to design a judicial system that allows judges to rule in such an independent manner. Yet, such a system should equally foster other values pertaining to the judiciary, such as judicial accountability, transparency, and the absence of corporatism. In each state, the protection of judicial independence should thus be balanced against other values.[12] While the way in which that balance is given shape is primarily a domestic issue, it has at this point in time an undeniable European dimension as well. Since its conception, the European Court of Human Rights has imposed minimum standards as to the right to judicial independence. That right, enshrined in the first paragraph of Article 6 ECHR, has given rise to a very rich body of case law. For the Court, judicial independence is primarily a jurisprudential construct, the foundational layer of which has been laid in the 80's and 90's and to which new layers are added regularly.[13] While the body of case law is too vast to describe in all its intricacies, it is possible to point to a few important developments that have taken place throughout the years.

It was in the judgment of *Campbell and Fell* that the Court introduced the – by now classic – list of factors which it takes into account to determine whether a body can be considered independent: the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence.[14] To this day, these four factors, while not exhaustive, remain the starting point for any assessment of judicial independence.[15] Whereas the court originally stressed the need for the independence from the executive and the parties to the case, it later explicitly added the need for independence vis-à-vis the legislature as well.[16]

This original jurisprudence stressed the independence of the judiciary in a sense that is commonly understood as an implementation of the theory of separation of powers.[17] It denotes the basic relationship between the judiciary and the two political branches of powers and stresses that the judiciary should be institutionally and functionally independent from them. In this sense, it is relevant to point out that the Court regularly states that the notion of separation of powers has assumed a growing importance in its case law.[18] Whereas in some cases the Court has mainly stressed the importance of the separation between the judiciary and the executive,[19] in others it has pointed to the importance of the separation between the judiciary and the political organs of government as a whole.[20]

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[12] G. Di Federico, 'Judicial Independence in Italy', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 357 at p. 399.
[13] P. Lemmens, 'L'indépendance du juge national vue depuis Strasbourg', 31 *RTDH* (2020) p. 785, at p. 786.
[14] ECtHR 28 June 1984, Nos. 7891/77 and 7878/77, *Campbell and Fell* v *the United Kingdom*, para. 78.
[15] See for some recent high profile examples: ECtHR 9 February 2021, No. 15227/19, *Xhoxhaj* v *Albania*, para. 289; ECtHR 21 April 2020, No. 36093/13, *Anželika Šimaitienė* v *Lithuania*, para. 78; ECtHR 3 March 2020, No. 66448/17, *Baş* v *Turkey*, para. 267; ECtHR (GC) 6 November 2018, Nos. 55391/13, 57728/13 and 74041/13, *Ramos Nunes de Carvalho e Sá* v *Portugal*, para. 144; ECtHR (GC) 25 September 2018, No. 76639/11, *Denisov* v *Ukraine*, para. 60.
[16] ECtHR 26 August 2003, No. 10526/02, *Filippini* v *San Marino*.
[17] In the same sense: concurring opinion of judge Sicilianos in *Baka*, *supra* n. 10, para. 3. S. Shetreet, 'Reflections on Contemporary Issues of Judicial Independence', in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano* (Springer 2019) p. 511, at p. 514.
[18] See for the first express reference in the case law: ECtHR (GC) 28 May 2002, No. 46295/99, *Stafford* v *the United Kingdom*, para. 78.
[19] *Ramos Nunes de Carvalho e Sá*, *supra* n. 15, para. 144; ECtHR 12 January 2016, No. 57774/13, *Miracle Europe KFT* v *Hungary*, para. 52; *Stafford*, *supra* n. 18, para. 78.
[20] *Anželika Šimaitienė*, *supra* n. 15, para. 78; ECtHR 18 October 2018, No. 80018/12, *Thiam* v *France*, para. 62; ECtHR (GC) 18 July 2013, Nos. 2312/08 and 34179/08, *Maktouf and Damjanović* v *Bosnia and Herzegovina*, para. 78.

In its more recent case law, the Court has also been tasked with delineating more ancillary and subtle cases of judicial independence, more particularly those relating to judicial councils.[21] Whereas there is no uniformity on this issue in Europe, a judicial council may be defined as an independent organ, positioned between the judiciary and the political branches of government, with – depending on the country in question – significant powers in terms of appointment, promotion and discipline of judges, court management, and budgeting.[22] Generally speaking, these institutions can be understood as striking a balance between judicial independence and judicial accountability.[23]

When it comes to judicial councils, the Court's foundational judgment is *Olujić*.[24] In this case, the Court indicated that a judicial council may be seen as a tribunal in the sense of Article 6(1) ECHR, thereby subjecting them to the substantive requirement of that provision. Since then, it has received several cases on this issue. In most of these cases, a domestic judge complains about a disciplinary penalty that he or she had incurred, arguing that the council in question was not impartial or independent. In several of these cases, the Court had to assess the composition of these bodies, reviewing the fragile balance that had been struck between the judicial and political members.[25] These cases concerning the composition of judicial councils thus put the Court in a position to delineate a more nuanced aspect of the independence between the judiciary and the political branches of power.

Around the same time, the Court also started to develop jurisprudence concerning a different aspect of judicial independence: internal judicial independence.[26] The concept of internal judicial independence requires that judges are free from any undue pressure from their superiors or their colleagues within the judiciary.[27] Whereas this principle originated in international soft-law instruments,[28] it was explicitly adopted by the Court in the 2009 judgment of *Parlov-Tkalčić*. In this judgment, the Court held that judicial independence as enshrined in Article 6 ECHR demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified.[29] Since its judgment in *Parlov-Tkalčić*, the Court has issued

[21] See in such sense: M. Leloup, 'The Concept of Structural Human Rights in the European Convention on Human Rights', 20 *Human Rights Law Review* (2020) p. 480 at p. 491.
[22] D. Kosař, J. Baroš and P. Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', 15 *EuConst* (2019) p. 427 at p. 446.
[23] S. Benvenuti, 'The Politics of Judicial Accountability in Italy: Shifting the Balance', 14 *EuConst* (2018) p. 369.
[24] ECtHR 5 February 2009, No. 22330/05, *Olujić* v *Croatia*.
[25] The most important examples are: *Ramos Nunes de Carvalho e Sá*, *supra* n. 15; *Denisov*, *supra* n. 15; ECtHR 9 January 2013, No. 21722/11, *Oleksandr Volkov* v *Ukraine*. See also: *Thiam*, *supra* n. 20.
[26] See more extensively on the topic: J. Sillen, 'The concept of 'internal judicial independence', in the case law of the European Court of Human Rights', 15 *EuConst* (2019) p. 104.
[27] Shetreet, *supra* n. 17, at p. 515.
[28] See article 1.4 of the *Bangalore Principles of Judicial Conduct* (2002); Article 9 of the *Mt. Scopus International Standards of Judicial Independence* (2008).
[29] ECtHR 22 December 2009, No. 24/10/06, *Parlov-Tkalčić* v *Croatia*, para. 86. These principles have been confirmed in subsequent judgments: ECtHR 23 January 2020, No. 35121/09, *Yuriy Koval* v *Ukraine*, para. 138;

several judgments in which judges have challenged measures coming from within the judiciary, mainly disciplinary sanctions, that they argued constituted a threat to their independence.[30]

From this short overview, it becomes clear that the Court's case law on judicial independence includes several dimensions of the principle: independence from the parties, institutional and functional independence from the executive and legislative powers both in its basic and more nuanced aspects, as well as internal judicial independence.[31] However, it is crucial to note that in all of the abovementioned case law these aspects of judicial independence have been assessed from the perspective of persons involved in court proceedings and not from that of judges' subjective right to have their own independence guaranteed and respected by their government.[32] Even in cases that concern internal judicial independence, the central question remains whether the applicant's doubts concerning the independence of the domestic judge in question can be objectively justified.[33] Admittedly, the cases in which the composition of a judicial council is challenged are brought before the Court by the national judges themselves. However, in these cases the judges should be seen as civil servants who simply want to enjoy the right to an independent tribunal. Therefore, these cases too concern the right to a fair trial for a party to the proceedings, rather than a judge's subjective right to independence. It must thus be concluded that at this point in time, the case law of the Court does not allow for a judge's subjective right to have his or her independence safeguarded.

ENFORCING JUDICIAL INDEPENDENCE VIA OTHER CONVENTION RIGHTS

This absence of a right to independence has nevertheless not prevented domestic judges from lodging complaints with the Strasbourg Court in order to try and safeguard their own independence, challenging measures like removal or demotion. Yet, due to the lack of an established right in this regard, they had to rely on other substantive Convention rights. Thus, instead of directly invoking a right to be independent, they had to rely on Convention rights that form part of a broader status that protects their independence.[34] The two Convention rights that have been relied on most in this regard are the right to private life, enshrined in Article 8 ECHR, and the freedom of expression, enshrined in Article 10 ECHR.

Before we can delve into the case law, however, an important disclaimer is in place. It is not because a domestic judge has lodged a case with the ECtHR, that the underlying measure can automatically be described as an attack on that judge's independence. For example, if a judge acts in a way that is incompatible with the dignity of office and he or she suffers a disciplinary sanction because of this, that sanction must not be seen as an assault on the judge's independence. It is certainly possible to point to such examples in the case law of the Court.[35]

ECtHR 6 October 2011, No. 23465/13, *Agrokompleks* v *Ukraine*, para. 137; ECtHR 19 April 2011, No. 33186/08, *Khrykin* v *Russia*, para. 29.

[30] See for example: ECtHR 30 January 2020, No. 29295/16, *Franz* v *Germany*; ECtHR 19 April 2011, No. 33188/08, *Baturlova* v *Russia*; ECtHR 15 July 2010, No. 16695/04, *Gazeta Ukraina-Tsentr* v *Ukraine*.

[31] In the same sense: P. Paczolay, 'The Notion of Judicial Independence: Impartiality and Effectiveness of Judges', in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano* (Springer 2019) p. 331, at p. 339.

[32] Sicilianos, *supra* n. 10, at p. 550.

[33] For example: *Parlov-Tkalčić*, *supra* n. 29, para. 86.

[34] Lemmens, *supra* n. 13, at p. 799.

[35] One can think of: ECtHR 19 October 2010, No. 20999/04, *Özpinar* v *Turkey*. In this case, the judge in question received a disciplinary sanction on account of her being late for work and her having close relationships with certain lawyers who apparently benefited from this relationship.

However, examples can also be found of cases in which the underlying measure can be understood as a concealed attack on the independence of the judge in question. It is this second kind that is most important for the topic of this article. Thus, it would in principle be possible to make a distinction based on the underlying motive of the measure in question. It is acknowledged here that this distinction is not one of black and white and that it may be difficult to convincingly argue in one case or another whether the measure in question had the intention of eroding the independence of the judge concerned.[36] Proving intent is difficult and illiberal regimes often invoke seemingly laudable aims to push through far less laudable changes. In this respect, in the EU context, Advocate General Bobek has stressed that alleged breaches of the principle of judicial independence should always be examined in their context, by looking at all relevant elements.[37] A legal measure should thus not be examined in isolation, but assessed in its application in practice when placed in the broader legal and institutional landscape.[38] Both the ECtHR and the ECJ also look at the broader legal context when examining cases about judicial independence.[39] Even though such a contextual approach certainly helps, it remains difficult – if not impossible – to completely objectively assess the motivation behind a measure, whether legislative or administrative in nature. Despite this important caveat, it is argued here that the following cases are all examples of cases where the measure in question entails a concealed attack on the independence of the judge in question, based on the context in which they have been taken.

Without a doubt the most well-known example of a case in which a domestic judge relied on a substantive Convention right in order to safeguard his own independence is the 2016 Grand Chamber judgment of *Baka*.[40] András Baka was the President of the Hungarian Supreme Court and was as such also *ex officio* President of the National Council of Justice. A particular aspect of this case was that in that capacity he had the statutory obligation to express an opinion on parliamentary bills that affected the judiciary. In this official capacity, Baka voiced strong criticisms against the reforms of the Constitution and other legislation by the Fidesz party, which had a great impact on the Hungarian judiciary. Ultimately, as a consequence of the entry

[36] To a certain extent, one can see a connection between the issue that is described here and the principle in administrative law of *détournement de pouvoir* or misuse of power. Here as well, the legal purpose of the act in question is difficult to prove. The Court is faced with a similar problem in its case law concerning Article 18 ECHR. In those cases, the Court applies the standard of proof 'beyond reasonable doubt', but allows that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. See: ECtHR (GC) 28 November 2017, No. 72508/13, *Merabishvili* v *Georgia*, para. 314. See further on the issue: A. Tsampi, 'The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of *contre-pouvoirs* within the State after all?', 38 *Netherlands Quarterly of Human Rights* (2020) p. 134, at p. 140-141.

[37] Opinion of AG Bobek of 8 July 2021 in case C-132/20, *Getin Noble Bank*, paras. 99-104; Opinion of AG Bobek of 20 May 2021 in joined cases C-748/19 to 754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim* v *WB*, para. 152.

[38] Opinion of AG Bobek of 23 September 2020 in joined cases C-83/19, C-127/19 and C-195/19, *Asociaţia "Forumul Judecătorilor Din România"*, paras. 242-248.

[39] For example: ECJ 15 July 2021, Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, paras. 88-113; ECJ 2 March 2021, Case C-824/18, *A.B. and Others (Nomination des juges à la Cour suprême - Recours)*; ECtHR 22 July 2021, No. 43447/19, *Reczkowicz* v *Poland*, para. 235; ECtHR 29 June 2021, No. 6158/18, *Tercan* v *Turkey*, para. 87; *Baka*, *supra* n. 10, paras. 143-152. It should be pointed out that the Court's reasoning in this last case has been criticized: D. Kosař and K. Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', 10 *The Hague Journal on the Rule of Law* (2018) pp. 83-110.

[40] *Baka*, *supra* n. 10.

into force of these constitutional and legislative reforms, Baka lost his mandate as President of the Supreme Court three and a half years before its expected date of expiry.

In legal doctrine there is little doubt that the dismissal of Baka from his position of Supreme Court President was a means to discard an influential voice that was critical of the political majority.[41] Consequently, the disputed measure can be seen as an assault on his judicial independence.[42] Nonetheless, Baka did not invoke the principle of judicial independence before the Strasbourg Court as such. He relied on Article 6 ECHR, but exclusively in the sense that he had been denied the right of access to a court, since there was no domestic remedy available to him. Furthermore, he relied on Article 10 ECHR, arguing that the termination of his mandate as President of the Supreme Court was a result of the views he had publicly expressed and therefore violated his right to freedom of expression.

Thus, even though judicial independence is one of the core issues at play in the *Baka* case, the case before the Strasbourg Court could not be framed as such. This meant that the Court could not really deal with one of the fundamental issues of this case.[43] Nonetheless, as was pointed out by judge Sicilianos in his concurring opinion, the principle of judicial independence is omnipresent in the judgement.[44] The Court indeed tries to incorporate the principle in its reasoning by relying heavily on international soft-law standards and referring to these standards all throughout the judgment.[45] In doing so, the Court stresses the concept of judicial independence in a different substantive Convention right, in this case Article 10 ECHR. It has recently adopted the same reasoning in the judgment of *Kövesi*, which concerned a case in which a Romanian prosecutor's mandate had been prematurely terminated following public criticism of legislative reforms.[46]

A second example of a case in which a domestic judge challenged a measure that can be seen as an attack on judicial independence via another substantive Convention right is *Erményi*. In fact, this case is closely related to the *Baka* case, since Erményi was the Vice-President of the Hungarian Supreme Court at the time of the abovementioned constitutional and legislative reforms. As a consequence of the same legislative provisions as Baka, Erményi was removed from his position as Vice-President almost four years before the scheduled expiry of his mandate. Then, one year later, he was released from his duties as a judge by the Hungarian President, due to the new law lowering the mandatory retirement age of judges.[47]

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[41] See in particular: K. Aquilina, 'The Independence of the Judiciary in Strasbourg Judicial Disciplinary Case Law: Judges as Applicants and National Judicial Councils as Factotums of Respondent States', in P. Pinto de Albuquerque and K. Wojtyczek (eds.), *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano* (Springer 2019) p. 1, at p. 28; Kosař and Šipulová, *supra* n. 39; A. Vincze, 'Dismissal of the president of the Hungarian supreme court: ECtHR Judgment Baka v. Hungary' 21 *European Public Law* (2015) p. 445.

[42] A. Vincze, 'Judicial independence and its guarantees beyond the nation state – some recent Hungarian experience', 56 *Journal of the Indian Law Institute* (2014) p. 202, at p. 211-212.

[43] For the same conclusion: Ducoulombier, *supra* n. 10, at p. 156.

[44] Concurring opinion of judge Sicilianos in *Baka*, *supra* n. 10, para. 6. In fact, the word independence appears 200 times in the entire judgment.

[45] It should be noted that this practice of using international soft-law standards for the interpretation of the principle of judicial independence has been criticized in legal doctrine. For a good example: M. Bobek and D. Kosař, ''Euro-products' and Institutional Reform in Central and Eastern Europe: A Critical Study in Judicial Councils', in M. Bobek (ed.), *Central European judges under the European influence: the transformative power of the EU revisited* (Hart 2015) p. 165, at pp. 175-180.

[46] ECtHR 5 May 2020, No. 3594/19, *Kövesi* v *Romania*. See also more recently: ECtHR 9 March 2021, No. 76521/12, *Eminağaoğlu* v *Turkey*.

[47] ECtHR 22 November 2016, No. 22254/14, *Erményi* v *Hungary*.

The complaint before the Court was limited to the dismissal of his post as Vice-President of the Supreme Court. In his application to the ECtHR, Erményi relied on Articles 6, 8, 13 and 14 of the Convention, as well as Article 1 of the First Additional Protocol. Nonetheless, the Court decided to consider the examination solely from the point of view of Article 8 ECHR. After finding the complaint admissible, the Court came to the conclusion that the Hungarian government had not been able to show that the termination of his mandate pursued one of the legitimate aims of Article 8(2) ECHR and subsequently found a violation of that Convention provision.[48]

The third and final example that will be mentioned here is the case of *J.B.*[49] In this case, a group of over 150 Hungarian judges complained about the mandatory lowering of their retirement age and the consequences of that measure for their professional careers and their private lives. The judges relied on Articles 6, 13 and 14 of the Convention, as well as Article 1 of the First Additional Protocol. The Court decided to communicate the applications to the government also under Article 8 ECHR. Ultimately, the Court found all complaints inadmissible, either because they were incompatible *ratione materiae* or because they were manifestly ill-founded. Importantly, the judges also relied on the principle of judicial independence and argued that the lowering of the retirement age had constituted a serious attack against the independence of the Hungarian judiciary as a whole.[50] The Court, however, did not address this argument in its decision.[51]

The examples do not end there.[52] Nonetheless, the three that were just set forth suffice to show the dangers of the current limited understanding of the right to an independent tribunal under the Convention framework. Due to the absence of a subjective right to their independence, domestic judges have to build their cases on other Convention rights, arguing that the measure in question was in violation of their right to freedom of expression, or that a mandatory lowering of the retirement age constituted a violation of the prohibition of discrimination, or of their rights to respect for private life and to property. The current state of the Court's case law does not allow the domestic judges to challenge any of these measures from an independence angle, but forces them to take a detour via other substantive fundamental rights, often via a rather

[48] *Erményi*, *supra* n. 47, paras. 26-40. However, see the dissenting opinion of judge Kūris, who opposed the broad material scope that was given to Article 8 ECHR in this judgment. See for a recent acclaim of this dissenting opinion in a later case: Dissenting opinion of judge Wojtyczek in ECtHR 17 December 2020, No. 73544/14, *Mile Novaković* v *Croatia*.

[49] ECtHR (dec.) 27 November 2018, Nos. 45434/12, 45438/12 and 375/13, *J.B. a.o.* v *Hungary*.

[50] *J.B.*, *supra* n. 49, para. 113

[51] Several authors have criticised this point: P. Bárd and A. Śledzińska-Simon, 'On the principle of irremovability of judges beyond age discrimination: *Commission* v. *Poland*', 57 *CML Rev* (2020) p. 1555, at p. 1571; R. Uitz, 'The Perils of Defending the Rule of Law Through Dialogue', 15 *EuConst* (2019) p. 1, at p. 6-7.

[52] Besides the judgments of *Broda and Bojara*, *Bilgen* and *Eminağaoğlu*, which are mentioned below, one could think of the Court's case law concerning the reduction of a judge's salary or pension. It is commonly accepted that the remuneration of judges is a central aspect of their independence. Yet, in its limited case law on the matter, the Court has never examined claims on this issue via Article 6 ECHR, even when the applicant judges expressly mention that the lowering of their salary or pension was incompatible with the principle of judicial independence. See: ECtHR 19 June 2012, No. 17767/08, *Khoniakina* v *Georgia*, para. 68 and paras. 72-80. In one decision, the Court did make a connection between a lowering of the wages of judges and the principle of independence, without, however, examining the case through the lens of Article 6 ECHR. See: ECtHR (dec.) 15 October 2013, Nos. 66365/09 a.o., *Savickas a.o.* v *Lithuania*, paras. 93-94. In the absence of any protection via Article 6(1) ECHR, judges need to fall back on the general protection offered by the right to peaceful enjoyment of possessions, enshrined in Article 1 of the First Additional Protocol, a provision that grants the Contracting Parties a very wide margin of appreciation when it comes to the implementation of economic and social policies. The ECJ, by contrast, does protect the remuneration of judges via the right to judicial independence. See *infra* the text at note 87.

contorted reasoning. This state of affairs has two important and related drawbacks. First, it leads to a situation where the Court is not able to fully grapple with one of the crucial elements underlying the application before it. As was shown in *Baka* and *Kövesi*, the Court may try to circumvent this by incorporating independence-rhetoric in other substantive Convention rights, but this cannot mask the fact that the right to freedom of expression or the right to private life were never meant to deal with issues of judicial independence. Second, and crucially, this, in turn, results in a lower protection for the domestic judges. They have to force their complaints in the straightjacket of Conventions rights that have fundamentally different aims and which – as opposed to the principle of judicial independence – leave the domestic authorities with a margin of appreciation. Briefly put, this leads to a situation in which domestic judges cannot effectively safeguard their own independence.

There are, however, two developments in recent jurisprudence that are important for the topic of this article and which merit closer attention. The first of those evolutions concerns the right of access to a court for judges. In several recent cases, the Court seems to have enhanced the procedural protection that judges enjoy via an expansive interpretation of the right of access to a court, as enshrined in Article 6(1) ECHR. According to the Court's well-established *Eskelinen* criteria, civil servants, including judges, may only be excluded from access to a court when this exclusion is expressly provided for in law and is justified on objective grounds in the state's interests.[53] In four recent judgments, the Court came to the conclusion that the exclusion in question could not be justified.[54] In this regard, the Court pointed to the crucial position that judges hold in the domestic constitutional landscape as a check on the political branches of government. Because of this, it stressed the need for procedural protection of judges in order to ensure their autonomy.[55] According to the Court it would be a fallacy to assume that judges can uphold the rule of law if domestic law deprives them of the guarantees of the Convention on matters directly touching upon their individual independence and impartiality.[56] Judges should enjoy protection from arbitrariness against the political branches and only oversight by an independent judicial body is able to render such a right effective.[57] Consequently, the Court held that it did not consider it justified to exclude members of the judiciary from the protection of Article 6 of the Convention.[58]

The effect of the Court's reasoning in these cases should not be underestimated. By stressing the procedural protection of judges and the need for their independence, the Court seems to have enhanced the right of access to a court when judges are concerned. When one takes a look at the Court's reasoning in these cases, it seems rather unlikely that it will still accept an exclusion of access to a court for judges as being properly justified in the state's interests.[59] Generally speaking, on account of this strand of case law, domestic judges should have access

[53] ECtHR (GC) 19 April 2007, No. 63235/00, *Vilho Eskelinen a.o.* v *Finland*, para. 62.
[54] ECtHR 22 July 2021, No. 11423/19, *Gumenyuk a.o.* v *Ukraine*; ECtHR 29 June 2021, Nos. 26691/18 and 27367/18, *Broda and Bojara* v *Poland*; ECtHR 9 March 2021, No. 1571/07, *Bilgen* v *Turkey*; *Eminağaoğlu*, *supra* n. 46.
[55] *Broda and Bojara*, *supra* n. 54, para. 148; *Bilgen*, *supra* n. 54, para. 96.
[56] Recently also in the context of the right to liberty of judges: *Tercan*, *supra* n. 39, para. 141.
[57] See also: *Kövesi*, *supra* n. 46, para. 124.
[58] *Gumenyuk*, *supra* n. 54, paras. 60-67; *Broda and Bojara*, *supra* n. 54, paras. 117-124; *Bilgen*, *supra* n. 54, paras. 69-81; *Eminağaoğlu*, *supra* n. 46, paras. 69-80.
[59] See in this regard also recently ECtHR 20 July 2021, Nos. 79089/13, 13805/14 and 54534/14, *Loquifer* v *Belgium*, para. 40. See also the concurring opinion of judge Pavli attached to that judgment, specifically para. 7.

to a domestic judicial remedy for issues concerning their independence, provided they can rely on a right that is recognized under national law.

The second evolution concerns the judgment of *Denisov*.[60] In that case, a Ukrainian judge challenged the fact that he had been dismissed from his post of president of a court of appeal due to a disciplinary sanction. In his complaint, he relied *inter alia* on Article 8 ECHR. The Grand Chamber used this case as an opportunity to streamline its case law in employment-related disputes. It held that the question of whether Article 8 ECHR applies in such a dispute is an issue of jurisdiction *ratione materiae*, which should in principle be dealt with at the admissibility stage. After an analysis of its relevant former case law, it concluded that the right to private life may be engaged in employment-related scenarios on the basis of two different approaches. The first of the two is the reason-based approach, meaning that the impugned measure was based on reasons that encroach upon the individual's freedom of choice in the sphere of private life. In other words: if the impugned measure was based on aspects that relate to the private life of the person in question, then Article 8 ECHR applies.[61] The second approach is the so-called consequence-based approach. When the reasons for imposing a measure are not linked to the individual's private life, an issue under Article 8 ECHR may still arise when the impugned measure may have serious negative effects on the individual's private life. These consequences may relate to the individual's inner circle, his or her opportunities to establish and develop relationships with others or the impact on the individual's reputation. However, not every kind of negative impact suffices in this regard; according to the Court it must be shown that the consequences reached a certain threshold of severity.[62]

The Grand Chamber judgment of *Denisov* and its express establishment of the consequence-based approach is of significant importance for the topic of this article. Under the current state of affairs, the consequence-based approach under Article 8 ECHR is the closest thing to a right for judges to safeguard their own independence in the Convention framework. This is because measures like the lowering of the retirement age or a disciplinary sanction can all be understood as entailing negative consequences for the judge's inner circle or his or her reputation. In this sense, *Denisov* can be understood as broadening the material scope of Article 8 ECHR, allowing judges to raise a complaint due to almost any measure that negatively affects them and their independence.[63]

The two evolutions that were outlined above are certainly important for the topic of this article. The enhanced protection of the right of access to a court strengthens the position of judges to bring cases concerning measures that affect their independence before a judicial body. The *Denisov* judgment can be seen as creating a certain fall-back right via which to protect their own independence. However, the effects of these evolutions should also not be overestimated. For the right of access to a court to be admissible, a judge must be able to rely on a right in the domestic legal order, which may not always be evident when issues like mandates as court

[60] *Denisov*, *supra* n. 15.
[61] For a recent example: *Mile Novaković*, *supra* n. 48, paras. 42-50.
[62] *Denisov*, *supra* n. 15, paras. 92-117.
[63] See for a similar conclusion: M. Leloup, 'Kroniek van een aangekondigde verdragsschending: het onderzoek van de geloofsbrieven getoetst aan de Europese mensenrechtenstandaarden', 75 *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2020) p. 383, at p. 403, footnote 187; H. Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal', *Industrial Law Journal*, available as Advance article.

(vice) president or the transfer to another court are at stake.[64] Furthermore, a right of access to a domestic judicial review might ring hollow in those states where there are doubts on a structural level about the independence of the judiciary. As far as *Denisov* is concerned, it bears repeating that the Court has established a certain threshold for the consequence-based approach, requiring that the consequences attain a minimum level of severity. The limited judgments in which the consequence-based approach has been applied so far prove that this threshold is not that easily met. This was already apparent from the case of *Denisov* itself, where the Court held that the dismissal of the position of court president, while retaining the post of judge, did not reach the required level of severity.[65] In *J.B.*, the Court equally did not find a violation of Article 8 ECHR based on the consequence-based approach, finding the complaint inadmissible.[66] So far, the Court has only found the level of severity to be reached when the person concerned has been dismissed.[67] All this indicates that whereas the consequence-based approach under Article 8 ECHR provides the domestic judges with somewhat of a safety-net in terms of safeguarding their own independence, its protection is limited and will likely lead to an inadmissible complaint in most cases. As such, it does not offer a suitable avenue to protect judicial independence, which, to be clear, was never the aim of that provision.

Thus, as matters stand now, domestic judges have still found their way to Strasbourg in order to challenge measures that threatened their independence, despite the absence of any recognition of a subjective right to their independence. However, due to this absence, they had to rely on other substantive Convention rights. This meant that the ensuing case could not easily be framed in terms of judicial independence. This state of affairs means that the Court cannot truly address one of the crucial aspects of the case, which makes it difficult for the domestic judges to effectively safeguard their independence this way. While recent case law can be understood as creating some new avenues in this regard, it is clear that they each have their limitations. All of this leads us to the question whether the Court should acknowledge a subjective right for judges to their independence under Article 6 ECHR.

THE SUBJECTIVE RIGHT OF JUDGES TO THEIR INDEPENDENCE IN OTHER LEGAL ORDERS

Before we turn to the ECHR, however, this article will first examine whether such a right for a judge to have his or her independence safeguarded is acknowledged in other legal orders. This section will first look into the case law of the UN Human Rights Committee and the Inter-

[64] Though it must be noted that in the judgments of *Gumenyuk*, *Broda and Bojara*, and *Bilgen*, the Court has been rather flexible in accepting the existence of such rights.
[65] *Denisov*, *supra* n. 15, paras. 118-134.
[66] *J.B.*, *supra* n. 49, paras. 130-138.
[67] *Gumenyuk*, *supra* n. 54, para. 88 (Article 8 ECHR applicable since the judges in question were no longer allowed to exercise their function); *Xhoxhaj*, *supra* n. 15, paras. 362-364 (Article 8 ECHR applicable since the judge in question was dismissed); ECtHR 20 October 2020, No. 36889/18, *Camelia Bogdan* v *Romania*, paras. 83-92 (Article 8 ECHR inapplicable since the judge in question was only temporarily suspended); ECtHR 25 June 2020, Nos. 81024/12 and 28198/15, *Bagirov* v *Azerbaijan*, paras. 87-88 (Article 8 ECHR applicable since the lawyer in question was disbarred); ECtHR (dec.) 11 February 2020, No. 526/18, *Platini* v *Switzerland*, paras. 52-58 (Article 8 ECHR applicable since the applicant, a person whose entire career had been built around football, was no longer allowed to exercise any professional activity linked to football); ECtHR 30 January 2020, No. 74354/13, *Namazov* v *Azerbaijan*, paras. 34-35 (Article 8 ECHR applicable since the lawyer in question was disbarred); ECtHR 17 October 2019, Nos. 58812/15 a.o., *Polyakh a.o.* v *Ukraine*, paras. 203-211 (Article 8 ECHR applicable since the civil servants in questions had been dismissed).

American Court of Human Rights.[68] Then, it will address an important and recent evolution that has been taking place in the EU and the case law of the ECJ.

The UN Human Rights Committee has had three cases in which it had to rule on the dismissal of judges. In these cases, the Committee addressed these complaints primarily from the point of view of Article 25(c) of the International Covenant on Civil and Political Rights, safeguarding the right to access to public service. Importantly however, it read this provision in light of the principle of judicial independence, enshrined in Article 14(1) of the Covenant. In this sense, it held in the case of *Bandaranayake* that "the dismissal procedure did not respect the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary. For this reason, the Committee concludes that the author's rights under Article 25 (c) in conjunction with Article 14, paragraph 1, have been violated."[69] From this, it becomes clear that the Human Rights Committee acknowledges that the dismissal of a judge may constitute an attack on the independence of the judiciary and that a judge is entitled, on the basis of his function, to the necessary guarantees of independence.[70]

Such attention to the personal right of a judge to have his or her independence protected is mentioned even more expressly in the case law of the Inter-American Court of Human Rights. In the 2013 judgment of *Quintana Coello* the Court had to rule on the removal of 27 judges of the Supreme Court of Ecuador via a parliamentary resolution. The Court held that this measure had violated the right to a fair trial, enshrined in Article 8(1) of the American Convention on Human Rights. With reference to the abovementioned case law of the Human Rights Committee, the Court held in this judgment that the institutional guarantee of judicial independence is directly related to a judge's right to remain in his post, as a consequence of the guarantee of tenure in office.[71] A bit further in the judgment, the Court sets out the following reasoning: "i) respect for judicial guarantees implies respect for judicial independence; ii) the scope of judicial independence translates into a judge's subjective right to be dismissed from his position exclusively for the reasons permitted, either by means of a process that complies with judicial guarantees or because the term or period of his mandate has expired, and iii) when a judge's tenure is affected in an arbitrary manner, the right to judicial independence enshrined in Article 8(1) of the American Convention is violated, in conjunction with the right to access and remain in public office, on general terms of equality, established in Article 23(1)(c) of the American Convention."[72] These principles were subsequently confirmed in two later judgments.[73] In this regard, two judges of the Court have stated in a dissenting opinion that the Court's case law has two different facets: an external one where the state is obliged to protect the judiciary as a system, and an internal one where it is obliged to protect a single judge. In other words, the Court has analyzed the principle of judicial independence from both an

[68] Part of the case law that will be discussed here is also mentioned in the *Baka* judgment, see: *Baka*, *supra* n. 10, paras. 73-76 and 84-85.
[69] HRC (dec.) 24 July 2008, CCPR/C/93/D/1376/2005, *Bandaranayake* v *Sri Lanka*, para. 7.3.
[70] See also: HRC (dec.) 31 July 2003, CCPR/C/78/D/933/2000, *Mundyo Busyo et al.* v *Democratic Republic of the Congo*, para. 5.2; HRC (dec.) 5 August 2003, CCPR/C/78/D/814/1998, *Pastukhov* v *Belarus*, para. 7.3. See also: P. Taylor, *A Commentary on the International Covenant on Civil and Political Rights. The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) p. 724.
[71] IACtHR 23 August 2013, *Supreme Court of Justice (Quintana Coello et al.)* v *Ecuador*, para. 153.
[72] *Supreme Court of Justice*, *supra* n. 71, para. 155.
[73] IACtHR 28 August 2013, *Constitutional Tribunal (Camba Campos et al.)* v *Ecuador*, paras. 188-99; IACtHR 5 October 2015, *López Lone et al.* v *Honduras*, paras. 190-202 and 239-40.

institutional and a personal perspective.[74] From this, it becomes clear that the Inter-American Court also acknowledges a judge's personal right to have his or her independence protected.[75]

Another notable jurisprudential evolution for the topic of this article has recently taken place in the EU legal order. Here, something akin to a judge's substantive right to judicial independence has taken shape in the case law of the ECJ. This evolution started with the 2018 judgment of *Associação Sindical dos Juízes Portugueses (ASJP)*.[76] In this case, the Court developed an autonomous ground to verify the requirements of effective judicial protection, via a novel understanding of Article 19(1)(2) TEU.[77] Essentially, the Court's reasoning in this case was the following. It reiterated that the observance of Union law is entrusted to both the CJEU and the national courts and tribunals.[78] Therefore, the Member States are obliged to ensure the application of and respect for EU law. In that regard, they are required to provide remedies that are sufficient to ensure effective judicial protection for individual parties in those fields covered by EU law. In light of these principles, all Member States 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.[79]

The revolutionary nature of the *ASJP* judgment lies in the fact that it has created an autonomous ground to verify the right to an effective judicial remedy, free from the constraints of Article 51(1) of the Charter.[80] Article 19(1)(2) TEU applies to all domestic courts which may be required to rule on questions which concern the application or interpretation of EU law and thus fall within the fields covered by EU law.[81] As has been noted several times already, there do not appear to be many, if any, courts that do not fit that description.[82]

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[74] Joint dissenting opinion of judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot in IACtHR, 29 May 2014, *Norín Catrimán a.o. (Leaders, Members and Activist of The Mapuche Indigenous People)* v *Chile*, paras. 13-14.

[75] C. Medina, *The American Convention on Human Rights: Crucial Rights and their Theory and Practice*, 2nd edn. (Intersentia 2017) p. 273.

[76] ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*.

[77] The Court's reasoning in the *ASJP* judgment and its innovative understanding of Article 19(1)(2) TEU have been set forth in detail by many others and will not be revisited here. See in particular: C. Rizcallah and V. Davio, 'L'article 19 du Traité sur l'Union européenne : sésame de l'Union de droit', 30 *RTDH* (2019) p. 156; L. Pech and S. Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case', 55 *CML Rev* (2018) p. 1827; M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*.', 14 *EuConst* (2018) p. 622. For one of the most recent judgments, with references to the most important case law: ECJ (order) 14 July 2021, Case C-204/21 R, *Commission v Poland*.

[78] ECJ 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami a.o.* v *Parliament and Council*, para. 90.

[79] *ASJP*, *supra* n. 76, paras. 33, 34 and 37.

[80] M. Leloup, 'The appointment of judges and the right to a tribunal established by law: The ECJ tightens its grip on issues of domestic judicial organization: Review Simpson', 57 *CML Rev* (2020) p. 1139, at p. 1154.

[81] *ASJP*, *supra* n. 76, para. 37.

[82] For example: Pech and Platon, *supra* n. 77, at p. 1840.

In its judgments, the ECJ has fleshed out the content of Article 19(1)(2) TEU by interpreting it in light of Article 47 of the Charter.[83] In several judgments, the Court has interpreted the former by looking at the right to an impartial and independent court, as enshrined in the latter.[84]

When we take these two considerations together, it becomes clear that the Court has created an autonomous ground to assess the compatibility of national measures with the principle of judicial independence. The importance of that conclusion for the topic of this article becomes apparent when it is combined with the preliminary reference procedure, enshrined in Article 267 TFEU. In essence, this combination has created a lifeline which allows the domestic judges to enquire the ECJ whether a national measure endangers the principle of judicial independence, thereby giving them an avenue via which to safeguard their own independence.

There are already several examples of cases in which a domestic court has made use of this avenue of "judicial self-defence".[85] A first example is the case of *Escribano Vindel* in which a Spanish judge challenged a lowering of his salary before the Catalan High Court of Justice. That court asked the ECJ – similarly to the *ASJP* case – whether the lowering of the salary of judges in Spain was in violation of the principle of judicial independence.[86] Although the ECJ ultimately found no violation of the principle of judicial independence, it did acknowledge that the receipt by judges of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.[87] A second example can be found in the case of *A.K.*, in which the Polish Supreme Court, in a case brought by three Polish judges, asked whether the new disciplinary chamber of the Supreme Court violated Article 19(1)(2) TEU, given their appointment by the newly composed council of the judiciary.[88] A third example is the Court's order in *RH*.[89] In this case, the domestic judge asked the Court whether a national law, which required the judge to adjudicate a certain case immediately, without being allowed to make a request for a preliminary ruling, and this on pains of a disciplinary sanction, was in compliance with Article 267 TFEU and Article 47 of the Charter. In its order, the Court made clear that such a national law is not in accordance with EU law and stressed that the principle of judicial independence opposed the situation in which a domestic judge is subjected to disciplinary sanctions for making a request for a preliminary ruling.[90]

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[83] Subsequent case law has made clear that both provisions may have a different material scope, but have an identical understanding of the notion of judicial independence. See in particular: ECJ 19 November 2019, Joined cases C-585/18, C-624/18 and C-625/18, *A.K., CP* and *DO,* para. 169. See further: K. Lenaerts, 'De twee dimensies van de onafhankelijkheid van de rechterlijke macht in de rechtsorde van de Europese Unie', in R. Leysen *et al.* (eds.), *Semper Perseverans - Liber amicorum André Alen* (Intersentia 2020) p. 897, at p. 906; M. Leloup, 'An Uncertain First Step in the Field of Judicial Self-government: ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K., CP* and *DO*', 16 *EuConst* (2020) p. 145, at p. 164.

[84] Two of the most notable examples: ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*; ECJ 5 November 2019, Case C-192/18, *Commission* v *Poland (Independence of ordinary courts)*.

[85] To borrow a term of the Opinion of AG Bobek, *Asociaţia "Forumul Judecătorilor Din România"*, *supra* n. 38, para. 222.

[86] ECJ 7 February 2019, Case C-49/18, *Escribano Vindel*.

[87] *Escribano Vindel*, *supra* n. 86, para. 66; *ASJP*, *supra* n. 76, para. 45. As was mentioned above, the ECtHR does not offer such a level of protection to the remuneration of judges.

[88] *A.K., CP* and *DO*, *supra* n. 83. See further on this judgment: M. Kraweski and M. Ziółkowski, 'EU judicial independence decentralized: *A.K.*', 57 *CML Rev* (2020) p. 1107.

[89] ECJ (order) 12 February 2019, Case C-8/19 PPU, *RH*.

[90] *RH*, *supra* n. 89, paras. 46-47. These principles have subsequently been confirmed by the Grand Chamber: ECJ 26 March 2020, Joined cases C-558/18 and C-563/18, *Miasto Łowicz*, paras. 58-59.

These few examples show that the preliminary reference procedure in combination with the strong position that the principle of judicial independence has acquired in EU law provides domestic judges with a framework to have their own independence safeguarded by the ECJ. They can do this either directly in a case pending before them, as evidenced by *RH*, or indirectly by starting a judicial procedure and nudging the domestic court in question to request a preliminary ruling.[91] Admittedly, there is a difference between the EU framework and the ECHR. The protection which is offered by the ECJ is less the consequence of a domestic judge enforcing a personal fundamental right to independence, rather than a protection flowing from the specific status as an EU judge. Nonetheless, the consequences in practice are very similar, as it offers the judge a way of enforcing his or her own independence.

It should, however, be pointed out here, that this protection that is offered by the EU framework is not unlimited.[92] This was made clear by the ECJ's judgment of *Miasto Łowicz*.[93] In this case, the Court had to respond to two preliminary references by Polish judges. These judges feared that they would be subjected to disciplinary proceedings if they would decide against the Polish state in the cases that were pending before them and asked whether the Polish system for judicial discipline was in accordance with Article 19(1) TEU. However, the Court ruled that these questions were inadmissible since the disputes in the main proceedings – relating to public subsidies and a criminal procedure – did not show any link to Union law.[94] With this judgment, the Court more clearly delineated the procedural access to the protection of Article 19(1)(2) TEU and indicated that even in cases that question the compatibility of domestic measures with the principle of judicial independence there must still be a connecting factor between the dispute in the main proceedings and the provisions of EU law to which the question in the preliminary reference relate.[95] In other words, Article 19(1)(2) TEU does not allow a domestic judge to ask purely abstract questions concerning the compatibility of pieces of domestic legislation with the principle of judicial independence without indicating how these are relevant to the case before him or her.[96]

This section has shown that other international legal orders do safeguard the subjective right of judges to their own independence in their case law. The UN Human Rights Committee and the Inter-American Court of Human Rights incorporate this right in the requirement of judicial independence as part of the broader right to a fair trial. The EU framework, in turn, offers domestic judges a way to safeguard their own independence as well. The autonomous

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[91] This duality is also implicitly present in: S. Platon, 'Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: *Miasto Łowicz*', 57 *CML Rev* (2020), p. 1843.

[92] See the Opinion of AG Bobek, *Asociaţia "Forumul Judecătorilor Din România"*, *supra* n. 38, para. 209. He confirms the very broad scope of Article 19(1)(2) TEU and states that at present the only limiting condition pertains to admissibility.

[93] *Miasto Łowicz*, *supra* n. 90.

[94] *Miasto Łowicz*, *supra* n. 90, paras. 48-52. See for the same reasoning in two later cases: ECJ (order) 6 October 2020, Case C-623/18, *Prokuratura Rejonowa w Słubicach*, paras. 22-37; ECJ (order) 2 July 2020, Case C-256/19, *S.A.D. Maler und Anstreicher*, paras. 45-50.

[95] F. Gremmelprez, 'Het arrest *Miasto Łowicz* (C-558/18 en C-563/18): de onafhankelijkheid van de Poolse rechterlijke macht – onontvankelijk maar gegrond', *Tijdschrift voor Europees en economisch recht* (2020), p. 633, at p. 635.

[96] M. Leloup, 'De waarborg van een Europese prejudiciële procedure: internationale bescherming tegen een nationale bedreiging', 75 *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2020), p. 275, at p. 279. In this regard, one author argues that the Court appears to take a bolder stance in infringement proceedings than it does in preliminary rulings and raises doubts about the usefulness of the preliminary rulings mechanism for judges to enforce their own independence. See: Platon, *supra* n. 91, p. 1843.

requirement in EU law to safeguard judicial independence, coupled with the preliminary ruling mechanism of Article 267 TFEU, has provided every Union judge with a lifeline to the ECJ in order to ask for protection.[97]

A RIGHT FOR JUDGES TO SAFEGUARD THEIR OWN INDEPENDENCE UNDER THE ECHR

The previous section has made clear that other international orders do offer domestic judges a right to protect their own independence. The logical next question is then whether a similar right should exist under the Convention. From the outset, it should be pointed out that a positive answer to that question is not self-evident. Judicial independence is seen by some as a structural safeguard for the judiciary as a whole, rather than a right of individual judges.[98] In other words, independence is then understood as a characteristic of the judge as a body of public power, rather than the individual. If the Court were to read a subjective right to judicial independence in Article 6 ECHR, it would scramble the – albeit already rather blurry –[99] distinction between the public post and the individual rights.[100] Though this argument should not be swept aside too cavalierly, it is argued there that the Court should nevertheless acknowledge such a right under Article 6 ECHR.

To substantiate this claim, it is worthwhile to briefly turn back to the EU legal order. The main reason for the ECJ's recent emphasis on judicial independence and the importance of 'judicial self-defence' is the crucial position that domestic courts take up within the Union's constitutional framework. It is up to them to provide effective remedies to individuals and to uphold the rule of law within the EU.[101] Clearly, that is a role they can only properly fulfil when they are sufficiently independent. The correct application of Union law and the right to effective judicial protection of individuals cannot be ensured when the independence of domestic judges is not guaranteed.[102]

This same reasoning can be applied to the Convention without many difficulties.[103] According to the principle of subsidiarity, which has recently been explicitly inserted in the Convention preamble,[104] it is first and foremost incumbent upon the Contracting Parties to safeguard the

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[97] The Court has moreover proven to be increasingly protective of this judicial lifeline. See recently: *Commission* v *Poland*, *supra* n. 39, paras. 222-234; *A.B. and Others*, *supra* n. 39, paras. 90-107.

[98] For example: P. Terry, 'Judicial Independence in Germany', *Law and the World* (2015), p. 33, at p. 36; A. Seibert-Fohr, 'Constitutional Guarantees of Judicial Independence in Germany', in E. Riedel and R. Wolfrum (eds.), *Recent Trends in German and European Constitutional Law* (Springer 2006), p. 269.

[99] The Court itself has contributed to this blurriness, since people exercising state authority, like judges or members of parliament are increasingly relying on fundamental rights. See for an example of a member of parliament: ECtHR 8 November 2016, No. 35493/13, *Szanyi* v *Hungary*. In this regard, one can also think of the abovementioned consequence-based approach set out in the *Denisov* judgment.

[100] See in particular the dissenting opinion of Judge Wojtyczek in *Broda and Bojara*, *supra* n. 54. With references to other dissenting opinions in which he made similar claims.

[101] K. Lenaerts, 'New Horizons for the Rule of Law Within the EU', 21 *German Law Journal* (2020) p. 29, at p. 30. See also: ECJ 9 July 2020, case C-272/19, *VQ* v *Land Hessen*, para. 45.

[102] Opinion of AG Bobek, *Prokuratura Rejonowa w Mińsku Mazowieckim* v *WB*, *supra* n. 37, para. 138.

[103] One could object in this connection that the textual bases between the two legal orders differ, in the sense that Article 19(1)(2) TEU provides a clearer legal basis for a structural requirement of judicial independence. Though it is true that the Convention does not contain a provision like Article 19(1)(2) TEU, a combined reading of Articles 1, 13 and 35 ECHR shows that the Convention just as well requires the Contracting Parties to provide for effective – and thus independent – remedies. Furthermore, the jurisprudence of the IACtHR and the HRC shows that this absence of a more structural provision does not necessarily preclude reading a subjective right to judicial independence in the right to a fair trial.

[104] Article 1 of Protocol 15 which entered into force on 1 August 2021.

Convention rights.[105] On this point, domestic courts play a crucial role. They are in a position to enforce the Convention standards in national disputes and to assume an essential role as compliance partners.[106] Just like for the EU, domestic courts are the foot soldiers in the enforcement of the Convention.[107]

However, this privileged position in the enforcement mechanism of the Convention presupposes that these domestic courts operate in an institutional framework that guarantees their impartiality and independence. The idea of subsidiarity is premised on the engagement in good faith with the Convention principles by the domestic actors.[108] In states where the judicial independence is under threat, this application in good faith may be put into doubt. In other words, the weakening of domestic courts will almost inevitably lead to a weakening of the compliance with the Court's case law on the domestic level.[109] To build upon the words of judge Sicilianos, how can one hope that persons involved in court proceedings will enjoy the right to an independent judge, or in fact any fundamental right, if judges themselves are not afforded safeguards capable of ensuring that independence?[110] In that sense, giving domestic judges a way to safeguard their own independence can be understood as a way to safeguard the conscientious application of Convention standards on the domestic level, which is an essential prerequisite for the application of the subsidiarity idea.[111]

Moreover, understanding Article 6 ECHR as encompassing a right for judges to their independence would allow the Court to more convincingly address cases in which the domestic authorities endanger the independence of the judiciary. As was shown above, the current state of affairs forces judges that challenge such measures to frame their complaint in terms of other substantive Convention rights. This, in turn, implies that the Court cannot clearly deal with one of the main underlying issues of the case. In this sense, a subjective right to independence would give the Court an instrument to more appropriately address complaints that challenge domestic measures which attack the independence of judges and with it, to better grapple with one of the most serious challenges at the moment within the European legal sphere. As was pointed out by judge Sicilianos,[112] this would also be most in line with the idea of the rule of law,[113] which

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[105] See, with further references: P. Popelier and C. Van de Heyning, 'Subsidiarity Post-Brighton: Procedural Rationality as an answer?', 30 *LJIL* (2017) p. 5, at p. 7-8.
[106] R. Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts', 30 *EJIL* (2019), p. 1129.
[107] I. Maher, 'National Courts as European Community Courts', 14 *Legal Studies* (1994) p. 226, at p. 242.
[108] R. Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law', 18 *HRLR* (2018) p. 473, at p. 492.
[109] F. Krenc and F. Tulkens, 'L'indépendance du juge. Retour aux fondements d'une garantie essentielle d'une société démocratique', in R. Chenal, I. Motoc, L.-A. Sicilianos and R. Spano (eds.*), Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi* (Wolf Legal Publishers 2019) p. 397; D. Kosař and L. Lixinski, 'Domestic Judicial Design by International Human Rights Courts', 109 *AJIL* (2015) p. 713 at p. 748.
[110] Concurring opinion of judge Sicilianos in *Baka*, *supra* n. 10, para. 15. See in the same sense: G. Yudkivska, 'Between Scylla and Charybdis – Judicial Independence and Accountability in the Populist Era' in L. Branko, I. Motoc, P. Pinto de Albuquerque, R. Spano and M. Tsirli (eds.), *Procès équitable: perspectives régionales et internationales* (Anthemis 2020) p. 757, at p. 767.
[111] See in such sense: R. Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', *ELJ* (2021) at p. 13; A. Tsampi, 'Separation of Powers and the Right to a Fair Trial under Article 6 ECHR: Empowering the Independence of the Judiciary in the Subsidiarity Epoch', in L. Branko, I. Motoc, P. Pinto de Albuquerque, R. Spano and M. Tsirli (eds.), *Procès équitable: perspectives régionales et internationales* (Anthemis 2020) p. 693, at p. 706.
[112] Concurring opinion of judge Sicilianos in *Baka*, *supra* n. 10, para. 15.
[113] See in the same sense: Ducoulombier, *supra* n. 10, at p. 162.

forms one of the foundational principles of the Convention and is inherent in all its provisions.[114] Such an understanding of Article 6 ECHR is especially important for those instances where there are no effective domestic remedies available to the judges in question, either because the domestic legal order does not provide them, or because those remedies are themselves not independent. In that regard, the ECtHR could be seen as providing – somewhat similar to the ECJ – an external lifeline for the judges.

Connected to this, it should be pointed out that a subjective right to independence would put more emphasis on the independence of the individual judges instead of the independence of the judiciary as a whole. Whereas these two dimensions are clearly connected, they do not fully overlap, and an institutionally independent judiciary is no watertight guarantee for independence on the individual level.[115] In fact, a strong institutional independence of the judiciary may even lead to a climate that endangers the independence of the judges on the individual level, for example due to pressure coming from high-ranking judges.[116] The introduction of a subjective right to independence for judges would lead to a stronger protection on the individual level, irrespective of the institutional context. In this sense it would not only better protect judges against pressure from inside the judiciary, but also make them more resilient against attacks on the independence of the judiciary as an institution.[117]

The above set forth several arguments for the Court to acknowledge a subjective right for judges to their independence under the Convention. A second question is then how such a right can be read into Article 6(1) ECHR. In this regard it is important to first point out that the UN Human Rights Committee and the Inter-American Court of Human Rights have read such a right in Article 14(1) ICCPR and Article 8(1) of the Inter-American Convention on Human Rights respectively, which are drafted in a very similar fashion as Article 6(1) ECHR. Neither of these provisions expressly enshrine a right for judges to enforce their own independence. Rather, like Article 6(1) ECHR, both are framed in terms of everyone having the right to a fair hearing by an independent and impartial tribunal.[118] There is not immediately anything preventing the Strasbourg Court to apply the same reasoning and to read a subjective right to judicial independence for judges in the existing text of Article 6(1) ECHR.

It would appear, moreover, that such a new dimension of the principle of judicial independence could easily be integrated into the existing case law. The abovementioned four criteria to assess whether a body is sufficiently independent can just as well be applied in such cases, the only difference being that it will be a judge setting forth his or her own situation instead of one of the parties to the proceeding questioning the independence of the tribunal that decided their case. The principles regarding internal judicial independence can equally be applied to that kind of cases without any difficulties. It can be expected that it might even turn out to be easier for

[114] See for some recent authorities: ECtHR (GC) 15 October 2020, No. 80982/12, *Muhammad and Muhammad* v *Romania*, para. 118; ECtHR (GC) 10 July 2020, No. 310/15, *Mugemangango* v *Belgium*, para. 109; *Baka*, *supra* n. 10, para. 117.
[115] C. Guarnieri, 'Judicial Independence in Europe: Threat or Resource for Democracy?', 49 *Representation* (2013) p. 347, at p. 353.
[116] See for an example: S. Spáč, K. Šipulová and M. Urbániková, 'Capturing the Judiciary from Inside: The Story of Judicial Self Governance in Slovakia', 19 *German Law Journal* (2018) p. 1741. Noting that the high level of autonomy of the judiciary chiefly led to the empowerment of judicial elites, who then abused their power.
[117] In such sense also: D. 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 *EuConst* (2017) p. 96, at pp. 114-121.
[118] This was also pointed out by judge Sicilianos: Sicilianos, *supra* n. 10, at p. 551-552.

judges to prove certain issues concerning their own independence, for example pressure that was put on them by certain people, than for normal parties to the proceedings. It would thus appear that acknowledging a subjective right for judges to their own independence would not raise many difficulties for the Court and its jurisprudence.

Nevertheless, one critical issue in this regard will be to decide exactly at what point there is a violation of the right to independence, which is an issue that the EU legal order is struggling with as well.[119] A subjective right to judicial independence should not be (ab)used as a means to challenge trivial issues or well-functioning systems of judicial accountability.[120] It is commonly understood that judicial independence, despite its crucial importance, cannot be seen to imply an absence of judicial accountability,[121] something which both the ECtHR and the ECJ have recently indicated as well.[122] Seen in that light, it would seem advisable to subject such a right to a severity threshold. In that regard, the threshold that the Court introduced in the *Denisov* judgment may provide some guidance.[123] Another – somewhat more radical – option would be to use the inadmissibility ground of no significant disadvantage, enshrined in Article 35(3)(b) ECHR. Notably, such a threshold may also be seen as mitigating the abovementioned scrambling of the divide between the public post and the individual right.

Another novel question that would arise is who exactly can be seen as a judge and would thus be able to invoke this right to their own independence. As of yet, the Court has not clarified the notion of 'judge' in its case law.[124] The most evident way to flesh out this concept would be to look at the notion of tribunal, since Article 6(1) ECHR makes mention of 'an independent and impartial tribunal'. The Court has, moreover, stressed on several occasions the link between the notion of tribunal and independence.[125] According to long-standing case law of the Court, the concept of 'tribunal' is an autonomous concept,[126] which is broader than a court of law of the classic kind, integrated within the standard judicial machinery of the country.[127] Rather, the Court has adopted a substantive understanding of the term. A tribunal is any body that determines matters within its competence on the basis of rules of law, following proceedings

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[119] In particular: Opinion of AG Bobek, *Getin Noble Bank*, *supra* n. 37, paras. 38-39; Opinion of AG Bobek, *Prokuratura Rejonowa w Mińsku Mazowieckim* v *WB*, *supra* n. 37, paras. 146-151. Warning for the dangers of an overly broad interpretation of Article 19(1)(2) TEU and arguing that it is an extraordinary remedy for extraordinary situations, meant to catch issues of a certain gravity and/or systemic nature. Opinion of AG Tanchev of 20 June 2019 in case C-192/18, *Commission* v *Poland (Independence of ordinary courts)*, paras. 115-116. Arguing that that same provision was confined to correcting problems with respect to a structural infirmity.

[120] AG Bobek in his opinion mentioned in the previous note used as examples the incorrect indexation of judicial salaries or the failure to approve end of year bonuses as examples.

[121] For a recent example: N. Garoupa and P. C. Magelhães, 'Public trust in the European legal systems: independence, accountability and awareness', 44 *West European Politics* (2021) p. 690, at pp. 692-694.

[122] *Xhoxhaj*, *supra* n. 15, paras. 299-300; *Asociaţia "Forumul Judecătorilor din România"*, *supra* n. 8, para. 229.

[123] *Denisov*, *supra* n. 15.

[124] Recently, the Grand Chamber has emphasised the qualities of technical competence and moral integrity of judges and stressed the importance of rigorous merit-based appointment procedures for judges. See: ECtHR (GC) 1 December 2020, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*, paras. 221-222. Repeated in: ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z o.o.* v *Poland*, para. 244; *Reczkowicz*, *supra* n. 39, para. 217.

[125] ECtHR 13 February 2003, No. 49636/99, *Chevrol* v *France*, para. 78; ECtHR 24 November 1994, No. 15287/89, *Beaumartin* v *France*, para. 38; ECtHR 29 April 1988, No. 10328/83, *Belilos* v *Switzerland*, para. 64.

[126] P.M. Van den Eijnden, 'Onafhankelijk en Onpartijdig Gerecht', in J. Gerards *et al.* (eds.), *Sdu Commentaar EVRM: deel 1* (Sdu 2020) p. 383, at p. 430.

[127] ECtHR 28 January 2020, Nos. 30226/10 and 5506/16, *Ali Riza a.o.* v *Turkey*, para. 173; ECtHR 2 October 2018, Nos. 40575/10 and 67474/10, *Mutu and Pechtstein* v *Switzerland*, para. 94; ECtHR (GC) 14 December 2010, No. 37575/04, *Boulois* v *Switzerland*, para. 73.

conducted in a prescribed manner,[128] resulting in a binding decision.[129] Recently, the Court has clarified that the mere fact that a court does not have the same powers as a court called upon to examine the merits of the case, for example when it rules in pre-trial proceedings, cannot be taken to mean that this court is not a 'tribunal' under Article 6(1) ECHR.[130] Accordingly, the notion of judge under the Convention could be interpreted as any person who has a decision-making function for the disputes that arrive before a body that can be seen as a 'tribunal' under the Convention. This would mean that the subjective right to independence would extend to people outside of the classic courts within a state. Such an understanding of the notion of judge would also lead to the most consistent application of the principle of judicial independence under the Convention.

The issues discussed here will permeate the Court's case law for the years to come. Over the course of the last few years, the Court has increasingly seen cases being lodged by domestic judges who are hoping to safeguard their own independence, and many other such cases are pending right now.[131] The way in which the Court responds to the issues that were raised in this section may change the way in which such cases are decided and would have an effect on the European judicial space as we know it. If the Court were to conclude to a subjective right to judicial independence in Article 6(1) ECHR, it would join a broader development in the international legal landscape. Such a decision would put an undeniable focus on the vital position that domestic judges take up within the Convention system and provide them with a crucial lifeline.

CONCLUSION

For scholars who are interested in constitutional law and human rights law, these are very interesting times. The deplorable path that some European countries have embarked upon has led to some ground-breaking evolutions in the case law of the highest courts in Europe. The most spectacular of these is probably the development of an autonomous ground to assess judicial independence within the European Union.[132] However, equally remarkable evolutions have taken place on other topics, for example the right to a tribunal established by law.[133]

One area in which the case law of the European Court of Human Rights has been unaltered since its origins is the subjective right of judges to their independence. This article has shown that, despite the evolution that the principle of judicial independence has undergone in the Court's case law, as of yet it does not offer judges a possibility to enforce their own

[128] *Guðmundur Andri Ástráðsson*, *supra* n. 124, para. 219; ECtHR 22 October 1984, No. 8790/79, *Sramek* v *Austria*, para. 36; *Campbell and Fell*, *supra* n. 14, para. 76.
[129] This decision may moreover not be altered by a non-judicial authority. ECtHR 19 April 1994, No. 16034/90, *Van de Hurk* v *the Netherlands*, para. 45.
[130] ECtHR 12 January 2021, No. 75614/14, *Victor Laurenţiu Marin* v *Romania*, para. 148.
[131] Besides the cases concerning the Polish judicial reforms, one can think of: ECtHR (communication) 12 November 2020, No. 25240/20, *Gyulumyan a.o.* v *Armenia*.
[132] It is rather generally accepted that the ECJ developed this strand of case law in the *ASJP* case with a view to the pending cases concerning Poland. In such sense: Bárd and Śledzińska-Simon, *supra* n. 51, at 1573; Bonelli and Claes, *supra* n. 77, at 623.
[133] Recent case law of both the ECJ and the ECtHR has made clear that a tribunal cannot be seen as 'established by law' if the relevant domestic legislative provisions were not complied with during the appointment procedure. ECJ 24 March 2020, Joined cases C-542/18 RX-II and C-543/18 RX-II, *Review Simpson* v *Council* and *Review HG* v *Commission*; *Guðmundur Andri Ástráðsson*, *supra* n. 124. The Strasbourg Court subsequently applied this new principle to the Polish Constitutional Tribunal and Disciplinary Chamber of the Supreme Court: *Xero Flor*, *supra* n. 124; *Reczkowicz*, *supra* n. 39.

independence. This state of affairs has forced domestic judges to frame their complaints in terms of other, substantive Convention rights, often via a rather contorted reasoning. Nonetheless, several other international jurisdictions do provide for such a subjective right for judges to their own independence. In this light, this article has argued that it is time for the Strasbourg Court to do the same. As has been shown, such a right could be integrated in the existing body of case law without many difficulties. Taking this step would greatly improve the international protection of domestic judges as crucial actors in the enforcement of the Convention standards and would allow the Court to deal more convincingly with one of the most serious current challenges in Europe.