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JUDICIAL INDEPENDENCE IN EUROPE: 21ST CENTURY EMERGING ISSUES AND RESPONSES

Abstract

Judicial independence is widely recognized as a fundamental pillar and an essential prerequisite for ensuring the rule of law and the effective protection of human rights and freedoms, both in times of peace and in periods of war or emergency. The concept of judicial independence is multifaceted and has generated an extensive body of scholarly literature, as well as a substantial acquis within the frameworks of the Council of Europe and the European Union. This article examines emerging challenges to judicial independence in European states, and explores potential responses, with particular emphasis on external judicial independence. It offers a critical analysis of contemporary threats, including populism and public criticism, which give rise to issues of trust and communication between the judiciary, other branches of state authority, and civil society. Particular attention is also paid to politically driven judicial reforms in certain newer European democracies.

Keywords

rule of law; judicial independence; European law; populism; criticism; judicial reforms; trust in the judiciary; communication

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Introduction

It is a well-established principle that judicial independence is not a privilege granted for the benefit of judges, but rather a fundamental guarantee enshrined in Article 6 of the European Convention on Human Rights[1] (ECHR). This provision ensures that every individual has the right to a fair trial, where cases are decided solely based on legal grounds and are free from any undue influence.

The issues of judicial independence are multifaceted, and they have generated a robust body of scholarly publications,[2] the Council of Eu-

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The right to a fair trial was recognized by the European Court of Justice, as "inspired by Article 6 of the ECHR": C-174/98 P and C-189/98 P, *Netherlands and Van der Wal v. Commission*, 11 January 2000, para. 17.

[2] E. g. see in chronological order starting from the most recent ones:

P. Čuroš, "Introduction – Judges under Stress: Institutions, Ideology and Resistance" (2025) 15(2) Oñati Socio-Legal Series, pp. 354–368, available at: https://opo.iisj.net/index.php/osls/article/view/2293 [last accessed 01.04.2026].

R. O'Neill, "Defending Judicial Independence in Court: A Subjective Right to Independence in EU Law" (2024) *Liverpool Law Review* (Springer, November 2024) pp. 65–84, available at: https://doi.org/10.1007/s10991-024-09376-8 [last accessed 01.04.2026].

H. Molbæk-Steensig et al, "Judicial Independence and Impartiality: Tenure Changes at the European Court of Human Rights" (2023) 34(3) *European Journal of International Law*, pp. 581–614, available at: https://academic.oup.com/ejil/article/34/3/581/7250322 [last accessed 01.04.2026].

S.J. Cheesman et al, "Judicial Reforms and Challenges in Central and Eastern Europe" (2023) 14(2) *International Journal for Court Administration*, available at: https://iacajournal.org/articles/10.36745/ijca.532 [last accessed 01.04.2026].

R.B. Gisbert, "Judicial Independence in European Constitutional Law" (2022) 18(4) *European Constitutional Law Review*, pp. 591–620, available at: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/judicial-independence-in-european-constitutional-law/90C05FAFC1D805ADDB9308436607B958 [last accessed 01.04.2026].

F. Van Dijk, *Perceptions of the Independence of Judges in Europe*, Springer Nature, 2021, 113 p.

M. Mastracci, "Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland" (2019) 5(3) *Athens Journal of Law*, pp. 323–350, available at: https://doi.org/10.30958/ajl.5-3-6 [last accessed 01.04.2026].

J.R. Brubaker, "The Judge Who Knew Too Much: Issue Conflicts in International Adjudication" (2008) 26(1) *Berkeley Journal of International Law*, pp. 111–152, available at: https://

rope (CoE)[3] and the European Union (EU)[4] acquis. A quarter-century on, new and more elusive threats to judicial independence have taken root across the pan-European legal landscape. The challenge now lies in how Europe's institutions, legal communities, and civil society can rise to meet them – with vigilance, innovation, and resolve.

Despite a substantial body of scholarly literature, the original contribution of this paper lies in the following. Part I examines the development, at the beginning of the twenty-first century, of the key sources of European law governing judicial independence. Part II addresses emerging challenges to the rule of law and judicial independence, which include illegitimate political attacks presented as judicial reforms, and also include populism, and criticism from politicians, the media, and the public, as well as the growing role of communication as a defensive strategy for judges. Part III proposes possible responses, focusing on the role of various actors in supporting judges subjected to such attacks, including European and domestic institutions, legal professionals at both national and international levels, civil society, and the judiciary itself.

I. Judicial Independence According to European Legal Standards: the 21st Century Improvements

In its most recent case law, the European Court of Human Rights (ECtHR) improved the interpretation of the word "independence" as "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

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www.berkeleyjournalofinternationallaw.com/_files/ugd/9a8c77_99af96d0f9274ecf884fde6d2c3fbaae.pdf[last accessed 01.04.2026].

[3] E.g. R. Mańko, European Parliament, Briefing, *Council of Europe Standards on Judicial Independence*, European Parliamentary Research Service, (May 2021), available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690623/EPRS_BRI(2021)690623_EN.pdf [last accessed 01.04.2026].

[4] E.g. R. Mańko, European Parliament, Briefing, *ECJ case law on judicial independence A chronological overview,* European Parliamentary Research Service, (October 2023), available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf [last accessed 01.04.2026].

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 the exercise of his or her duties."[5]

European legal standards in the field of judicial independence have become more legally well-grounded in the 21st century. The primary sources establishing fundamental standards on judicial independence are well-recognized by European scholars and practitioners. These sources include the Magna Carta of Judges (MCJ)[6] and various opinions on judicial independence issued by the Consultative Council of European Judges (CCJE)[7]; the Committee of Ministers Recommendation on Judges: Independence, Efficiency, and Responsibilities (2010) (CM Recommendation)[8] and the Action Plan on strengthening judicial independence and impartiality[9]; the key documents of the Venice Commission, such as the 2007 Report on Judicial Appointments[10], the 2010 Report on Judicial Independence[11], The Rule of Law Checklist (2016) and The Updated Rule of Law Checklist (2025).[12] Additionally, the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) play a crucial role in shaping and reinforcing these standards while interpreting the Convention on

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[5] *Guðmundur Andri Ástráðsson v. Iceland* [GC], Application no. 26374/18, Judgment of 01.12.2020, para 234.

[6] Consultative Council of European Judges (CCJE), CCJE (2010)3 Final, *Magna Carta of Judges (Fundamental Principles)*, 17.11. 2010, available at: https://rm.coe.int/16807482c6 [last accessed 01.04.2026].

[7] 28 CCJE Opinions adopted as of 1 April 2026, available at: https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta [last accessed 01.04.2026].

[8] Committee of Ministers, *Recommendation CM/Rec(2010)12 to member states on judges: independence, efficiency and responsibilities*, 17.11.2010.

[9] Council of Europe, CM(2016)36 final, *Action Plan on Strengthening Judicial Independence and Impartiality*, 2016, 27 p., available at: https://rm.coe.int/1680700285 [last accessed 01.04.2026].

[10] Venice Commission, *Report on Judicial Appointments*, CDL-AD(2007)028, 22 June 2007.

[11] Venice Commission, *Report on the Independence of the Judicial System: Part I – The Independence of Judges* (CDL-AD(2010)004, 16 March 2010).

[12] Venice Commission, *Rule of Law Checklist* (CDL-AD(2016)007, 18 March 2016). *The Updated Rule of Law Checklist* (CDL-AD(2025)002 16 December, 2025).

Human Rights and Fundamental Freedoms (the Convention) and the Charter of Fundamental Rights (CFR), respectively.

The MCJ, in particular, provides a structured typology of judicial independence, categorizing it into three distinct dimensions:

1. Statutory independence, which ensures that judges are appointed and removed according to clear legal frameworks.
2. Functional independence, which guarantees that judicial decision-making remains free from external pressures or influence.
3. Financial independence, which secures adequate resources for the judiciary to perform its functions effectively (paragraph 3 of the MCJ).[13]

On November 17, 2010, the Committee of Ministers of the Council of Europe (CMCE) outlined a widely accepted framework for judicial independence in its Recommendation on Judges: Independence, Efficiency, and Responsibilities (CM Recommendation).[14] This Recommendation provides a nuanced distinction between two key dimensions of judicial independence: *external* and *internal*.

Despite both documents (the MCJ and the CM Recommendation) being adopted on the same date, they have a different nature and pursue different goals. The MCJ is a short, principle-based document focusing on the essence of judicial independence, while the CM Recommendation is a detailed guideline for state authorities with concrete implementation strategies.

As outlined in the abstract, this article focuses primarily on *external judicial independence*. According to the CM Recommendation, this concept encompasses various aspects, which we suggest can be categorized into three main groups:

- *Relations with the executive and legislative branches of power,* which to a point interprets the principle of checks and balances, – executive and legislative authorities must respect judicial decisions: they should not override them (except in cases like amnesty or

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[13] Consultative Council of European Judges (CCJE), CCJE (2010)3 Final, *Magna Carta of Judges (Fundamental Principles)*, 17.11. 2010, available at: https://rm.coe.int/16807482c6 [last accessed 01.04.2026].

[14] Committee of Ministers, *Recommendation CM/Rec(2010)12 to member states on judges: independence, efficiency and responsibilities,* 17.11.2010.

pardon) and should avoid criticism or actions that undermine judicial independence or public confidence in the judiciary.[15]

- *Communication with professional society:* without prejudice to their independence, judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as professionals whose tasks are related to the work of judges in order to facilitate an effective and efficient administration of justice.[16]
- *Communication with civil society:* judicial matters are of public interest, but information must respect judicial independence. Courts should manage communication responsibly, and judges should be cautious with the media. Public confidence is essential, so mechanisms to gather societal feedback on the justice system are encouraged.[17]

One of the most significant improvements, which has brought about a transformative shift in the protection of judicial independence over the past 25 years is the ECtHR's case law under Article 6 of the ECHR. Originally conceived as a guarantee of the right to a fair trial, Article 6 has evolved through the case law of the European Court of Human Rights into a powerful instrument for safeguarding the institutional and individual independence of the judiciary.

A key application of Article 6 in protecting judges can be seen in cases concerning the dismissal or disciplining of members of the judiciary. The Court has held that disputes relating to the career, tenure, and removal of judges fall within the scope of "civil rights and obligations," thereby triggering the guarantees of a fair hearing before an independent and impartial tribunal established by law.

For example, in *Baka v. Hungary*[18], the Court found a violation of Article 6 where the premature termination of the President of the Supreme Court deprived him of access to a court to challenge his dismissal. The case was particularly significant because it recognized that interference

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[15] *Ibid*, paras 17, 18.

[16] *Ibid*, para 12.

[17] *Ibid*, paras 19, 20.

[18] *Baka v. Hungary* [GC], Application no. 20261/12, Judgment of 23.06.2016.

with judicial tenure not only affects the individual judge, but also undermines the independence of the judiciary as a whole.

Similarly, in *Denisov v. Ukraine*[19], the Court clarified the circumstances under which disciplinary measures against judges engage Article 6, reinforcing procedural safeguards and limiting arbitrary interference by the executive or legislative branches.

In this way, Article 6 operates, not only as an individual right, but also as a structural guarantee of the rule of law, protecting the judiciary from undue political influence.

It must be acknowledged that the core pan-European standards on judicial independence have undergone significant strengthening over the past two and a half decades, driven by the Council of Europe's institutions, the evolving case law of the ECtHR, and a growing body of soft law instruments. One of the revolutionary shifts is that the ECtHR's law has evolved considerably in recognizing a "right" under the civil limb of Article 6, adopting a broader interpretation whereby this provision applies even to cases that do not explicitly concern a civil right, but have direct and significant effects on an individual's pecuniary or non-pecuniary interests. Through this jurisprudence, Article 6 has become a cornerstone in the protection of judicial independence by ensuring access to a court for judges in disputes affecting their status and requiring that disciplinary and dismissal proceedings meet standards of fairness.

II. External Judicial Independence and Its New Threats: European Focus

1. Populism and Criticism

Explicit threats to judicial independence underscore the extent to which political actors may seek to justify or pursue control over the judiciary. The reason for this is that the judiciary is the last bastion for democracy and the rule of law.[20]

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[19] *Denisov v. Ukraine* [GC], Application no. 76639/11, Judgment of 25.09.2018, para 51.

[20] E.g. see the arguments for the importance of judges' resilience here: H. P. Graver, "Judges Under Stress and the Duty to Resist. What US Judges Can Learn From the Ger-

As the United Kingdom Attorney General Lord Hermer KC mentioned during his 2024 Bingham Lecture titled "The Rule of Law in an Age of Populism" – "At a time when there is a desperate need for cooperation and solutions, we are increasingly confronted by the divisive and disruptive force of populism. This is not a new phenomenon. But in recent years, we have grown accustomed to diagnosing its symptoms, on both right and left."[21]

Populism, often characterized by anti-elitist rhetoric and a focus on majoritarian rule, can undermine judicial independence by portraying the judiciary as an obstacle to the "will of the people."[22] In many cases, populist movements seek to weaken judicial oversight, erode constitutional checks and balances, and exert political control over the judiciary. Because the judiciary typically does not respond publicly, it becomes an easy target for populists seeking to influence public opinion through criticism and blame.

Criticism of the judiciary and judicial decisions (judgments) in public media space raises a fundamental question of whether the interests of a democratic society are better served by free debate about judicial matters or by protecting the judiciary from criticism.

In this respect the ECtHR applies a conditionally protective approach to the judiciary because of its inability to reply to criticism, mostly because of the rules of judicial ethics. [23]

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man Experience", *Verfassungsblog*, 14 March 2025, available at: https://verfassungsblog.de/judges-resistance-executive-power/ [last accessed 01.04.2026].

[21] Attorney General's Office, *Attorney General's 2024 Bingham Lecture on the Rule of Law,* 14 October 2024, available at: https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law [last accessed 01.04.2026].

[22] E.g. see: K. Humble, "Populism and the Threat to International Law", 09.06.2022, *Laws* 2022, 11(3), available at: https://doi.org/10.3390/laws11030050 [last accessed 01.04.2026].

[23] In the case of *Prager and Oberschlick v. Austria* (1995), para 34, the ECtHR provided a clear answer as regards the degree of protection concerning judges. In particular, the Court held: "Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying."

Since 1989, when the ECtHR in *Barfod v. Denmark*[24] decided the first case on the criticism of judges, the Court has faced numerous challenges against the alleged overreaction of the judiciary on criticism, increasing from the early beginning of the 21st century so that we can "finally talk about case-law instead of individual cases".[25]

It is worth noting at the outset that Article 10 of the ECHR test can be expressed in the following shortcut: (i) scope; (ii) interference; (iii) prescribed by law; (iv) legitimate aim; (v) necessary in a democratic society. It is clear that the drafters of the Convention were aware of the special status of judges and explicitly included maintaining the authority and impartiality of the judiciary in the list of permitted restrictions of free speech in Article 10 paragraph 2. The ECtHR considers that the phrase "authority of the judiciary" includes the concept "that the courts are, and are accepted by the public at large as being, the proper forum for the resolution of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large has respect for and confidence in the courts' capacity to fulfil that function."[26]

Importantly, in December 2022, the Consultative Council of European Judges (CCJE) adopted its 25th Opinion, dedicated to the freedom of expression of judges (Opinion). [27] The Opinion discusses the main aspects of judicial expression. It addresses the *legal and ethical duty* of a judge to speak out in order to safeguard the rule of law and democracy at the domestic, European, and international levels (para 4). It covers judicial expression both inside and outside the court. The Opinion intends to give general guidance to judges and a broad framework for an ongoing discussion on which parameters to consider when they exercise their right to freedom of expression. This approach was applied

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[24] *Barfod v. Denmark,* Application no. 11508/85, Judgment of 22.02.1989.

[25] D. Kosar, *Freedom of Speech and Permissible Degree of Criticism of Judges: in the jurisprudence of the European Court of Human Rights and the U.S. courts* (MA thesis, Central European University, November 22, 2007), p. 17, (See footnote 74), available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwibkJajxPj1AhXImIsKHT3yCCwQFnoECAUQAQ&url=https%3A%2F%2Fwww.etd.ceu.edu%2F2008%2Fkosar_david.pdf&usg=AOvVaw0-xKjf6gI_PVv9AhEib0R7 [last accessed 01.04.2026].

[26] *Morice v. France* [GC], Application no. 29369/10, Judgment of 23.04.2015, paras 129–30.

[27] CCJE, *Opinion No 25 (2022) on Freedom of Expression of Judges* (Council of Europe, 2022) available at: https://rm.coe.int/opinion-no-25-2022-final/1680a973ef [last accessed 01.04.2026].

previously by the ECtHR in the case of *Żurek v. Poland*, in June 2022 by stressing: "…the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat."[28]

As formulated in paragraph 4 of the Opinion, the *legal and ethical duty* of a judge to speak out in order to safeguard the rule of law and democracy raises a debate about the extended individual freedom of expression of judges.

In the recent article "Public opinions of a judge in defence of the rule of law: transformation of the right to freedom of expression into an ethical and legal duty to speak out in defence of fundamental values" Ukrainian judge Kostiantyn Pilkov noted:

> "It is now recognized that there is an ethical, if not a legal, duty to stand up in defence of judicial independence, a duty that lies with every judge. In this context, it becomes clear that this responsibility concerns not only the protection of independence by an individual judge in situations that affect them personally, but also the defence of judicial independence across the entire judicial system.
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> The rhetoric of authoritative sources (such as conclusions and commentaries from international organizations) regarding public statements in defence of the rule of law and judicial independence is also shifting: from an emphasis on restraint and the limited permissibility of commenting on politically sensitive issues, toward "fearless advocacy" and "clear and persuasive statements" expressing judicial opposition to government proposals that tend to undermine judicial independence"[29] (*Author's translation from Ukrainian).*

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[28] In *Żurek v. Poland*, Application no. 39650/18, Judgment of 16.06.2022, para 222 – the ECtHR underlined that "[t]his duty has been recognised, *inter alia*, by the CCJE (see paragraph 41 of its Opinion no. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, the UN Special Rapporteur on the independence of judges and lawyers (see paragraph 102 of his 2019 Report on freedom of expression, association and peaceful assembly of judges) and the General Assembly of the ENCJ (see paragraph (vii) of its 2013 Sofia Declaration)."

[29] К. Пільков, "Публічні висловлювання судді на захист верховенства права: трансформація права на свободу слова в етичний і юридичний обов'язок висловитись на захист фундаментальних цінностей", *Актуальні проблеми правознавства*, 2024/4,

Reading these lines written by a Ukrainian Supreme Court judge, one may conclude that the aforementioned CCJE Opinion has instilled greater confidence in judges to respond to political attacks and unjustified criticism, without compromising the integrity or reputation of the judiciary. It must be acknowledged that the Opinion generated particular enthusiasm in newer European democracies (post-socialist states), where there is a strong demand for systemic and consistent communication with civil society.

In fact, the proclaimed *legal and ethical duty* should be systemically interpreted with paragraph 42 of the Opinion, which stipulates:

> "The CCJE agrees with the European Court of Human Rights (ECtHR) that individual judges should refrain from making use of the media with respect to their own cases, even if provoked. If the media or interested members of the public criticize a decision, a judge should avoid answering such criticism by writing to the press or by responding to journalists' questions. A judge should answer the legitimate expectations of the citizens through clearly reasoned decisions. However, when judges or their judgments are unfairly criticized, the associations of judges, the council for the judiciary and/or the court president have an institutional duty to clarify the facts to preserve the image of an authoritative and independent judiciary, also in public debates. In addition and in exceptional cases where a judge is defamed or denigrated, he/she should have the right to defend himself/herself and protect their integrity as any other citizen. Judges should get institutional support in that respect."[30]

In practice, the judges' public responses to criticism directed at themselves or their decisions/judgments are rare. In the most outstanding/crucial/high-profile cases they do get institutional support in that respect.

For instance, in the United Kingdom's legal tradition, the freedom of expression of judges has been based on judicial (self-)restraint, includ-

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c. 100. / K. Pilkov, "Public opinions of a judge in defence of the rule of law: transformation of the right to freedom of expression into an ethical and legal duty to speak out in defence of fundamental values", *Актуальні проблеми правознавства*, 2024, Issue 4, p. 100.

[30] CCJE, *Opinion No 25 (2022) on Freedom of Expression of Judges* (Council of Europe, 2022), para 42.

ing the notions of judicial discretion, reserve, or moderation. In February 2025 a video interview with Lord David Neuberger, Baron Neuberger of Abbotsbury, President of the Supreme Court of the United Kingdom (2012–2017), was recorded. Answering the question on freedom of judges' speech, Lord Neuberger underlined:

> "I am not sure how valuable it is for judges to speak out more than they do. I think we're great believers in the power of words and the power of logic and the power of principles, which we always tend to follow or try to follow. But outside the legal world, outside the courts, I think things are more atavistic, less logical, and less comfortable. And the difficulty with judges getting involved in debates with populist politicians is that they risk devaluing the coinage. … Judges do have a duty to speak out, but I think it's a duty which must be exercised with great caution. … And I think one has to be very careful because, having said that, there are undoubtedly occasions where it's a duty of the Chief Judge, the Lord Chief Justice or Lady Chief Justice in this country, the President of the Supreme Court to speak out about something, but it has to be very rare in my view."[31]

A recent and indeed rare example of the UK judiciary engaging in a politically sensitive debate took place on 18 February 2025, during a press conference held by the Lady Chief Justice of England and Wales. The Lady Justice stated, "I was deeply troubled to learn of the exchanges on the 12th of February at Prime Minister's Question Time. I think it started with a question from the opposition suggesting that the decision in a certain case was wrong and, obviously, the prime minister's response to that. Both the question and the answer were unacceptable."[32]

Preventing the interest of the press to the issue, the Lady Chief Justice mentioned earlier in her opening words:

> "It is not acceptable for judges to be the subject of personal attacks for doing no more than their jobs. Their jobs? To find the facts on the evidence be-

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[31] Interview with Lord D. Neuberger. *The Dynamics of the Judiciary in Ukraine*, 21.02.2025, available at: https://www.youtube.com/watch?v=5hbqx3ekurA [last accessed 01.04.2026].

[32] Lady Chief Justice S. Carr, *Press Conference*, 18.02.2025, p. 7, available at: https://www.judiciary.uk/wp-content/uploads/2025/02/LCJ-press-conference-transcript-18.02.24-1.pdf [last accessed 01.04.2026].

> fore them and apply the law as it stands to those facts. If they get it wrong, the protection is a challenge on appeal. If the legislation is wrong, it is Parliament's prerogative to legislate. It is really dangerous to make any criticism of a judgment without a full understanding of the facts and the law. The judgment is the only accurate source of information. Judges are public servants acting independently. They do not court publicity and they cannot speak out to defend themselves. They speak only through their judgments and, frankly, judges deserve better."[33]

This case is a classic example of how the leaders of the judiciary should react to safeguard the rule of law, democracy, and judicial independence. It should be underlined that unjustified criticism of the judiciary has become a common populist tool to blame the courts for their inability to "fix the problem," which often stems from systemic or structural deficiencies, or addresses matters that may not serve the immediate interests of the ruling government, but rather uphold democracy, human rights, and the rule of law.

2. Politically Driven Judicial Reforms

Similarly to populism, politically driven judicial reforms – especially those enacted under the guise of increasing efficiency or accountability – may, in practice, serve as mechanisms for political interference. Such reforms often target judicial appointments, tenure security, or disciplinary procedures, thereby diminishing the judiciary's ability to function as an impartial adjudicator.

This issue is more prevalent in Central and Eastern European transitional societies, where "conflict between politics and law"[34] may be determined by post-socialist transitions. Following the collapse of the socialist camp, reforms were widely seen as a necessary and deliberate step toward democratic transformation. Civil societies embraced them with optimism, not anticipating that politicians would later exploit the

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[33] *Ibid*., p. 2.

[34] M. Hein, "Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach", *Studies of Transition States and Societies*, 2011, Issue 3(1), p. 4.

very concept. In Central and Eastern Europe the removal of judges from office during their term has most commonly occurred through legislative changes and reforms.

The ECtHR has not specified any particular term of office for the members of a decision-making body, although their irremovability during their term of office must, in general, be considered as a corollary of their independence (*Urban and Urban v. Poland*, para 45).[35] In the aforementioned *Baka v. Hungary*, the Court analysed a case concerning the termination of the term in office of the President of the Hungarian Supreme Court due to the entry into force of a new constitution that liquidated the Supreme Court and created the Curia in its place. The ECtHR found a violation of the Convention owing to the fact that the former president of the former Supreme Court did not have access to an independent tribunal to review the expiry of his term in office, as provided for by the new Constitution. [36]

The case law of the European Court of Human Rights concerning external judicial independence has evolved substantially in response to the politically driven judicial reforms undertaken in Poland since 2015, which started "with the election of judges to the Constitutional Court, subsequently followed by the remodelling of the NCJ, and the power of the Minister of Justice being expanded to control the courts."[37]

The *Ástráðsson* criteria[38] have been applied to Poland's judicial appointment irregularities, affecting all court levels, including the Consti-

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[35] R. Mańko, European Parliament, Briefing, *Judicial Independence in the Case Law of the European Court of Human Rights*, European Parliamentary Research Service, (May 2024), p. 7, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762305/EPRS_BRI(2024)762305_EN.pdf [last accessed 01.04.2026].

[36] *Baka v. Hungary* [GC], Application no. 20261/12, Judgment of 23.06.2016.

[37] S.J. Cheesman et al, "Judicial Reforms and Challenges in Central and Eastern Europe" *International Journal for Court Administration*, 2023, Issue 14(2), available at: https://iacajournal.org/articles/10.36745/ijca.532 [last accessed 01.04.2026].

[38] The GC ECtHR case *Guðmundur Andri Ástráðsson v. Iceland* became final in 2021. In this case, the ECtHR refined and clarified all the relevant case-law principles. It formulated a three-step test to determine whether such irregularities were serious enough to violate the fundamental right to a tribunal established by law. In the first prong of the test it is necessary to consider whether there has been a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such. Second – In fact, only those breaches that affect the essence of the right to a tribunal established by law are likely to result in a violation of that right. The third prong of the

tutional Tribunal (CT) and Supreme Court (SC). In *Xero Flor v. Poland*[39], the ECtHR found that the President and Parliament had unlawfully influenced judicial appointments by refusing to swear in duly elected CT judges. *Reczkowicz v. Poland*[40] addressed the independence of the SC's Disciplinary Chamber (DC), which emerged from the 2017 judicial reforms that replaced the National Council of the Judiciary (NCJ) with members elected by Parliament. The ECtHR, aligning with the Polish Supreme Court and the CJEU's findings, highlighted the DC's systemic flaws, including its composition of individuals with close ties to the executive and legislative branches. Consequently, it was determined that the DC was not a legitimate tribunal.

Further rulings reinforced this stance. In *Advance Pharma v. Poland,*[41] the ECtHR scrutinized irregular appointments to the SC's Civil Chamber. It found that the 2017 NCJ reforms – shifting judicial appointments from peer-elected judges to parliamentary appointees – violated both domestic constitutional principles and EU law. Throughout these cases, the Court underscored that breaches of the rule of law, judicial independence, and the separation of powers fundamentally compromised the legitimacy of judicial appointments and, by extension, the fairness of proceedings.

In Ukraine, the inconsistency of judicial reforms was underlined by the Venice Commission. It stressed: "Following presidential elections, the new political power would often start new changes to the judicial system. In the absence of a holistic approach, various pieces of legisla-

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test refers to the legal consequences of the breach for the individual's Convention rights. Once a breach of the relevant domestic rules has been established, the assessment by the national courts of the legal effects of such breach must be carried out on the basis of the relevant Convention case law and the principles derived from it. The conclusions of this case and separate opinions raises a lot of discussions taking into account that the applicant in this case was not a participant of appointment prosses and the court of appeal was already functioning and considering cases.

[39] *Xero Flor w Polsce sp. z o.o. v. Poland,* Application no. 4907/18, Judgment of 07.05.2021, para. 275.

[40] *Reczkowicz v. Poland,* Application no. 43447/19, Judgment of 22.07.2021, para. 255, 264.

[41] *Advance Pharma sp. z o.o. v. Poland*, Application no. 1469/20, Judgment of 03.02. 2022, para. 321.

tion were adopted that did not have the character of a comprehensive reform."[42]

Despite the request of society after the Ukrainian Revolution of Dignity in 2014, good intentions, political will, and the bright start of the comprehensive reform of the judiciary in Ukraine in 2016 (supported by the CoE institutions), it collapsed in 2019 and had some deficiencies identified by the ECtHR[43] years later. As was noted by the judges of the Supreme Court, "None of these reforms was initiated by the judiciary itself: the changes were always caused by political processes, imposed from outside, which, on the one hand, resulted in resistance and, on the other hand, involved the judiciary doing its best to adapt to changes to preserve itself and imitate formal signs of reforms."[44]

Another legal ground for the dismissal of judges in Ukraine was considered in the case of *Samsin v. Ukraine*[45] – namely, "automatic lustration." The case concerned the dismissal of a Supreme Court of Ukraine[46] judge, Igor Samsin, under the Government Cleansing (Lustration) Act (GCA), brought in to address negative developments in public service in the period when former President Viktor Yanukovych was in power. The Law was applied systematically to specific categories of public servants who had been in posts between 2010 and 2014. Mr. Samsin was

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[42] Venice Commission and Directorate General of Human Rights and Rule of Law, *Joint Follow-up Opinion to the Joint Opinion on the Draft Amendments to the Law "On the Judiciary and the Status of Judges" and Certain Laws on the Activities of the Supreme Court and Judicial Authorities,* CDL-AD(2023)027, adopted at the 136th Plenary Session, Venice, 6–7 October 2023, para. 24, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)027-e [last accessed 01.04.2026].

[43] E.g. see *Gumenyuk and Others v. Ukraine,* Application no. 11423/19, Judgment of 22.07.2021.

[44] T. Antsupova et al. *Proposals for strengthening the capacity of the Ukrainian judiciary in the short and long-term perspectives. Concept paper,* September 2024, p. 3, available at: https://binghamcentre.biicl.org/documents/2198_concept_paper_final.pdf [last accessed 01.04.2026]

[45] *Samsin v. Ukraine*, Application no. 38977/19, Judgment of 14.10.2021.

[46] The Supreme Court of Ukraine (SCU) was restructured and renamed as the Supreme Court (SC) through the amendments, which came into effect on 30.09.2016. The SC regained the power of cassation review, and it was composed of the Grand Chamber, the Administrative Cassation Court, the Commercial Cassation Court, the Criminal Cassation Court, and the Civil Cassation Court. A new method for determining judicial salaries was introduced, resulting in higher salaries for judges.

banned from employment in the public service until the end of 2024, and his name was put in a publicly accessible Lustration Register. In addition, as his resignation application was not considered, he was deprived of the benefits associated with judicial retirement despite being close to retirement age. The Court found a violation of Article 8 (right to respect for private and family life) of the ECHR. In particular, it found that the measures envisaged by the GCA and imposed on the applicant had not been necessary in a democratic society.

A chronological list of the general measures adopted by the Ukrainian authorities[47] as of 15 October 2025 shows that the trajectory of reforms was not straight, with certain backsliding in the consistency of judicial reforms in 2019–2023 and some improvements in 2024–2025.

Unfortunately, for the last century, Central and Eastern European citizens have had ample reasons to distrust state authorities, making scepticism toward the government and judiciary a deeply ingrained part of the national identity and legal culture. One consequence of this enduring distrust is the ease with which politicians can manipulate public opinion to serve their political agendas. A similar dynamic played out in Hungary in 2010,[48] when the government, capitalizing on public criticism and backed by a two-thirds parliamentary majority, enacted judicial reforms. These reforms transferred the administration of the courts to a powerful administrative body led by an official appointed by a two-thirds majority in Parliament.

In this context, the procedures for appointing and dismissing judges serve as key indicators of judicial independence, and simultaneously, they are among the most attractive leverage points for exerting pressure on the judiciary.

To conclude this part, it is important to remind ourselves that when the judiciary loses its independence, it risks becoming politicized – and in doing so, it can no longer uphold democracy or the rule of law. As

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[47] T.Antsupova and P. Pushkar, *Thematic Digest: Independence of the judiciary in Ukraine*, Bingham Centre for the Rule of Law, 5 November 2025, available at: https://binghamcentre.biicl.org/newsitems/188/thematic-digest-independence-of-the-judiciary-in-ukraine [last accessed 01.04.2026].

[48] S. J. Cheesman and A. Badó, "Judicial Reforms and Challenges in Central and Eastern Europe", *International Journal for Court Administration*, 2023, Volume 14, Issue 2, available at: https://iacajournal.org/articles/10.36745/ijca.532 [last accessed 01.04.2026].

was fairly stressed in the Updated Rule of Law Checklist, "Even legal systems that appear stable and robust are not immune to changes that undermine the Rule of Law. Such changes can affect many of the benchmarks defined in this Rule of Law Checklist. Experience has shown that the undermining of judicial independence is, as a rule, the first and crucial factor in such scenarios as independent courts are key guardians of the Rule of Law".[49]

Conclusions

1. Recommended Responses and Concluding Reflections

Although this article was focused on the pan-European legal area in the context of threats to the judiciary, we should admit the world-wide trend of populism and authoritarianism. Beyond the European legal order a tectonic shift is threatening American democracy,[50] targeting the independence of the judiciary,[51] and raising the question of whether the institutions (civil society, professional lawyers, judiciary, and judges themselves) are strong enough to defend democratic values and the rule of law. After decades of instructing the world on how to build democracies, the United States may now find itself in need of support from Europe to safeguard its own constitutional order.

However, any rule-based order "does not cease to exist by the actions or the narrative of powerful actors alone… It ceases to exist when the rest, such as experts and middle and small nations, acquiesce."[52] The

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[49] Venice Commission of the Council of Europe. *The Updated Rule of Law Checklist,* CDL-AD(2025)002, 16 December, 2025, para. 152.

[50] S. Levine, "Outcry as DC US Attorney Claims He and Colleagues Are 'President Trump's Lawyers'" *The Guardian*, 24.02.2025, available at: https://www.theguardian.com/us-news/2025/feb/24/us-attorney-trump-lawyers [last accessed 01.04.2026].

[51] M. Gates, "Hate Amplified: Online Posts About U.S. Judges Take Increasingly Violent Turn", *Security Management,* 16 May 2025 available at: https://www.asisonline.org/security-management-magazine/latest-news/today-in-security/2025/may/hate-amplified-vs-judges/ [last accessed 01.04.2026].

[52] Public International Law & Policy Group, "Roundtable Blog: After the Rupture: International Lawyers Reckon with the Disruption of the Rules-Based Order", *Lawyer-*

following considerations aim to respond to the question: how could European and domestic institutions, legal professionals, civil societies, and judiciaries themselves address the threats to judicial independence in contemporary Europe and beyond?

1.1. European Institutions

It is well known that the tools of public international law are limited, and the decisions of European intergovernmental organizations on judicial independence[53] can be implemented if there is the domestic political will to do so. The Council of Europe (a pan-European leader for ensuring the rule of law, democracy, and human rights) has been criticized for its "too little, too late" reaction.[54] One of the explanations is that "the European Court of Human Rights can 'only' offer judicial protection in specific cases *ex post facto,* i.e., only after the alleged violation of the ECHR has already taken place."[55] The bitter irony lies in how swiftly democracy and the rule of law can be dismantled – destructive and violent acts are quick and easy. Yet their restoration is a far more time-consuming process, considering that this cannot be done in an abusive manner, but requires patience and thoroughness.

The European Union, considering its supranational mechanisms, can react to challenges much quicker than European intergovernmen-

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ing Justice Blog, 10.04.2026, available at: https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2026/4/10/roundtable-blog-after-the-rupture-international-lawyers-reckon-with-the-disruption-of-the-rules-based-order [last accessed 10.04.2026].

[53] E.g. see, OSCE Office for Democratic Institutions and Human Rights and Max Planck Minerva Research Group, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability*, Kyiv, 23–25 June 2010, available at: https://www.osce.org/files/f/documents/a/3/73487.pdf [last accessed 01.04.2026].

[54] A. Drzemczewski, "The Erosion of the Rule of Law and of Judicial Independence in Poland since 2015: The Council of Europe's Reaction: Too Little, Too Late?" in Jakub Urbanik and Adam Bodnar (eds), *Law in a Time of Constitutional Crisis: Studies Offered to Mirosław Wyrzykowski*, C.H. Beck, 2021, pp. 149–167; A. Nußberger, "Human Rights and Peace – Disillusionment or Hope? The Russian Example" in *Liber Amicorum Robert Spano*, Anthemis s.a., 2022, p. 520.

[55] Drzemczewski, "The Erosion of the Rule of Law…", p. 163.

tal organizations. The EU has many more options to control democracy backslides in candidate states through monitoring mechanisms within its enlargement policy, and in the new Member States through the donations priority policy.

1.2. Domestic Institutions

Since Montesquieu[56] presented a classical doctrine of the separation of powers, it has remained the most effective framework for ensuring democratic governance. Any imbalance favouring one branch of state power inevitably undermines democracy and the rule of law. To safeguard institutional capacity, consistent improvements must be pursued with full transparency, ensuring accountability and public trust. At the same time, constitutional continuity is essential to provide a stable foundation for democratic development, preventing abrupt or opportunistic shifts in power that can erode institutional legitimacy.

The scope of legal, organizational, financial, and social measures to guarantee the judiciary's independence may vary from one state to another; however, the universal basics should be unchangeable – lifetime appointment for the national judges and one-term appointment for the international judges, irremovability during their term of office, accountability and dismissal procedures according to the International Law standards, and by the especially empowered body (typically High Council for the Judiciary) without the interferences of other branches of state power at the national level, ensuring the judicial immunity and budgetary autonomy of the judiciary, and stable (consistent) remuneration of judges.

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[56] C.-L. de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, Book XI, Chapter 6, Cambridge University Press, 1989, p. 157.

1.3. Legal Professionals

In times of political instability and systemic pressure, legal professionals, both nationally, supranationally, and internationally, serve as the frontline defenders of the rule of law and judicial independence.

The most essential message to legal professionals is simple yet profound: do not tolerate violations of the rule of law, no matter how incremental or politically convenient they may seem. Tolerance of breaches, even under pressure, undermines the foundations of justice and empowers those who seek to dismantle judicial integrity.

Bar associations, judicial councils, law faculties, and international legal bodies must play a more proactive role. This includes: issuing timely public statements when judicial independence is threatened; supporting colleagues who face retaliation for defending legal principles; monitoring and reporting on systemic issues in domestic or international legal systems.

Preventing erosion of the rule of law begins long before crises emerge. Legal education must go beyond the mechanics of law to instil a strong ethical foundation and civic responsibility in future lawyers and judges. Likewise, a robust legal culture, where integrity, fairness, and accountability are internalized, serves as a powerful preventive mechanism. It equips professionals to recognize and resist both subtle and overt threats to judicial independence.

1.4. Civil Society

What influences society's attitude towards judges? One of the important factors is the bold and timely judgments that society expects; judgments that demonstrate internal and external independence. Considering that the building of trust in the judiciary and its independence is a two-sided street with mutual respect and responsibilities, another very important factor is the legal culture in society (which in old Western democracies has been formed over centuries). The basic brick of legal culture is legal education and awareness of historical truth.

It will be even more difficult to maintain this awareness in the future as political technologies, propaganda, and manipulations of pub-

lic opinion are strengthening every day through social and other media platforms and with the assistance of AI. One can easily say Ukraine invaded russia to mirror russian propaganda and try to rewrite history. Public legal education and critical thinking are crucial in learning the lessons of history as uneducated people are easy prey for influencers.

1.5. Judiciaries Themselves

The primary responsibility for safeguarding internal and external judicial independence, and for maintaining societal confidence in the fairness of the justice system, rests with the judiciary itself. It should assume a leading role in shaping its strategic development.[57] Moreover, subject to established limits, direct engagement with civil society is essential to promote transparency, strengthen accountability, and sustain public trust, particularly in young democracies or in contexts of post-backsliding institutional recovery.

In a comparative sense, the question arises: is it more important to prioritize the institutional reputation or the personal reputation/profile of the judge? Within the framework of the pan-European legal area, it is noticeable that in the Common law tradition, the figure of judge, his/her name and personal reputation tend to be more recognized than institution he/she serves. Conversely, in the Roman law tradition (and even more so under the influence of the CoE law and legal culture), courts are more service-oriented and transparent, with limited discretion of judges – this depersonalizes the figure of the individual judge. Furthermore, in European countries with Soviet heritage, judgments are not viewed as the result of law-making or the creative, intellectual process of the legal professional; instead, the institutional culture remains more focused on judges being part of the system rather than being prominent and well-known personalities.

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[57] Strategies for the judiciaries should be elaborated by the Councils for the judiciaries. See, Annex 1. Strategies for the Judiciary of Finland and Sweden of *ENCJ, Report on Independence, Accountability and Quality of the Judiciary 2023/2024*, adopted at the General Assembly, Rome, 12–14.06.2024, p. 38, available at: https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%202024/Report%20IAQ%202024%2008%2026%20MT.pdf [last accessed 01.04.2026].

Returning to the starting point of this article and the definition of judicial independence as such, provided by the ECtHR, one should remember two dimensions of the term "independence": (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* […].

To ensure *a set of institutional and operational arrangements* that provide safeguards against undue influence and unfettered discretion by other State powers (external independence), a mutual understanding among all stakeholders and society is needed. This understanding recognizes that the independence of the judiciary is essential for the sustainable development and prosperity of future generations.

In newer European democracies, the mental transition[58] required to establish a particular *state of mind* and moral integrity among judges is an evolutionary process. The functional reinforcement of judicial independence relies on a combination of measures, including regular training programmes, the strengthening of internal institutional culture, the establishment of coherent communication policies with society and other branches of state power, continuous self-education, access to psychological support in times of crisis or burnout, and the safeguarding of judges' well-being through a balanced professional and private life.

However, a judge's *state of mind* and *moral integrity* are inherently intangible qualities. The inner workings of the judicial mind remain a black box. Regardless of how much is written and read on the subject of judicial independence, the rhetorical question remains: can any qualified lawyer administer justice?

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[58] M. Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries", *European Public Law,* 2008, Issue 14, pp. 99–123.