Judgments and recommendations

The Council of Europe's work protecting the rule of law and judicial independence

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1 Introduction

In a trinational conversation on the rule of law between Poland, the Czech Republic and Germany, the Council of Europe must play a role. All countries are members and have committed to the European Convention on Human Rights (ECHR) and the jurisdiction of the European Court of Human Rights (ECtHR). All three members have representatives in the different bodies of the Council of Europe. Therefore, the Council of Europe and the work of its institutions such as the case law of the ECtHR or the recommendations of the Venice Commission can function as a common point of reference in a conversation on the rule of law. Such a joint point of reference can be a topic of joint orientation towards the Council of Europe, of joint rejection, or a reference point of disagreement. Since its establishment, the Council of Europe has probably been in all three positions. This essay does not attempt to give an account of the relationship between the Council of Europe and the three members of the conversation. Rather, it wishes to highlight certain characteristics and challenges of the work of the Council of Europe as a joint reference point in this trinational conversation on the rule of law.

The paper addresses the challenges and limitations of the Council of Europe (1) before distinguishing between a human rights approach focusing on the individual through judgments of the ECtHR (2) and a systemic approach taken by other bodies of the Council of Europe like the Venice Commission and the Consultative Council of European Judges (CCJE) (3). These bodies work through recommendations delivered through Opinions which take a more systemic approach. The paper will conclude with a short discussion of judicial councils in Europe, which have been endorsed by the Council of Europe's different bodies. Judicial councils are discussed here as an example of the profound effects recommendations of the Council may have and highlight the need for a cautious adoption of such recommenda-

tions. The paper will argue that while a systemic approach is useful to support the rule of law in the member states, such work must strike a fine balance between respecting the context in which different rules function and the diversity of the member states on the one hand and the need to firmly insist on the respect of the rule of law on the other.

2 Challenges, limitations and cooperation

All international institutions need to find common ground within the diversity of national systems and have only limited means to enforce their orders. This is true for the European Union but much more so for the Council of Europe. The ECtHR may hand down judgments against member states but can only use fines to enforce them. The member states decide what consequences to draw from the judgments. During the time after the invasion of Crimea, the Russian Federation was denied voting rights within the Council of Europe. Apart from such measures, the Council of Europe may only issue recommendations and engage its members in dialogue. The Council of Europe also has no real means to force members to make financial contributions, as was noticeable when the Russian Federation – which was still a member then – withheld payments.

The Council of Europe never had the goal of creating legal harmonization for a joint market. Rather, the Council aims at protecting human rights, the rule of law and democracy in now 46 member states with different legal and political systems. Human rights issues are assessed against the ECHR. Its guarantees are still quite abstract, however. While the ECtHR interprets their meaning autonomously, it remains necessary that the ECtHR detects violations in relation to different legal systems, political cultures and societies. Comparative law is of special importance in this context. Principles like the rule of law and democracy are especially difficult to enforce compared to guarantees such as freedom of expression because they require that violations to these rather abstract principles are identified in concrete measures of member states. Moreover, the Council of Europe lacks something like the Article 7 Treaty on European Union (TEU) procedure. In relation to principles like democracy and the rule of law, recommendations and cooperation, which are the only means the Council of Europe may use, require fewer resources. An approach focusing on exchange and cooperation may also be more successful in the end. While the diversity of member states and the Council's lack of competence

might be seen as a disadvantage, the Council has the unique opportunity to take a bird's-eye perspective on distinct developments in vastly different political and legal systems.

The Council takes a two-pronged approach, working on the individual and systemic level. On the individual level, the ECtHR applying the ECHR can be identified as the most influential body of the Council of Europe. Just as the introduction of individual, constitutional complaints has considerably broadened the importance of the work of national constitutional courts,[1] the individual complaint of the ECtHR ensured the constant (one may say overpowering) influx of cases from all member states. This also guarantees the attention of the public, even though the attention is often rather nationalized as it is focused on different issues in different member states. The case law of the Court with its bird's-eye approach has led to considerable changes in, inter alia, German family law – even beyond influential decisions of the German constitutional court.[2]

With this decentralized approach and the right to issue judgments on the basis of the convention, the Court and consequently the Council developed much more impact than if it had been limited to the reports of a human rights commissioner.[3] Issuing judgments against a member state can be seen as meaningful, even if the state does not respond by making effective legal and systemic changes. However, this approach comes with its own challenges. Firstly, if member states do not change their actions in response to the judgments of the ECtHR, the whole process might be seen as futile. Secondly, the characteristic focus on the individual case makes it difficult to address systemic problems, as for example in the case of the European rule of law crisis.

1 Andreas Voßkuhle, in von Mangoldt, Klein and Starck (eds), *Grundgesetz* (7th edn., C H Beck 2018), Art. 93, para 13; Patrick Schäfer, in Karpenstein and Mayer (eds), *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (3rd edn., C H Beck 2022), Art. 34, para 2; Holger Zuck and Reiner Eisele, *Das Recht der Verfassungsbeschwerde* (6th edn., C H Beck 2022), paras 100 et seq.; Introduction of the individual complaint before the consitutional court of North Rhine-Westphalia (NRW) in 2019; see NRW, LT–Drs. 17/2122, p. 20.

2 E.g. ECtHR, case 22028/04 *Zaunegger v. Germany* (2009), which was taken up by the German FCC, case 1 BVR 420/09 (2010).

3 The Council of Europe has of course a human rights commissioner doing important work: <https://www.coe.int/en/web/commissioner/home> accessed 26 August 2022.

3 Human rights approach and the rule of law

As already pointed out, the ECtHR is the most important player of what has been described above as the human rights approach on the individual level. In the German literature, Rebhan remarked that this orientation on the individual case would lead to a loss of doctrinal coherence generally.[4] Moreover, in the context of the rule of law, the individual approach has some limitations when it comes to systemic changes in the organization of courts in the member states. Even though the rule of law is meant to protect the individual, given its potentially broad scope and systemic character, it is more difficult to assess violations of the rule of law in the context of the traditional human rights focusing on the individual protected within the framework of the ECHR. Judicial independence, while of great importance for the rule of law, is not protected as an individual right. After all, judicial independence is not a privilege but meant to serve society governed by the rule of law.[5]

However, the Court has found a way to address such issues in its case law on Article 6 ECHR, thereby addressing systemic problems on the rule of law within the context of human rights issues on the individual level. Article 6 ECHR states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In recent years, in the context of the European rule of law crisis, the Court has extended its case law on Article 6 ECHR to the institutional foundations of the rule of law.[6]

3.1 Violation of judicial independence from the perspective of parties

Cases concerning Article 6 ECHR may address aspects of central importance for the rule of law, especially the guarantee of an "independent tribunal established by law". Such complaints have been brought by parties to

4 Robert Rebhahn, 'Zivilrecht und Europäische Menschenrechtskonvention' (2010) 210 Archiv für die civilistische Praxis 489, 551.

5 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010(12), para 11.

6 See Vilfan-Vospernik, Report on the ECHR case law on the Independence of the Judiciary, CDL–JU(2019)019.

legal procedures.[7] Establishing a definition of an independent tribunal, the Court developed criteria such as irremovability, appointment of members, security of tenure and guarantees against outside pressures from the executive or legislator, for example in the case *Campbell and Fell v. UK*.[8] Not only direct instructions and pressures but also negative comments of politicians may violate the parties' right to a fair trial, as the Court decided in *Kinsky v. Czech Republic*.[9]

Moreover, the Court took the opportunity to put these guarantees into a wider context. In *Perez v. France*, for example, the Court stressed the importance of fair trial rights in a democratic society.[10] In *Sovtransvato Holding v. Ukraine,* the Court held that interventions from public authorities violated the "notion of an independent and fair tribunal" and revealed a "lack of respect for the judicial office".[11] In this decision, the Court also referred to the rule of law as a common heritage of the contracting states.[12]

In recent years, the Court has stressed the importance of the lawful appointment of judges.[13] In *Guðmundur Andri Ástráðsson v. Iceland*,[14] the Grand Chamber of the Court held that the rights of a criminal defendant protected under Article 6 ECHR could be violated if a judge who had been appointed in violation of national legal rules decided the case. Not all violations of the rules of judicial appointments have such far-reaching effects, however, but only those meant to protect judicial independence. In *Xero Flor v. Poland*,[15] the Court applied these principles to the Polish Constitutional Court to which a couple of judges with close connections to the ruling PiS party had been appointed to fill seats which had already been filled by the previous parliament. These events, by which the governing party gained considerable influence over the constitutional court, was noticed internationally and marked the beginning of increasing political influence over the Polish judicial system. The ECtHR held that a constitutional court

7 See ECtHR, case No 40575/10 *Mutu and Pechstein v. Switzerland* (2018); ECtHR, case No 80018/12 *Thiam v. France* (2018).
8 ECtHR, case No 7819/77, 7878/77 *Campbell and Fell v. UK* (1984), paras 77–82.
9 ECtHR, case No 42856/06 *Kinsky v. Czech Republic*, (2012), paras 91–99.
10 ECtHR, case No 47278/99 *Perez v. France* (2004), para 64; ECtHR, case No 42856/06 *Kinsky v. Czech Republic* (2012), para 82.
11 ECtHR, case No 48553/99 *Sovtransvato Holding v. Ukraine* (2002), para 80.
12 ECtHR, case No 48553/99 *Sovtransvato Holding v. Ukraine* (2002), para 72.
13 ECtHR, case No 55391/13 et al. *Ramos Nunes de Carvalho e Sá v. Portugal* (2018), para 144; EctHR, case No 18952/18 *Gloveli v. Georgia* (2022).
14 ECtHR, case No 26374/18 *Guðmundur Andri Ástráðsson v. Island* (2020).
15 ECtHR, case No 4907/18 Xero *Flor w Polsce v. Poland* (2021).

can be an independent tribunal in the sense of Article 6 ECHR and that parties' rights can be violated if judges are appointed in an unlawful way.[16]

Thus, the guarantees of Article 6 ECHR do not only protect the individual in court but have indirect systemic effects on the judiciary, as they might request member states to undertake changes in their judicial systems or politicians to respect the independence of procedures.

3.2 Individual rights of judges

Judges can be violated in their rights as well and can request access to an independent tribunal, even though judicial independence is – as pointed out already – not an individual right of judges. Still, the rights connected to a judicial post can be protected as civil rights under Article 6 ECHR if the preconditions of the *Eskelinen* test are met. This test requires that, firstly, the state in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the state's interest.[17] The Court has decided cases in relation to the applicability of Article 6 ECHR in the context of disputes concerning the appointment, career and dismissal of judges.[18] In *Gloveli v. Georgia*, the Court reprimanded the lack of judicial review for the decision not to appoint the applicant to a judicial post with respect to the general Council of European principle that judges' appointments must be based on merit.[19]

In *Baka v. Hungary,* the Court discussed the dismissal of Andras Baka as court president in the context of the Hungarian judicial reforms.[20] In *Ramos Nunes de Carvalho e Sá v. Portugal* the Court addressed judicial

16 ECtHR, case No 4907/18 *Xero Flor w Polsce v. Poland* (2021).
17 ECtHR, case No 63235/00 *Vilho Eskelinen and Others v. Finland* (2007), para 62.
18 ECtHR, case No 55391/13 et al. *Ramos Nunes de Carvalho e Sá v. Portugal*, 06.11. (2018), para 196; ECtHR, case No 20261/12 *Baka v. Hungary* (2016), paras 100–106; ECtHR, case No 49868/19 and 57511/19 *Dolińska-Ficek and Ozimek v. Poland* (2021), paras 220–228; ECtHR, case No 11423/19 *Gumenyuk and Others v. Ukraine* (2021), paras 44–59; ECtHR, case No 76521/12 *Eminağaoğlu v. Turkey* (2021), paras 59–63; ECtHR, case No 1571/07 *Bilgen v. Turkey* (2021, paras 47–52 and paras 65–68; ECtHR, case No 43572/18 *Grzęda v. Poland* (2022), paras 257–64; ECtHR, case No 18952/18 *Gloveli v. Georgia*,(2022), para 34.
19 ECtHR, case No 18952/18 *Gloveli v. Georgia* (2022), paras 49–51.
20 ECtHR, case No 20261/12 *Baka v. Hungary* (2016), para 79.

review against disciplinary procedures.[21] In *Grzęda v. Poland*, the Court discussed the Polish reform of the High Judicial Council, identifying the lack of judicial review against the dismissal from that council as a violation of Article 6 ECHR.[22] *Gumenyuk v. Ukraine*[23] concerned the dismissal of judges in the context of the reorganization of the judiciary after the Maidan Revolution. However, internal independence, in particular the relationship between judges and councils for the judiciary, were also of concern for the case law of the ECtHR.[24]

3.3 A systemic approach in the case law

While all these decisions concern individual cases, the Court took the opportunity again and again to stress the general importance of the judicial office for society and thereby the rule of law. Thus, the Court takes a much more systemic look than what might be expected from the national court of a member state.

For example, in *Gloveli v. Georgia,* the Court stated:

> Given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see Ramos Nunes de Carvalho e Sá v. Portugal [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018, with further references therein), the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.[25]

A considerable number of decisions concerned cases in the context of problematic judicial reforms such as in Hungary and Poland. In *Baka v.*

21 See ECtHR, case No 55391/13 et al. *Ramos Nunes de Carvalho e Sá v. Portugal* (2018), para 196.

22 ECtHR, case No 43572/18 *Grzęda v. Poland* (2022).

23 EctHR, case No 11423/19 *Gumenyuk and Others v. Ukraine* (2021).

24 See Vilfan-Vospernik, Report on the ECHR case law on the Independence of the Judiciary, CDL–JU(2019)019 p. 4; ECtHR, case No 21722/11 *Volkov v. Ukraine* (2013), para 130; ECtHR, case No 76639/11 *Denisov v. Ukraine* (2018), para 79; ECtHR, case No 55391/13 *Ramos Nunes de Carvalho e Sá v. Portugal* (2018).

25 ECtHR, case No 18952/18 Gloveli v. Georgia (2022), para 49; see also ECtHR, case No 11423/18 *Gumenyuk v. Ukraine* (2021), para 49.

Hungary, for example, the Court stressed the importance of judges speaking up against systemic threats to the rule of law.[26] In *Grzęda v. Poland*, the Court not only discussed access to justice for the loss of a seat on the Polish Judicial Council but took the opportunity to elaborate on the importance of such councils as an institutional basis for the independent appointment of judges based on merit for the rule of law. In *Grzęda v. Poland* the Court stated:

> 307. While there exists a widespread practice, endorsed by the Council of Europe, to put in place a judicial council as a body responsible for selection of judges, the Convention does not contain any explicit requirement to this effect. In the Court's view, whatever system is chosen by member States, they must abide by their obligation to secure judicial independence. Consequently, where a judicial council is established, the Court considers that the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers in order to, inter alia, safeguard the integrity of the judicial appointment process. The CJEU underlined the importance of this obligation in respect of the NCJ (see §§ 138 and 142–144 of the judgment of 19 November 2019 in A.K. and Others, C-585/18, C-624/18 and C-625/18; and §§ 125–131 of the judgment of 2 March 2021, A.B. and Others, C-824/18; see respectively paragraphs 152 and 156 above), a conclusion fully endorsed by the Supreme Court and Supreme Administrative Court in their subsequent judgments relating to the NCJ (discussed further in paragraphs 316 and 319-321). The Court observes that States are free to adopt such a model as a means of ensuring judicial independence. What they cannot do is instrumentalise it so as to undermine that independence.
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> 308. The Court has held that "independence" refers to the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality. It characterises both (i) a state of mind, which denotes a judge's imperviousness to external pressure as a matter of moral integrity, and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that ensures their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during

26 ECtHR, case No 20261/12 *Baka v. Hungary* (2016), para 79 and paras 99–100.

> the exercise of his or her duties (see Guðmundur Andri Ástráðsson, cited above, § 234). The Court has also discerned a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers (ibid., § 233).[27]

As will be discussed below, the bodies of the Council of Europe – taking a systemic approach to the rule of law – have advocated for judicial councils for some time. With the *Grzęda v. Poland* decision, the Court supported this approach, protecting its institutional basis on the level of a violation of individual rights. This shows that the Court takes a systemic perspective even within the individual approach. This systemic approach can be seen as an increasingly important feature of the work of the Court, noticeable in tools such as pilot judgment procedures[28] and non-binding Advisory Opinions (Protocol 16, 2018). Given the large influx of cases, this seems to offer the greater impact. However, this shift may blur the differences between the work of the Court and the other advisory bodies of the Council of Europe.

4 Systemic approaches within the Council of Europe

After a discussion of the ECtHR's case law on the rule of law which necessarily takes an individual, human rights perspective as a starting point, the paper will now turn to the systemic approach taken by other bodies within the Council of Europe. They draft reports, offer counselling to member states for the development of institutional foundations of the rule of law, and develop soft law standards. The highest ranking of them is the Council of Ministers, which has developed recommendations on the judiciary, e.g. CM Rec 94/12 and Rec 2010/12. These recommendations address internal and external independence, judicial conduct, councils for the judiciary, and appointment and disciplinary procedures.

The Commission for Democracy through Law (Venice Commission) and the Consultative Council of European Judges (CCJE) are two of the bodies concerned with protecting the rule of law and shall be discussed

27 ECtHR, case No 43572/18 *Grzęda v. Poland* (2022), paras 307–308.

28 <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed 29 August 2022.

in more detail.[29] While their work necessarily takes a systemic view, these bodies face the challenge that in a diverse group of member states, one-size-fits-all solutions are rarely appropriate.

4.1 The Venice Commission

The Venice Commission was founded in 1990 to support the drafting of new constitutions in the so-called young democracies in Central and Eastern Europe. The Venice Commission was not dissolved after an initial time of institution-building in the "new democracies" but grew in importance and membership. Today, there are 61 member states going far beyond the borders of the Council of Europe, including Algeria, Costa Rica, South Korea, Mexico and the USA.[30]

The Venice Commission prepares legal Opinions on issues concerning the rule of law and democracy (democratic institutions and fundamental rights, constitutional justice and ordinary justice, elections, referendums and political parties) on the request of different institutions including the government, parliament or heads of state of the states concerned.[31] Thus, like a court, it addresses topics brought to its attention by parties, rather than being completely free in the choice of its subject of investigation. Such Opinions are drafted by working groups consisting of individual members who include judges or former judges of the highest rank, academics, lawyers and heads of human rights institutions.[32] They are based on information gathered in the respective countries, especially through interviews with people bringing different perspectives, including, for example, government officials but also representatives of NGOs. As members of the Venice Commission say, it is deemed important to assess any topic in the context of the individual country. Thereby, while taking a case-by-case approach, the Venice Commission may address systemic issues.

29 Others are for example Group of States against Corruption (GRECO). For an overview: <https://www.coe.int/en/web/portal/rule-of-law> accessed 26 August 2022.

30 List of the current member states of the Venice Commission: <https://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN> accessed 26 August 2022.

31 See for information on the tasks and working methods: <https://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN> accessed 26 August 2022.

32 List of the current individual members of the Venice Commission: <https://www.venice.coe.int/WebForms/members/default.aspx?lang=EN> accessed 26 August 2022.

After the process of collecting information on the specific country and topic, Draft Opinions are discussed and adopted in the plenary sessions. While these Opinions have no legally binding force, a yet unpublished seminar paper by Jan-Philip Fahrbach, a student of the German University of Münster, has shown that a majority of member states act on the recommendations of the Venice Commission at least to some degree. A particularly large number of states obey major recommendations if the state's institutions have requested it. The Venice Commission refers to its own Opinions in its work, but also to other international documents and decisions of the ECtHR. Apart from its legal Opinions, the Venice Commission sometimes works on topical issues, summarizing the principles developed in its Opinions. Such documents include studies on the rule of law,[33] the Rule of Law Checklist[34] and the Report on the Independence of the Judicial System Part I.[35]

4.2 Consultative Council of European Judges (CCJE)

The CCJE was established in 2001 as an advisory body consisting exclusively of judges from all of the now 46 member states of the Council of Europe. The CCJE prepares Opinions on topics of importance for judiciaries based on the rule of law. The now 25 Opinions[36] address topics such as judicial independence,[37] judicial councils,[38] corruption,[39] judges' associations,[40] separation of powers,[41] training of judges,[42] evaluation of

33 Venice Commission, Report on the Rule of Law, CDL–AD(2011)003rev, adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011).
34 Venice Commission, Rule of Law Checklist, CDL–AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016).
35 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL–AD(2010)004-e, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010).
36 All Opinions are available at <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta> accessed 26 August 2022.
37 CCJE Opinion No. 1 (2001).
38 CCJE Opinion No. 10 (2007); No. 24 (2021).
39 CCJE Opinion No. 21 (2018).
40 CCJE Opinion No. 23 (2020).
41 CCJE Opinion No. 18 (2015).
42 CCJE Opinion No. 3 (2003).

judges,[43] court presidents,[44] judges and technology,[45] ethics,[46] the media[47] and the relationship between judges, prosecutors[48] and lawyers[49]. In 2010, the CCJE summarized the main principles of the Opinions drafted so far in a Magna Carta of Judges. In addition to the Opinions drafted to advise the Council of Ministers, the CCJE also prepares Opinions and reports on current issues. For example, the CCJE used to publish situation reports on challenges for judicial independence and the rule of law in the member states.

The CCJE decides on the next year's Opinion at the annual plenary meeting. On that occasion, a working group is formed, which is usually chaired by the president and vice president. Then, a questionnaire is developed and sent out to the member states in order to collect information and views on the selected topic. The questionnaire, responses and other preliminary works are published online.[50] The CCJE works with an expert from academia or the judiciary who undertakes the evaluation of the responses, makes a first draft of the Opinion, and then supports the drafting process up to the adoption in the plenary.[51] The Opinions take a general perspective, addressing issues in an abstract way which may take into account individual examples without always addressing them. The goal of the Opinions is not to blame individual member states for their practices, but to develop abstract principles that can be applied in different contexts on the basis of concrete experiences. For example, while Opinion No. 18 (2015) "on the position of the judiciary and its relation with the other powers of state in a modern democracy" is clearly a response to the emerging European rule of law crisis, it only briefly addresses the situation in individual member states.

Opinions of the CCJE,[52] like those of the Venice Commission and the European Network of Councils for the Judiciary (ENCJ), are not legally

43 CCJE Opinion No. 17 (2014).
44 CCJE Opinion No. 19 (2016).
45 CCJE Opinion No. 14 (2011).
46 CCJE Opinion No. 3 (2002).
47 CCJE Opinion No. 7 (2005).
48 CCJE Opinion No. 12 (2009).
49 CCJE Opinion No. 16 (2013).
50 Documents to the Preliminary Works are available at <https://www.coe.int/en/web/ccje/preliminary-works> accessed 26 August 2022.
51 The author has supported four CCJE Opinions as expert: No. 17, 18, 22 and 24.
52 See generally: CCJE, Opinion No. 10 (2007).

binding but are often used by the ECtHR[53] to interpret the guarantees of the Convention in relation to judges.[54] Especially in recent decisions like *Guðmundur Andri Ástráðsson v. Iceland* and *Grzęda v. Poland*, the ECtHR referred to the work of the CCJE at length. In this context, it is also interesting to note that two judges of the ECtHR, Raffaele Sabato from Italy and Julia Laffranque from Estonia, have previously been members of the CCJE.

The close cooperation of judges from different member states in networks like the CCJE but also in the European Network of Councils for the Judiciary (ENCJ), European Commission for the Efficiency of Justice (CEPEJ), and also international judges' organizations such as the International Association of Judges (IAJ), European Association of Judges (EAJ) and Magistrats Européens pour la Démocratie et le Libertés (MEDEL) may increase the cross-border understanding of judges for topics like judicial independence, administration of the judiciary and efficiency. Elaine Mak has suggested that an international judges' identity may be fostered this way.[55] Such an international identity of judges may even encourage cross-border engagement to protect judicial independence in Europe. It may be remembered that judges from different countries marched in Poland for the protection of judicial independence. It may be assumed that a body like the CCJE, consisting exclusively of judges, is able to gain more attention for topics concerning the judiciary than other bodies like the Council of Ministers and the Parliamentary Assembly, which are closer to the views of the executive and legislative.

However, the body has also been criticized. Fabian Wittreck has formulated concerns on the composition of the CCJE. He has argued that the judges would take a biased view on issues, aiming to expand the power

53 See e.g.: European Commission's Regular Report on Czech Republic's Progress towards Accession, SEC (2002) 1402 final (Oct. 9, 2002,), p. 22–24; Daniel Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence' in Czarnota et al. (eds), *Spreading Democracy and the Rule of Law* (Springer 2006), 313, 323–325.

54 See only ECtHR, case No 20261/12 *Baka v. Hungary* (2016), para 79; ECtHR, case No 48783/07 *Gerovska Popčevska v. the Former Yugoslav Republic of Macedonia* (2016), paras 34, 35; ECtHR, case No 34796/09 *Albu and others v. Romania* (2012), para18; ECtHR, case No 48554/10 *Borovská and Forrai v. Slovakia* (2014), para 43; ECtHR, case No 4410/11 *Mráz and Others v. Slovakia* (2014), para 42;ECtHR, case No 26374/18 *Guðmundur Andri Ástráðsson v. Iceland* (2020), paras 124–127; ECtHR, case No 43572/18 *Grzęda v. Poland* (2022), paras 135–139.

55 Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the changing practices of western highest courts* (Bloomsbury 2013).

of the judiciary.[56] In my opinion, this criticism is not justified. I have worked on four CCJE Opinions and was always under the impression that discussions focused on how judges can contribute best to a society based on the rule of law not in their own interests but in the interests of the people. It is certainly true that judges have a unique perspective on the best approach to reaching that goal. Not everybody might agree with the views taken by the all-judges body. However, the CCJE was established especially in order to include the unique perspective of a body composed exclusively of judges in the policymaking of the Council of Europe. After all, the Council of Ministers is composed of members of the executive, while the Parliamentary Assembly provides the perspective of a parliament. The CCJE is completely transparent about its composition in its name and on its website. This does not mean, of course, that all positions of the CCJE – just as any other body of the Council of Europe – must provide the right approach for every member state. After all, it only makes recommendations without binding force.

An approach of the Council of Europe that is discussed critically is the endorsement of the establishment of judicial councils as an institution supporting the rule of law in the so-called new democracies. The next part of the paper will turn to the judicial council as an example of the effects of the advisory bodies of the Council of Europe.

4.3 Judicial councils

Both the Venice Commission[57] and the CCJE[58] recommend the adoption of judicial councils as an approach to the self-administration of the judiciary and in order to protect the rule of law and separation of powers.

56 Fabian Wittreck, 'Empfehlen sich Regelungen zur Sicherung der Unabhängigkeit der Justiz bei der Besetzung von Richterpositionen?' (2020) Gutachten G zum 73. Deutschen Juristentag, G8, G34.

57 Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL–AD(2010)004-e, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010), para 32; Venice Commission, Rule of Law Checklist, CDL–AD(2016)007, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), paras 81, 82; Venice Commission, Judicial Appointments – Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16–17 March 2007), CDL–AD(2007)028-e, para 25,26. Some doubts are expressed in para 26 if judges should be responsible for the administration

The origins of the concepts of judicial councils lie in southern Europe, especially in Italy, where the Italian Judicial Council (Consiglio Superiore de la Magistratura, CSM) still forms the basis of a model of a judicial council with extensive competence. In Italy, the constitution of 1948 introduced the Council in its basically current form after the fascist regime.[59] In Portugal and Spain, judicial councils were also introduced after the end of authoritarian systems.[60] After the end of the Cold War, most new constitutions in Central and Eastern Europe introduced judicial councils to institutionalize their judiciaries with the goal of making them independent after similarly profound changes to their constitutional systems.

According to the recommendations of the CCJE,[61] such a council shall support judicial independence and efficiency. It should be independent from the other powers of state, namely the legislative and the executive.[62] The majority of its members should be judges elected by their peers.[63] A selection by the executive or legislative should be avoided. Members should also not be politicians but may very well be non-judges like attorneys and also laypeople who have no legal education.[64] Older recommendations suggest that such councils should have considerable competence including the administration of the judiciary and career decisions like selection, promotion and disciplinary decisions.[65]

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of the judiciary, see at <https://www.venice.coe.int/webforms/documents/CDL-AD(2007)028.aspx> accessed 26 August 2022.

58 CCJE, Magna Carta of Judges (2010), para 13; CCJE Opinion No. 10 (2007), para 42.

59 Simone Benvenuti and Davide Paris, 'Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model' (2018) 19 German Law Journal 1641, 1642.

60 See for Portugal the information provided on the ENCJ website: <https://www.encj.eu/images/stories/pdf/factsheets/csm_portugal.pdf> and website of the Council itself: <https://www.csm.org.pt/> both accessed 26 August 2022. See for Spain: Aida Torres Pérez, 'Judicial Self-Government and Judicial Independence: the Political Capture of the General Council of the Judiciary of Spain' (2018) 19 German Law Journal 1769, 1770.

61 CCJE Opinion No. 10 (2007) para 8–10.

62 CCJE Opinion No. 10 (2007) para 8–14; CCJE Opinion No 24 (2021) para 5.

63 Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010/12, para 27; CCJE Opinion No. 10 (2007) para 17.

64 CCJE Opinion No. 24 (2021) para 29.

65 CCJE Opinion No. 10 (2007) para 13.

4.3.1 Prevalence in Europe

A recent survey among members of the CCJE shows how successful the recommendations of the Council of Europe have been. The survey was undertaken in preparation of CCJE Opinion No. 24 (2021). Information from 41 of the 46 member states was submitted.[66] Thirty-four out of 41 responses stated that their member state had a judicial council. Taking Malta, which has information published on the website of the ENCJ, into account, this makes 35 member states which have established a judicial council, a considerable majority: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta (ENCJ information), Monaco, Montenegro, The Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Turkey, Ukraine. Only seven member states responded that they have no judicial council: Austria, Czech Republic, Germany, Luxembourg, Sweden, Switzerland (none at the federal level, 5 out of 26 cantons have one), United Kingdom.

Being aware of the diversity of systems, the CCJE did not prescribe a definition, but offered a yes/no question if a member state had a judicial council and asked for its name. These inquiries were followed by a number of questions about different competences in relation to the judiciary such as administration, personnel, ethics and PR. Among the most important competences of judicial councils following the judicial council model[67] endorsed by the Council of Europe and most famously established by the Italian CSM are competences in the administration of the judiciary[68] and competence for personnel. The latter includes the selection (27 of 41

66 The questionnaire and a compilation of answers can be found on the CCJE website: <https://www.coe.int/en/web/ccje/opinion-no.-24-on-the-evolution-of-the-councils-for-the-judiciary-and-their-role-for-independent-and-impartial-judicial-systems?> accessed 26 August 2022.

67 See Anne Sanders, Comparative Overview of Judicial Councils in Europe, DG I-DLC(2022)1, drafted for the International Roundtable "Shaping Judicial Councils to meet contemporary challenges", <https://www.venice.coe.int/files/overview_JC_Europe_en.pdf> accessed 26 August 2022.

68 Albania, Andorra, Bosnia and Herzegovina, Bulgaria, Denmark, Estonia, Finland, Georgia, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, San Marino, Slovakia, Slovenia, Spain, Turkey.

member states),[69] promotion (28)[70] and evaluation of judges (19)[71]. Most judicial councils also contribute to the selection of court presidents (21).[72] In 24 member states, judicial councils also have a role in disciplinary procedures.[73]

4.3.2 The Council of Europe and judicial councils

While there was never a legal duty to introduce such councils,[74] for states in Eastern and Central Europe it was tempting to adopt them in order to quickly show progress on the 1993 Copenhagen Criteria to qualify for

69 Information from responses to CCJE questionnaire sent out in preparation of CCJE Opinion No. 24 (2021) (CCJE information): Albania, Andorra, Armenia, Azerbaijan (judges selection committee formed by council), Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Finland (technical role), France (gives a binding opinion on proposal of MoJ; judges at supreme court and presidents of courts are selected by the council), Georgia, Hungary, Italy, Latvia, Lithuania, Malta (advice), Monaco, Montenegro, North Macedonia, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Turkey.

70 CCJE information: Albania, Andorra, Armenia, Azerbaijan, Belgium (not for deputy and specific mandates), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Finland, France (promotion of judges except supreme court judges; court presidents suggested by MoJ to council), Georgia, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Monaco, Montenegro, North Macedonia, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Turkey, Ukraine.

71 CCJE information: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Georgia, Ireland, Italy, Lithuania, Montenegro, North Macedonia, Portugal, Romania, San Marino (not yet, but is about to be introduced on the recommendation of GRECO), Slovakia, Spain, Turkey.

72 CCJE information: Andorra, Armenia, Azerbaijan (suggestion), Belgium (proposal), Bulgaria (except for Supreme Court and Supreme Administrative Court), Croatia (except president of Supreme Court), Cyprus, Estonia (suggestion, can block appointment), France, Georgia, Greece, Latvia, Lithuania, North Macedonia, Netherlands (proposal), Portugal, Romania, San Marino (no removal), Slovakia, Slovenia, Spain (removal only for disciplinary reasons).

73 CCJE information: Albania, Andorra, Armenia, Azerbaijan, Belgium (no, but Council may provide information to the disciplinary courts if a judge refuses to assist in the exercise of powers of the Council), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, France, Georgia, Ireland, Italy, Malta, Monaco, Montenegro, North Macedonia, Poland (elects judges' disciplinary representative), Portugal, Romania, San Marino, Slovakia, Slovenia (independent body within), Spain, Switzerland (in cantons where they are in place), Turkey, Ukraine.

74 See Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010/12, para 35, see also p. 25 of the Explanatory Memorandum of Rec(2012)10.

the admission to the European Union demanding "achieving stability of institutions guaranteeing … the rule of law".[75]

The endorsement of judicial councils by the different institutions of the Council of Europe and the European Union had a detrimental effect, it is argued, because its adoption was taken as an "easy fix" to adhere to European rule of law standards while neglecting the necessary "small steps" for an efficient, transparent and accountable judiciary in a society based on the rule of law.[76]

Moreover, it is argued that the focus on judicial councils ignored the fact that elements of judicial self-administration protecting judicial independence may be found not only in systems with a judicial council but also in member states where a ministry of justice or a court service board have the final say on the administration of the judiciary.[77]

It is true that in different member states the administration of the judiciary as a basis for the rule of law can only be understood by a detailed analysis of the interplay of different institutions. The CCJE is aware of this fact. In the options offered in the CCJE survey to the member states of the CCJE for the different competences were not only the options "judicial council", "ministry of justice" and "parliament", but also "judicial administration board" (which was intended to cover the court service model of the Nordic countries), "court presidents", "bodies within courts", "association of judges" and "others" with a request for clarification. The approach was meant to show not only the competence of judicial councils but also how different institutions interact in different systems. This proved correct: in most member states, all mentioned authorities and bodies are involved in different ways in the administration of the judiciary.

75 Copenhagen European Council, Presidency Conclusions, 21.06.-22.06.1993, iii): "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union"; <https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> accessed 26 August 2022.

76 The Venice Commission and CCJE have recently stressed this: Venice Commission, Urgent Interim Opinion on the draft new constitution, 11.12.2020, Bulgaria, CDL-AD(2020)035, para 37; CCJE Opinion No 24 (2021) para 3.

77 See Katarína Šipulová et al., 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary' (2022) 17 Regulation and Governance 22 with further references; and Aarli and Sanders, working paper presented at the EGPA 2022 in Lisbon.

There is some overlap between the competence investigated in the CCJE survey with the dimensions of competence of judicial self-administration identified by Šipulova et al. in their important work on judicial self-administration in the Czech Republic, Germany, Slovakia and Italy.[78] Both works show that judicial self-administration is not only undertaken by judicial councils but also by court presidents and bodies of judges within courts.

While the endorsement of judicial councils may lead to a critical self-assessment of judicial systems and improvements, it may also be understood as the "European must-have" for all systems. The Nordic countries Denmark, Norway and Finland responded affirmatively to having a judicial council. However, the Nordic countries are often described as following a court service model in which the judiciary is administrated by an independent administrative body.[79] Such bodies are usually not led by a majority of judges and do not have competence for personnel.[80] In Norway, for example, there is even some resistance to handing the administration of the judiciary over to a body with a majority of judges. Such a system, the recent Court Commission debating a reform argued, would lack democratic legitimacy. Nevertheless, Denmark, Norway and Finland (which have a majority of judges present on their judicial administration boards) responded that they had a judicial council. Denmark and Finland are also members of the ENCJ. This response may very well be seen as a sign of a broad understanding of judicial councils, embracing diversity of systems. According to this understanding, different institutions can be judicial councils if they protect judicial independence and the rule of law. However, this shows that while judicial councils are an important feature in the administration of many judiciaries in Europe, a more nuanced view of its composition, competence and interactions with other institutions is necessary to truly understand

78 Katarína Šipulová et al., 'Judicial Self-Governance Index: Towards better understanding of the role of judges in governing the judiciary' (2023) 17 Regulation and Governance 22, 24.

79 See for these different models the two reports drawn up in preparation of CCJE Opinion No. 10 (2007), both accessible at *Martine Valdés-Boulouque,* The Current Situation in the Council of Europe's Member States*,* CCJE (2007)3; See for a report on countries without a judicial council: Lord Justice Thomas, Preliminary Report Councils for the Judiciary, States without a High Council, CCJE (2007) 4; see also Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A critical study in judicial councils in Central and Eastern Europe' (2014) 15 German Law Journal 1257, 1265, who distinguish the Ministry of Justice model, the judicial council model, the courts service model, a hybrid model and the socialist model.

80 For a discussion of the Nordic systems see Aarli/Sanders (forthcoming).

their role in different member states and whether and how they actually help secure the rule of law.

The judiciary in countries with powerful judicial councils is not necessarily perceived as particularly independent, at least if the Nordic countries are not counted as having judicial councils. For example, the 2022 EU Justice Scoreboard shows that the judiciary in Finland, Denmark, Austria, Luxembourg, the Netherlands, Germany and Sweden are considered the most independent by the public. Poland and Croatia have the worst results. Countries with powerful judicial councils like Spain, Italy, Belgium and Slovakia have not achieved particularly good results.[81] According to the 2022 ENCJ survey, judicial councils also do not enjoy particularly high acceptance among judges for personnel decisions.[82] For example, roughly 37 % of participating Italian judges and roughly 65 % of participating Spanish judges assume that promotion is not achieved because of competence. However, not having a judicial council also does not seem to be a guarantee for acceptance: 35 % of German judges assume that promotions to the highest courts are not based on competence. The best results are shown by Denmark (1 %), the Netherlands (1 %), Norway (3 %) and England and Wales (3 %).

A nuanced view is necessary to explain such individual results. The analysis must take into account general trust in public institutions, transparency, economic situation and general stability. It must be assumed that many of the difficulties judicial councils struggle with are beyond their control. Nevertheless, the data shows that just adopting a judicial council is not enough to achieve a judiciary that is perceived as independent and trustworthy.[83] However, adopting another system, for example a Nordic-style court administration, would not be enough either. Rather, a bespoke strategy of small steps tailored to the individual member state is necessary. For example, the systems doing particularly well in relation to decisions on personnel follow different approaches. They employ independent commissions with various compositions and procedures and have persons from

81 The 2022 EU Justice Scoreboard, figure 50, p. 40: <https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf> accessed 26 August 2022.

82 ENCJ Survey on judicial independence 2022, 34 ff; <https://www.encj.eu/node/620> accessed 26 August 2022.

83 Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A critical study in judicial councils in Central and Eastern Europe' (2014) 15 German Law Journal 1257; Cristina E. Parau, 'The Drive for Judicial Supremacy' in Seibert-Fohr (ed), *Judicial Independence in Transition* (Springer 2012) 619, 643.

different institutions including laypersons from civil society interact with each other.

4.3.3 A more nuanced approach

Thus, a context-oriented approach to the systemic work of the different Council of Europe bodies is necessary. The Council of Europe should continue to assess situations and legislation in context and emphasize that different approaches can lead to satisfactory results. Therefore, it should adopt a healthy scepticism in respect to lists of best practices and easy fixes. This is especially important if recommendations are adopted in individual member states. The Venice Commission follows this very useful but also resource-intensive approach.

However, it shall not be denied that without general rules, assessing and making suggestions for improvements from a European perspective are much harder. It makes it very difficult to reprimand one country for enacting legislation that others have in place, but which might function differently in its specific context. In the discussion on the judicial reforms in Poland, for example, Polish officials often argued that its new laws were comparable to the German rules on the administration of the judiciary. While this suggestion was not convincing because it overlooked the context of the German system,[84] it highlights the difficulties of comparing the functioning rather than the rules of two different systems. This again shows the importance and difficulties of assessing rules and practices in diverse political and legal contexts. A fine combination of justified criticism on the basis of general principles from a bird's-eye perspective – which is to be expected and desired from an international institution – must be combined with a respectful, context-oriented analysis. A great challenge indeed!

The Council of Europe's bodies seem to be increasingly aware of this. The Council of Ministers,[85] the CCJE and the Venice Commission have all stressed in recent Opinions that institutional changes are not enough but that long-term efforts are needed to achieve independent, trusted and ef-

84 See Anne Sanders and Luc von Danwitz, 'Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a new Approach to Judicial Legitimacy' (2018) 19 German Law Journal 769, 800–804.

85 See Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CM Rec 2010/12, para 35, see also p. 25 of the Explanatory Memorandum.

fective judiciaries supporting the rule of law.[86] Moreover, these institutions are issuing warnings against politicization and corporatism, learning from difficult experiences made in the European rule of law crisis. In its Opinion 24, the CCJE has also cautioned that an all-powerful judicial council is especially vulnerable to politization from within and outside the judiciary.[87] A system of checks and balances involving different institutions may be the best way forward to develop and protect the rule of law.

5 Concluding remarks

This paper has argued that the Council of Europe follows a multilevelled approach through its different institutions. The ECtHR necessarily focuses on the individual and human rights in the cases filed by individuals. The paper showed that the ECtHR, while ruling on an individual case, nevertheless protects guarantees of the rule of law. Moreover, the Court tends to adopt a systemic view, making general remarks on issues such as judicial independence, the rule of law and the institutional foundations of an independent judiciary.

Other bodies such as the Venice Commission and the CCJE take a more systemic approach, drafting Opinions containing abstract recommendations or looking at challenges to the rule of law in a member state, taking a holistic perspective. With their work, these European institutions create a European audience that points out dangers to the rule of law, as has happened during the rule of law crisis. However, the special case of the endorsement of judicial councils by the Council of Europe shows that there are no easy fixes just from lists of best practices and recommendations. However, it should be kept in mind that it is not the fault of the CCJE and Venice Commission that politicians at all ends wanted to see quick results institutionalizing independent judiciaries. While a systemic view is necessary, it must avoid overgeneralization to be effective. Long-term efforts after careful analysis are necessary.

In all this, the work of the different bodies of the Council of Europe is crucial and its judgments and recommendations must be discussed and adopted by the member states with care and caution.

86 CCJE Opinion No. 24 (2021) para 3; Venice Commission, Urgent Interim Opinion on the draft new constitution, Bulgaria, CDL–AD(2020)035 para 37.

87 CCJE Opinion No. 24 (2021) para 25.