**Call for input of the Special Rapporteur on the independence of judges and lawyers for the next thematic report on safeguarding the independence of judicial systems in the face of contemporary challenges to democracy**

<https://www.ohchr.org/en/calls-for-input/2024/call-input-special-rapporteur-independence-judges-and-lawyers-next-thematic>

**Purpose of the Call:** To inform the Special Rapporteur’s forthcoming report on safeguarding the independence of judicial systems in the face of contemporary challenges to democracy, to be presented at the 56th session of the Human Rights Council in June 2024

**Introduction about the Centre for Judicial Co-operation**:

The Centre for Judicial Cooperation has been hosted at the Robert Schuman Centre for Advanced Studies since January 2016. Since its set up, in December 2011, the Centre has developed a wide network of judges, lawyers and scholars, to establish a space for collaboration and exchange of knowledge between legal practitioners and the academic community on topics related to judicial interaction across various areas of law. Through its activities and expertise, the Centre engages with both practitioners and academics in various activities ranging from workshops and conferences to pure research and policy endeavours. Its current DG Justice-supported projects, e-NACT, JudIT, InterLEX, TRIIAL 1 and TRIIAL 2, provide several occasions to foster the emergence and consolidation of a common culture of fundamental rights through mutual exchanges among practitioners and scholars across the EU. Its key areas of research consist of the exploration of legal and judicial interactions in the area of fundamental rights, and in various thematic areas, including, inter alia, migration and asylum law, data protection, and non-discrimination.

To disseminate the results of its work, the Centre publishes open-access papers, such as handbooks, reports, and ‘distinguished Lecture’ papers addressing the judicial and academic communities. Moreover, the Centre’s Database includes case law gathered by the expert team in collaboration with the national legal practitioners, providing a practical tool able to improve the understanding and use of judicial interaction techniques within the scope of the application of the EU Charter.

In 2018, the Centre launched a Lecture series inviting academics, policy makers and legal practitioners on a monthly basis to give distinguished lectures presenting their recent research or work-related experiences. Topics ranged from the aftermath of landmark CJEU decisions on national case-law and policy choices, the revision of the national Criminal law code, the impact of data protection reform on judicial dialogue, fundamental rights and migration policies, and the use of AI and big data for law enforcement purposes.

The **focus of the work of the Centre is the countries of the European Union** and experts from the finding presented below derive directly from the TRIIAL 2 project – encompassing the EU as opposed to the questions asked directly about the in-country situation and focussed on the judiciary given

word limit restrictions, answering requested by the OHCHR in this regard. We hope the findings are useful and informative.

**Judges**

**Have judges played an active role in safeguarding democracy and upholding fundamental democratic rights in your country?**

In the European Union (EU), judges have long played an active role in safeguarding democracy through their independence and impartiality which stems from the Constitutions of their states and has always been a pre-requisite for accession to the EU. It is also now enshrined in Article 19(2) of the Treaty of the European Union (TEU). The judiciary provides for important checks on the executive and legislative branches and protection of individual fundamental rights, and they are therefore the prime target of autocratic governments of the EU even if they are chosen by ‘free and fair elections’ which lead to the establishment of *de facto* electoral autocracies and one-party states. This goes against the very grain of the principle of the rule of law and the very reason for which courts, the third pillar of power, are designed– to be the independent arbitrators and guardians of the law as emphasized by the seminal “Portuguese judges” ruling of the (Court of Justice of the European Union) CJEU.[[1]](#footnote-1) The judgment is seen as important because it establishes a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals. The CJEU does this solely based on Article 19(1) TEU read in light of Articles 2 and 4(3) TEU. It thereby rejects also the arguments often used in other cases such as those relating to Poland and Hungary, that “judicial reform” is an internal matter only. The case is important because it marked a milestone in the development of the EU's rule of law protection. The judgment in ASJP recognized judicial independence as a general principle of EU law derived from Article 19(1)(2) TEU.

This understanding has been fundamental and laced throughout the judgments of CJEU in particular, as a result of the last decade of the mentioned destruction of this fundamental principle. Most obviously, in Hungary and Poland, the latter of which is now attempting to unravel the damage done by the previous autocratic government. The progress in this is yet to be seen following the 2024 elections. In Hungary, due to the more entrenched dismantlement of judicial independence the possibility of judges to resist and express their opinions freely is much more limited.

**Are judges facing any obstacles, risks, or challenges in your country when fulfilling this role? If so, provide examples, and highlight if judges face particular obstacles, risks, or challenges based on their gender, racial identity, or other characteristics protected by human rights law.**

Judges in countries of the European Union face many obstacles when they exercise their freedom of expression, when they exercise their right to a fair trial, and when they exercise their right to question the application of European Law through prejudicial questions, which they have a right to do under Art 267 Treaty for the European Union (TFEU) which gives each judge a right to send a question to the CJEU.

Most perniciously, the judiciary and single judges face smear campaigns and disciplinary proceedings under new rules and new Chambers (such as that still operating in Poland at the time of

writing), aiming at having a chilling effect on their work. Notwithstanding this, the resistance of judges esp. in Poland has been consistent and many have turned also to the European Court on Human Rights and Freedoms (ECtHR) to adjudicate their cases and their individual rights to privacy and a fair trial. Indeed, the principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, and which is now reaffirmed by Article 47 of the Charter

Meanwhile, in the case of *AK and others*[[2]](#footnote-2), concerning Poland, CJEU while also focussing on the illegality of the disciplinary chamber of the Supreme Court of Poland, focused mainly on the curtailment of the age of retirement as a way of ridding the judiciary of a certain category of older judges, and thus espousing the principle of security of tenure and irremovability of judges, by passing down a judgment that courts should reinstate wrongly dismissed judges. The Court also found that a non-politicized national judicial council for judges was essential and in this case the newly established national judicial council (NJC) cannot be considered such an independent body.

Compared to this, Hungarian judges have seemed to be reluctant to use preliminary references, The story of one judge has shown that judges could be exposed to retribution for turning to the CJEU on constitutional issues that challenge the fundamentals of the current political system. Moreover, a junior judge was found unsuitable for judicial office and was dismissed after successfully challenging some elements of the Hungarian asylum legislation in her reference to the CJEU.[[3]](#footnote-3)

**Is there a specific role played by the judiciary in democratic elections?**

Supreme Court of many of the European Union countries are those who give the final approval of the legitimacy and fairness of elections and hear complaints. In some countries where the above-described reforms took place saw a reshuffling of chambers of the Supreme Court and judges chosen by the “new” judicial council seated in the chamber responsible for elections and election disputes. In the case of Hungary, the highest decision-making judicial instances are the packed Constitutional Court and the Supreme Court with a government-loyal President always deciding in favour of the incumbent government.

**Are there any policies or institutional arrangements in place to limit the role of judges in safeguarding democracy?**

The policies in place mentioned above in some countries of the the European Union, which have been found to be illegal by either the CJEU or ECtHR, are the dismissal of judges by the shortening of retirement age. As well as in many cases the freedom of expression of judges. For instance, in the

EctHR case of *Żurek v. Poland* (application no. 39650/18) the European Court of Human Rights held: by, six votes to one, that there had been a violation of Article 6 § 1 (right of access to court) of the European Convention on Human Rights, and unanimously, that there had been a violation of Article10 (freedom of expression). Mr Żurek is a judge. He was also spokesperson for the National Council of the Judiciary (NCJ), the constitutional body in Poland which safeguards the independence of courts and judges. In that capacity, he has been one of the main critics of the changes to the judiciary initiated by the legislative and executive branches of the new Government which came to power in 2015. The case concerned his removal from the NCJ before his term had ended, and his complaint that there had been no legal avenue to contest the loss of his seat. It also concerned his allegation of a campaign to silence him. In Hungary, after 2010, when the current government came to power the previous model of judicial self-governance was replaced by a centralized form of court administration in which substantial powers were conferred on the President of the National Judicial Office (NJO), elected by the Parliament for nine years. The National Judicial Council (NJC) had only weak competencies to supervise the activity of the President of the NJO.[[4]](#footnote-4)

**Are there any additional issues you wish to raise with the Special Rapporteur in this context?**

It would be crucial to take note also of the role and significance (one mentioned in passing above) of both the national judicial councils who elect judges and the role of the constitutional court that have both been captured by the political class. Regarding the first, while many models of national judicial councils exist it is not by chance that the election of judges is done by the parliament (eg Poland) in some countries and where democracies are underdeveloped this creates an opportunity for influence on the judiciary which is highly politicized and permits near-hand picking of judges by politicians rather than their peers.

Regarding constitutional courts, while inevitably subject to political influence it is important that their tenure does not overlap with that of parliament or the President and that they do not overstep their function by being the mouthpieces of political wishes. The Constitutional Court’s decisions must not be “on call” of the executive as they are the true guardians of the Constitution. Both in Hungary after 2010 and in Poland after 2015 the first step of the autocratization has been to replace the independent judges of the constitutional courts with government-loyal members.

**What are the approaches taken to protect judges in this role?**

On occasion above, it has been mentioned that the national judicial council is kept separate from or in as far as possible with minimal input of the executive or legislature, again with the exceptions in Hungary and Poland (until the new government elected in October 2023 will be able to change the situation), and partly in Romania.

Constitutional court judges cannot be dismissed, although those in Hungary and Poland elected exclusively with the votes of the governing parties are not threatened. The Court Presidents are

usually elected by their peers, again with the exception of Hungary, where the governing party in the Parliament elects the the chief judge.

**Are there any additional issues you wish to raise with the Special Rapporteur in this context?**

Judicial independence is more or less guaranteed in most of the EU Member States, with certain concerns in some countries, such as Romania, Portugal, Spain, but in Hungary and Poland currently, the basic guarantees of such independence are lacking. Hopefully, the newly elected Polish government will able to change this situation in the near future.

[end]

1. C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117. [↑](#footnote-ref-1)
2. Joined Cases C-585/18, C-624/18 AND C-625/18 A. K. and others ECLI:EU:C:2019:982. [↑](#footnote-ref-2)
3. Hungarian Helsinki Committee, ‘Another scandal at the judiciary: no effective remedy for judges dismissed from the bench’ (Helsinki.hu, 12 September 2022) <https://helsinki.hu/en/another-scandal-at-the-judiciary-no-effective-remedy-for-judges-dismissed-from-the-bench/> accessed 11 November 2023 [↑](#footnote-ref-3)
4. The NJC consists of 15 judges, out of which 14 are elected by their peers. The President of the Kúria is an ex officio member of the body. [↑](#footnote-ref-4)