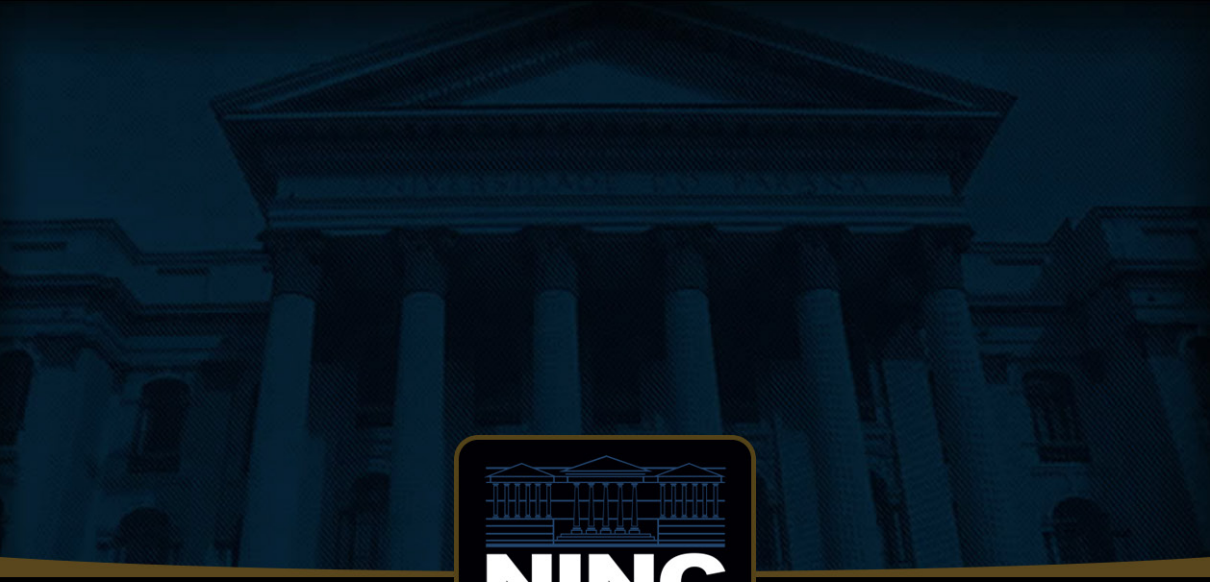

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Upholding the independence of constitutional courts in the EU beyond illiberal tendencies. Towards further convergence?

Da independência dos tribunais constitucionais na UE além das tendências iliberais. Rumo a uma maior convergência?

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Abstract

This article explores the impact of the CJEU case law on the independence of constitutional courts in EU member states that have not experienced an illiberal shift, and whether it will lead to further convergence among EU members regarding their models of constitutional justice. While EU standards on judicial independence have justifiably emerged in a context of crisis, they have become autonomous standards of EU law, applicable to all EU member states. However, such standards may be at odds with the current legal frameworks and practices operating in some EU member states. This paper argues that the development of EU standards on judicial independence and impartiality may positively impact member states that do not experience a rule of law decline. On the one hand, they underline possible anomalies that may exist in the appointment procedures of national

Resumo

Este artigo explora o impacto da jurisprudência do TJUE na independência dos tribunais constitucionais nos Estados membros da UE que não experimentaram uma mudança iliberal, e se isso levará a uma maior convergência entre os membros da UE em relação aos seus modelos de justiça constitucional. Embora os padrões da UE sobre independência judicial tenham surgido justificadamente em um contexto de crise, eles se tornaram padrões autônomos do direito da UE, aplicáveis a todos os Estados membros. No entanto, tais padrões podem estar em desacordo com os atuais marcos legais e práticas operacionais em alguns Estados membros da UE. Este artigo argumenta que o desenvolvimento dos padrões da UE sobre independência e imparcialidade judicial pode impactar positivamente os Estados membros que não experimentam um declínio no Estado de direito. Por um lado, eles destacam possíveis anomalias que podem existir

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constitutional judges. On the other hand, this tension paves the way for a European dialogue on the definition of constitutional justice and the promotion of a rule of law culture.

Keywords: judicial independence; constitutional courts; EU law; CJEU; Rule of Law

nos procedimentos de nomeação de juízes constitucionais nacionais. Por outro lado, essa tensão abre caminho para um diálogo europeu sobre a definição de justiça constitucional e a promoção de uma cultura do Estado de direito.

Palavras-chave*: independência judicial; tribunais constitucionais; Direito da UE; TJUE; Estado de Direito*

CONTENTS

1. INTRODUCTION

"Compared to ordinary courts, constitutional courts can be true colossuses with clay feet".[1] The Polish and Hungarian examples, just to name a few, have demonstrated how governments may be tempted to destabilize constitutional courts in order to subject the judiciary to their control. Given the central role of constitutional courts in ensuring respect for the rule of law, democracy, and fundamental rights, guaranteeing that constitutional judges are independent and impartial is of crucial importance.

In this respect, the CJEU has been called to play an important role in guaranteeing respect for the principle of judicial independence at the national level in a context of rule of law crisis. Within this context, it has developed an extensive body of case law addressing many aspects of judicial independence. The standards developed by the CJEU cover a variety of elements, including the appointment process, the length of the mandate, the conditions for the exercise of the mandate, the absence of external pressure, impartiality, and the grounds for disqualification, recusal, and removal of its members. Furthermore, since the Euro Box Promotion case,[2] it has become clear that EU standards on judicial independence also apply to national constitutional courts.

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1 DISANT, Mathieu; LARROUTUROU, Thibaut. La nomination des juges nationaux saisie par les juridictions européennes. **Revue Trimestrielle des Droits de l'Homme**, vol. 4, n. 18, 2021, p. 800.

2 CJEU, Judgment of the Court (Grand Chamber) of 21 December 2021, Euro Box Promotion, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 216.

Against this background, this article will analyze the impact of the CJEU case law on the independence of constitutional courts in EU member states that have not experienced an illiberal shift, and if it will lead to further convergence among EU members regarding their models of constitutional justice. Indeed, while EU standards on judicial independence have justifiably emerged in a context of crisis, they have become autonomous standards of EU law, applicable to all EU member states. However, such standards may be at odds with the current legal frameworks and practices operating in some EU member states.

In this paper, it is argued that the developments of EU standards on judicial independence and impartiality may positively impact member states that do not experience a rule of law decline. On the one hand, they underline possible anomalies that may exist in the appointment procedures of national constitutional judges. On the other, this tension paves the way for a European dialogue on the definition of constitutional justice and the promotion of a rule of law culture.

This paper is structured as follows: Section 1 examines the case law of the CJEU in ensuring judicial independence, with a specific focus on the appointment procedures of judges. Section 2 critically analyzes whether this case law conflicts with the appointment procedures of some constitutional courts, taking the French and Spanish cases as examples. While the rule of law is not under attack in Spain and France, there are gaps/issues in the legal framework and/or practice in the procedures governing the appointment of constitutional judges from the perspective of EU law. Against this background, Section 3 reflects on how to appropriately frame the CJEU's case law in order to ensure respect for both EU and national constitutional identities, proposing a European dialogue on the meaning of the independence of constitutional courts. It will end with some concluding remarks.

2. THE APPOINTMENT PROCEDURES OF CONSTITUTIONAL JUDGES IN THE EU CASE-LAW

The role of the CJEU in ensuring judicial independence has become increasingly significant amidst the so-called rule of law crisis in the EU (2.1.). The limitations of existing EU mechanisms, such as Article 7 TEU, have necessitated a more proactive stance from the CJEU, evident in landmark cases like *Associação Sindical dos Juízes Portugueses*. Furthermore, the CJEU's case law has evolved to address judicial appointment procedures (2.2.), significantly influencing the standards of judicial independence across member states. This section examines these developments, focusing on the interplay between the CJEU and the ECtHR in shaping European standards for judicial appointments, as illustrated by pivotal cases such as Review Simpson and Ástráðsson v. Iceland.

2.1. The role of the CJEU in ensuring judicial independence

In accordance with the principle of conferral enshrined in art. 5 TEU, the EU does not hold competence in the organization of the judiciary at national level, and this matter is left to national authorities. As a consequence, the standards relating to judicial independence used to be developed within the framework of the Council of Europe – especially the Venice Commission[3] and the ECtHR. However, the CJEU has progressively developed its own standards, first to ensure the effectiveness of EU law, and then in reaction to the so-called rule of law crisis.[4] Indeed, the CJEU has developed a doctrine on judicial independence when determining whether domestic authorities could be considered as courts or tribunals under the preliminary ruling procedure. However, since the objective was to ensure the effectiveness of EU law through judicial dialogue between domestic courts and the CJEU, the criteria used by the Court were quite relaxed. Conversely, the rule of law crisis prompted the CJEU to develop a more rigorous definition of judicial independence.

Indeed, the ineffectiveness of the mechanisms foreseen by the Treaties, especially article 7 TEU, have compelled EU institutions to react. In this context, the CJEU has once again assumed its role of driving force in the absence of a satisfactory political response. It is the EU institution that has thus far played the most important and effective role in defending judicial independence in EU member states as a component of the rule of law through its case law.[5] The underpinning of the case-law developed by the Court is that judicial independence is one of the components of the value 'rule of law', recognized in art. 2 TEU. Therefore, attacks on judicial independence correlatively affect the rule of law. Such attacks, even when not intended to explicitly subject the judiciary to the executive and/or legislative branches, alter the legal order and undermine citizens' trust in the institutions[6].

In the revolutionary *Associação Sindical dos Juizes Portugueses* (ASJP) judgment of 27 February 2018,[7] the CJEU recognized that all domestic courts should be

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3 See, in particular, the Venice Commission *Report on European Standards as regard the independence of the judicial System. Part I – The independence of judges*, CDL-AD(2010)004, Strasbourg, 16 March 2010.

4 See, e.g., BUSTOS GISBERT, Rafael. **Independencia judicial e integración europea**. Tirant lo Blanch, Valencia, 2022.

5 See, e.g.: KOCHENOV, Dimitry.; BÁRD, Petra. The last soldier standing? Courts versus politicians and the rule of law crisis in the new member states of the EU. **European Yearbook of Constitutional Law**, vol. 1, p. 243-287, 2019; BLATIÈRE, Lauren. La protection évolutive de l'État de droit par la Cour de justice de l'Union européenne. **RDLF**, vol. 31, 2019; PECH, Laurent; WACHOCIEC, Patryk; MAZUR, Dariusz. Poland's Rule of Law Breakdown: a Five-Year Assessment of EU's (In)Action. **Hague Journal on the Rule of Law**, vol. 13, p. 1-43, 2021.

6 DISANT, Mathieu; LARROUTUROU, Thibaut. La nomination des juges nationaux saisie par les juridictions européennes. **Revue Trimestrielle des Droits de l'Homme**, vol. 4, n. 18, 2021, p. 792.

7 On this judgment, see, e.g.: BONELLI, Matteo; CLAES, Monica. Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary. **European Constitutional Law Review**, vol. 14, n. 3, p. 622-643, 2018; PECH, Laurent; PLATON, Sébastien. Rule of Law backsliding in the EU: The Court of Justice to the rescue?

independent, even when they do not apply EU law to the case in question. Indeed, the Court held that article 19 TEU, which requires Member States to provide for effective judicial protection in areas covered by EU law, should be applicable to any court that may act as an ordinary court of EU law, regardless of the applicability of EU law to the case in question. The mere fact that a national court may have jurisdiction over questions concerning the application or interpretation of EU law is enough to consider that article 19 TEU applies[8]. Thus, even though the EU does not hold competence in the organization of the judiciary at national level, EU member states must respect the standards elaborated by the CJEU – and the ECtHR – on judicial independence insofar as national courts also act as ordinary courts of EU law[9]. In this respect, the CJEU recalled in the Euro Box Promotion case of 21 December 2021 that:

> *[a]lthough neither Article 2 TEU nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law, requires member states to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences, member states must nonetheless comply, inter alia, with the requirements of judicial independence stemming from those provisions of EU law.*[10]

On the basis of the ASJP judgment, an increasing number of cases have reached the CJEU through infringement proceedings and preliminary rulings. It is now well known that the CJEU has developed a rich case law on judicial independence on the basis of articles 2 TEU, which recognizes the rule of law as a founding value of the EU, art 19(1) TEU, which recognizes the principle of effective judicial protection in areas covered by EU law, and article 47 of the Charter of Fundamental Rights, on the right to a fair trial and effective judicial protection.[11] Judicial independence is thus conceived both

Some thoughts on the ECJ ruling in Associação Sindical dos Juízes Portugueses. **EU Law Analysis**, 2018. Retrieved from https://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html.

8 CJEU, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses c. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117, para. 40: "Consequently, to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a 'court or tribunal', within the meaning referred to in paragraph 38 above, on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU."

9 CJEU, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses c. Tribunal de Contas, ECLI:EU:C:2018:117, paras. 40-43.

10 CJEU, Judgment of the Court (Grand Chamber) of 21 December 2021, Euro Box Promotion, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 229.

11 See, e.g.: PECH, Laurent. A Union founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law. **European Constitutional Law Review**, vol. 6, p. 359-396, 2010; SCHEPPELE, Kim Lane; KOCHENOV, Dimitry; GRABOWSKA-MOROZ, Barbara. EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union. **Yearbook of European Law**, vol. 39, p. 3-121, 2020; SCHROEDER, Werner. The Rule of Law as a

"as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the member states set out in article 2 TEU, in particular the value of the rule of law, will be safeguarded".[12] The CJEU has indeed referred to the separation of powers as a principle that "characterises the operation of the rule of law"[13] and has repeatedly recalled that judicial independence "must be ensured in relation to the legislature and the executive"[14].

The European case law on judicial independence has flourished, and this principle at the intersection of art. 2 TEU, art. 19(1) TEU, and art. 47 of the Charter of Fundamental Rights now encompasses a set of standards regarding external independence and internal independence. External independence is understood as the need to protect the court from external influence while internal independence refers to impartiality.[15] These standards touch upon a variety of elements, including the appointment process, the length of the mandate, the conditions for the exercise of the mandate, the absence of external pressure, impartiality, and the grounds for disqualification, recusal, and removal of its members. These standards on judicial independence have become autonomous concepts of EU law and must be respected in all EU member states. Furthermore, since the Euro Box Promotion case, it has become clear that they also apply to constitutional courts:[16]

> *[A]lthough the organisation of justice in the Member States, including the establishment, composition and functioning of a constitutional court, falls within the competence of those Member States, they are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law.*[17]

Value in the Sense of Article 2 TEU: What Does It Mean and Imply? In: VON BOGDANDY, Armin; BOGDANOWICZ, P.; CANOR, I.; GRABENWARTER, C.; TABOROWSKI, M.; SCHMIDT, M. (Eds.). **Defending Checks and Balances in EU Member State**. Heidelberg: Springer, 2021. p. 105-126; MARTÍN RODRÍGUEZ, Pablo M. **El Estado de Derecho en la Unión Europea**. Madrid: Marcial Pons, 2021.

12 CJEU, Judgment of the Grand Chamber of 19 November 2019, AK and Others, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 120.

13 CJEU, Judgment of the Grand Chamber of 19 November 2019, AK and Others, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 124; CJEU, Judgment of 10 November 2016, Poltorak, C-452/16 PPU, paragraph 35; Judgement C-585/18, C-624/18 et C-625/18, para. 124.

14 CJEU, Judgment of the Grand Chamber of 19 November 2019, AK and Others, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, paras. 116 and 118. Repeated in subsequent case law: CJEU, Judgment of the Court of 18 May 2019, Asociația Forumul Judecătorilor din România și alții, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393; CJEU, Judgment of the Court (Grand Chamber) of 21 December 2021, Euro Box Promotion, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, paras. 228 and 229.

15 BUSTOS GISBERT, Rafael. **Independencia judicial e integración europea**. Tirant lo Blanch, Valencia, 2022, p. 135.

16 MAGALDI, Nuria. La independencia de los tribunales constitucionales nacionales: Una visión desde el derecho europeo. **Tocqueville Papers**, n. 23, 2022.

17 CJEU, Judgment of the Court (Grand Chamber) of 21 December 2021, Euro Box Promotion, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 216.

Within this context, aspects related to appointment procedures of judges used to be quite discreet and were mostly developed by the Venice Commission, to the point that some authors concluded that member states enjoyed complete discretion on this aspect.[18] This has now changed, as both the CJEU and the ECtHR consider that irregularities during the appointment procedure may amount to a violation of the right to a tribunal established by law. Indeed, the CJEU has developed new standards on the appointment procedures of judges in the Review Simpson[19] case. They have been further developed by the ECtHR in different yet equivalent terms in the Ástráðsson v. Iceland[20] and Xero Flor v. Poland[21] cases. Special attention must be paid to the case-law of the ECtHR in this context, as art. 6 TEU enshrines the European Convention of Human Rights as a source of EU law in the definition and interpretation of fundamental rights and recognizes the EU's accession to the ECHR. Furthermore, there has been an interesting interplay between the CJEU and the ECtHR on matters relating to judicial independence. As underlined by Disant and Larrouturou, the principles derived from the case law of the ECtHR and the CJEU are similar in matters of appointment procedures, something that is also fostered by article 53 of the Charter of Fundamental Rights of the EU. Consequently, even though the present analysis focuses on EU law, it will also draw on the ECtHR case-law relating to the appointment procedures of judges.

2.2. European standards on judicial appointment procedures

As a general principle, both the CJEU and the ECtHR recognize that the constitutional organization of the judiciary is an internal matter and should be respected.[22] They do not impose any specific constitutional model on the relationships between the judiciary on the one hand and the executive and legislative branches on the other. For present purposes, they accept the validity of appointments by the executive and legislative powers, provided that judges can exercise their functions freely and do not receive instructions within that framework. By way of examples, the appointments of the President of the Greek Court of Cassation by the executive,[23] of members of the

[18] DISANT, Mathieu; LARROUTUROU, Thibaut. La nomination des juges nationaux saisie par les juridictions européennes. **Revue Trimestrielle des Droits de l'Homme**, vol. 4, n. 18, 2021, p. 794.

[19] CJEU, Joined Cases C-542/18 RX-II and C-543/18 RX-II, Judgement of 26 March 2020, Simpson v. Council and HG v. Commission, EU:C:2020:232.

[20] ECtHR (Grand Chamber), Judgment of 1 December 2020, Guðmundur Andri Ástráðsson v. Iceland (Application no. 26374/18), ECLI:CE:ECHR:2020:1201JUD002637418.

[21] ECtHR, Judgment of 7 August 2021, Xero Flor w Polsce sp. z o.o. v. Poland, (Application no. 4907/18), ECLI:CE:ECHR:2021:0507JUD000490718.

[22] DISANT, Mathieu; LARROUTUROU, Thibaut. La nomination des juges nationaux saisie par les juridictions européennes. **Revue Trimestrielle des Droits de l'Homme**, vol. 4, n. 18, 2021, p. 795.

[23] ECtHR, Judgment of 2 June 2005, Zolotas v. Greece (Application no. 38240/02), ECLI:CE:ECHR:2005:-0602JUD003824002.

French Supreme Administrative Court by the President of the Republic,[24] or of judges by the Maltese Prime Minister[25] have been endorsed by the European Courts.[26] With regard to constitutional judges specifically, the CJEU held that the involvement of the legislative and executive branches is not by itself problematic, as "the mere fact that the judges concerned are appointed by the legislature and the executive" does not necessarily undermine judicial independence.

Therefore, rather than the appointing authority, the determining criteria are the absence of a "relationship of subordination […] to the legislature or the executive" or "doubts as to their impartiality, if, once appointed, they are free from influence or pressure when carrying out their role".[27] This entails scrutinizing not only the legal frameworks regulating the appointment procedures, but also the practice, in order to assess whether there is an undue influence of the legislative or executive branches on members of the judiciary. In this line of reasoning, the CJEU held that the rules on judicial independence "must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned."[28]

While accepting diverse constitutional models of justice, EU member states must still respect the standards elaborated by the CJEU regarding the appointment of judges, including constitutional judges. In this respect, the CJEU and the ECtHR have elaborated general tests in the Review Simpson and Ástráðsson cases respectively, under the framework of the right to a tribunal established by law, interpreted as comprising respect for the relevant rules concerning the appointment of judges. These judgments now provide a legal basis for individuals who believe that irregularities have taken place in the appointment procedure due to undue interference from the executive or legislative branches.[29] As noted by Leloup, with this case law, "the European Courts have placed the judicial appointment procedure within their purview and are in a position to safeguard the legitimacy of such proceedings and, more broadly, the principle of separation of powers."[30]

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[24] ECtHR, Judgment of 9 November 2006, Sacilor Lormines v. France (Application no. 65411/01).

[25] CJEU, Judgment of the Court (Grand Chamber) of 20 April 2021, Repubblika v. Il-Prim Ministru, ECLI:EU:C:2021:311.

[26] DISANT, Mathieu; LARROUTUROU, Thibaut. La nomination des juges nationaux saisie par les juridictions européennes. **Revue Trimestrielle des Droits de l'Homme**, vol. 4, n. 18, 2021, p. 796.

[27] CJEU, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Euro Box Promotion 21 December 2021, ECLI:EU:C:2021:1034, para. 233.

[28] CJEU, Judgment of the Grand Chamber of 19 November 2019, AK and Others, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 125.

[29] LELOUP, Mathieu. Guðmundur Andri Ástráðsson: the right to a tribunal established by law expanded to the appointment of judges. **Strasbourg Observers**, 2020. Retrieved from https://strasbourgobservers.com/2020/12/18/gudmundur-andri-astradsson-the-right-to-a-tribunal-established-by-law-expanded-to-the-appointment-of-judges/.

[30] Ibid.

On 26 March 2020, the CJEU had the occasion to refine the meaning of the notion of 'tribunal established by law' in the Review Simpson judgment.[31] The Court had to pronounce itself on whether certain irregularities committed during the appointment process of judges to the European Union Civil Service Tribunal amounted to a violation of art. 47 of the Charter of Fundamental Rights of the EU on the right to an effective remedy and to a fair trial, in particular with regard to the right to a tribunal established by law. In this context, the Court analyzed whether such irregularities were significant enough to affect the independence and impartiality of the judges. It first framed the issue within the rule of law principle. In particular, it recalled that judicial independence and impartiality form part of the right to effective judicial protection and to a fair trial, and serve both "as a guarantee [of] all the rights which individuals derive from EU law" and a safeguard of EU values, particularly the rule of law.

It then referred to the need to offer an equivalent protection to that offered by the ECHR, insofar as there is a correspondence between the wording of art. 47 of the EU Charter and art. 6 ECHR. In this regard, the CJEU refers to the ECtHR case law when it affirms that the notion of 'tribunal established by law', recognized in art. 47 of the Charter ensures that "the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction" (para. 73). In particular, it considered that it

> *covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned.*[32]

The Court also referred to the interim judgment of the Ástráðsson case to highlight that the ECtHR considered that the process of appointing judges is part of the right to be judged by a tribunal 'established by law' (para. 74).

Against this background, the CJEU deduces that the existence of irregularities during the appointment procedure may lead to a violation of Article 47 of the Charter if it can create a "real risk" of undue influence from the executive or legislative branches, thus undermining the integrity of the appointment process (para. 75). With this judgement, the CJEU set a precedent for the assessment of judicial appointment procedures as a matter of EU law. Pursuant to the CJEU, an irregularity in the appointment process may constitute a violation of art. 47 of the Charter if it is:

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31 CJEU, Joined Cases C-542/18 RX-II and C-543/18 RX-II, Simpson v. Council and HG v. Commission, 26 March 2020, ECLI:EU:C:2020:232.

32 Ibid., para. 73.

> *of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.*[33]

The CJEU's test thus includes the following elements. There must be a) an irregularity in the appointment procedure; b) it must be of special gravity, so that not all kinds of irregularities should result in an infringement of art. 47 of the Charter. This criterion seems to be fulfilled when fundamental rules relating to the judicial system are at stake; c) this irregularity must create a real risk of undue influence from the executive or legislative branches, although no guidance is offered as to what constitutes a 'real risk'; and d) it must give rise to a reasonable doubt in the perceived independence of the judges. This case therefore seems to follow the course of the appearance theory, first developed by the ECtHR in the Delcourt case of 1970,[34] as the social perception of independence and impartiality is critical to determine whether the right to a tribunal established by law is infringed upon. As Manko has noted, the CJEU has favored this criterion and has mostly left to domestic courts the decision on the validity of judicial appointments.[35]

The ECtHR followed the footsteps of the CJEU in the Ástráðsson judgement, issued on 1 December 2020.[36] In this case, the Court had to assess whether the irregularities committed in the appointment of one of the judges of the new Icelandic Court of Appeal violated art. 6(1) on the right to a tribunal established by law. It held that art. 6(1) does not require a separate examination as to whether the breach of that right rendered a trial unfair to constitute a violation of the Convention. To reach that conclusion, it significantly borrowed from the CJEU's case law and formulated a three-step test.

First, there must be a manifest breach of domestic law, "in the sense that this breach must be objectively and genuinely identifiable as such" (para. 244). The second step consists of assessing whether the breach pertains to any fundamental rule of the judicial appointment procedure, as only "the most fundamental rules" are at stake, thus excluding the infringement of formal rules that do not undermine the rule of law and the separation of powers. To do so, it is assessed in light "of the object and purpose of the right to a tribunal established by law, namely to ensure the ability of the judiciary

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33 Ibid., para.75.

34 ECtHR, 17 Jan. 1970, Delcourt v. Belgium (Application no. 2689/65), ECLI:CE:ECHR:1970:0117JUD000268965.

35 MAŃKO, Rafał. **European Court of Justice case law on judicial independence**. Brussels: EPRS | European Parliamentary Research Service, 2023, p. 12.

36 ECtHR (Grand Chamber), Judgment of 1 December 2020, Guðmundur Andri Ástráðsson v. Iceland (Application no. 26374/18), ECLI:CE:ECHR:2020:1201JUD002637418.

to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers" (para. 246). In this regard, "breaches that wholly disregard the most fundamental rules of the appointment procedure or that may otherwise undermine the purpose and effect of the right to a tribunal established by law, must be considered to violate this right" (para. 246). The objective of this criterion is therefore not to unnecessarily destabilize established courts,[37] but rather to focus on fundamental rules whose violation would be of such gravity that it would impair the legitimacy of the procedure. Finally, the third step of the test consists in evaluating whether the alleged violations of the right to a tribunal established by law were effectively reviewed and remedied by national courts. Therefore, if domestic courts have established the existence of a breach in line with the Convention, the Court will normally "defer to the national courts' interpretation and application of domestic law" (paras 248-251). Thus, the claims must be scrutinized by national jurisdictions and the situation must be corrected in order to satisfy this criterion. The test of the ECtHR therefore slightly differs from that of the CJEU, to the extent that it does not refer to a 'real risk'; it is nonetheless mostly equivalent to that of the CJEU. The principle that an irregularity in the appointment process of judges may entail a violation of the right to a tribunal established by law by itself is therefore solidly enshrined in European Constitutional Law.

While the development of the CJEU case-law on judicial independence has been crucial in addressing the rule of law crisis in some EU member states, its impact in other EU Member States is not clear. On the one hand, these standards have become autonomous principles of EU law, and are therefore applicable to all EU member states, regardless of the internal situation. The focus of the CJEU case-law on judicial independence in general, and on the appointment procedures of judges in particular, highlights the tension that may arise between the CJEU's understanding of judicial independence and the existing procedures at the national level. Indeed, it is quite likely that some member states' constitutional organization of the judiciary is not fully in line with the CJEU's standards. In the following section, the French and Spanish cases will be used as case studies.

3. A POSSIBLE TENSION WITH THE APPOINTMENT PROCEDURES OF NATIONAL CONSTITUTIONAL JUDGES

The rule of law crisis has prompted a discussion on EU values, enshrined in article 2 TEU. In this respect, the re-definition of European standards on judicial independence and impartiality at the EU and ECHR levels constitutes an opportunity to also put the spotlight on the deficiencies and/or irregularities that exist in other EU member

[37] DISANT, Mathieu; LARROUTUROU, Thibaut. La nomination des juges nationaux saisie par les juridictions européennes. **Revue Trimestrielle des Droits de l'Homme**, vol. 4, n. 18, 2021, p. 797.

states, even though the rule of law is not under attack. In this framework, the appointment procedures of the French (3.1.) and Spanish (3.2.) constitutional judges are used as case studies.

3.1. The French case. A problematic legal framework and practice

In the French case, not only the practice but also the legal framework governing the appointment procedure of the members of the French Constitutional Council (FCC) may be problematic from an EU law perspective. Pursuant to article 56 of the Constitution, the FCC is composed of nine members, appointed for a non renewable nine-year mandate. From among the nine members, three are appointed by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate. The Council is renewed by thirds every three years. In addition to these nine members, the former presidents of the Republic are *ex officio* members for life. The FCC is competent to rule on the constitutionality of bills and treaties –through an *a priori* procedure–, and of laws –through an *a posteriori* procedure, made possible since the adoption of the constitutional reform of 23 July 2008. The FCC has therefore moved from a political body in 1958, whose functions were quite limited, to a judicial one. In spite of that, the French model remains characterized by several anomalies, starting from the presence of former heads of state to the selection criteria for the remaining members, which do not require that they have a legal background. These anomalies are at odds with the increasing judicialization of the Council, especially after the adoption of the constitutional reform of 23 July 2008. As Champeil-Desplats underlines, there is "a gap between, on the one hand, the movement of judicialization undertaken by the Council since the 1990's, and on the other, the appointments procedures, the profile of its members, or their obligations".[38] The FCC is, therefore, a politicized constitutional court (3.1.2.), composed of members who do not have the necessary legal skills to fulfil their duties (3.1.1.).

3.1.1. A non-technical court

One element that already catches the attention for a constitutional court is that its members are not required to have a legal background. This is notably a consequence of the traditional distrust toward constitutional judges in France, and the fact that the FCC was originally created as a political body, rather than a judicial one.[39] However, the

[38] CHAMPEIL-DESPLATS, V. Faut-il fixer des critères déontologiques pour les candidats aux fonctions de membre du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 22. The translation is mine.

[39] MEURANT, Cédric. Le rôle du service juridique du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 319.

members of the FCC do need to resort to legal reasoning in the exercise of their duties. While having a legal background is not sufficient to be a competent constitutional judge, one may consider that this is a minimum condition to be one. Furthermore, it can be argued that this is a precondition for the impartial exercise of their functions,[40] that is, based not on political opinions but on legal reasoning. Competence and independence go hand in hand, and it is quite surprising that no reform has been undertaken in this sense. As Fontaine has observed, while the independence of judges is to be found in their status, it is also something that is learnt and developed, so that a prior experience of independence is useful.[41] This aspect further justifies that the members of the FCC should be chosen from among experienced judges, lawyers, and law professors. In the same line, the legal knowledge and experience of the members of the FCC is one of the factors that legitimate the existence of the Council and of its rulings.[42]

There is therefore a paradox, as the case-law of the FCC is subtle, especially as it must deal with increasingly complex legal matters, while its members are not necessarily lawyers.[43] This is made possible thanks to the important work of the legal services of the Council. Although the judicialization of the FCC could have led to the creation of *référendaires* who individually assist the members of the FCC, the choice was made to maintain the legal service unit, whose importance has grown in light of the transcendence of the work conducted by the FCC in parallel to its judicialization. Indeed, due to the lack of legal capacity of many members, the latter rely to a great extent on the works conducted by the legal service to decide on a specific ruling.[44] As some scholars have noted, the legal service could even be compared to an investigative chamber of the Council,[45] as it is responsible for the preparation of the case and thus frames the choice of possible legal solutions to the issue in question. While the members of the FCC are not bound by the solutions proposed by the legal services, it is arguably more difficult

[40] WACHSMANN, Patrick. Les membres du Conseil constitutionnel au risque la déontologie. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 47.

[41] FONTAINE, Lauréline. Bilan et réflexions sur une éthique de la justice constitutionnelle à la lumière de ce qu'en font et de ce qu'en disent ses acteurs. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 160.

[42] Ibid.

[43] ARDANT, Philippe. Le Conseil constitutionnel d'hier à demain. In: **L'avenir du droit. Mélanges en hommage à François Terré**. Dalloz, 1999, p. 743. Quoted in: MEURANT, Cédric. Le rôle du service juridique du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 329.

[44] This also entails transparency and accountability issues, which go beyond the scope of this paper, but are nonetheless of great importance.

[45] CIAUDO, Alexandre. Un acteur spécifique du procès constitutionnel: le secrétaire général du Conseil constitutionnel. **RFDC**, 2008, p. 22. Quoted in: MEURANT, Cédric. Le rôle du service juridique du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 325.

to oppose a legal solution without any legal background. As a matter of fact, they rarely choose a different solution, except for those who are lawyers.[46] As a consequence, it seems that having a legal background would indeed reinforce the independence of the members of the FCC when analyzing the problem at stake and proposing a legal reasoning; it would also diminish their dependency on the legal service for that matter.

The lack of requirements for the legal knowledge of the members of the FCC has also led to another unfortunate development, as the appointing authorities have often nominated former politicians to exercise this duty. The FCC is, therefore, a non-technical judicial organ, which suffers from important politicization.

3.1.2. A politicized court

The first issue regarding politicization is arguably the presence of former heads of state in the FCC. France is the only state in the Council of Europe that adopts such a system, and in practice, it is the only state in the world where former heads of state have sat on a constitutional court.[47] This French specificity can certainly be qualified as an anomaly or the "*exception française de trop*" in the words of Robert Badinter, former president of the FCC.[48] It is true that this question has become more theoretical, insofar as since President Sarkozy, the former presidents of the Republic have not been sitting in the FCC. Therefore, the death of Valéry Giscard d'Estaing in 2020 marked the end of the presence of former heads of state in the FCC in practice. Nonetheless, such practice could be reversed depending on the simple will of future former heads of state. Furthermore, it is quite difficult to ascertain the compatibility of article 56(2) of the Constitution with European standards on judicial independence and impartiality. While there is a unanimous consensus among scholars and politicians that article 56(2) of the Constitution should be repealed,[49] the attempts to do so have been unsuccessful thus far. As Fontaine has underlined, "maintaining this mechanism says a lot about the lack of esteem politicians express towards constitutional justice".[50]

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[46] MEURANT, Cédric. Le rôle du service juridique du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 328.

[47] CHOPPLET, Antoine. Les membres de droit et à vie du Conseil constitutionnel: inutile réforme et nécessaire abrogation. LEMAIRE, E. ; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence.** Institut Francophone pour la Justice et la Démocratie, 2022. p. 124.

[48] Rober Badinter, Le Monde, 19 May 2012.

[49] CHOPPLET, Antoine. Les membres de droit et à vie du Conseil constitutionnel: inutile réforme et nécessaire abrogation. LEMAIRE, E. ; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence.** Institut Francophone pour la Justice et la Démocratie, 2022. p. 124-125.

[50] FONTAINE, Lauréline. Bilan et réflexions sur une éthique de la justice constitutionnelle à la lumière de ce qu'en font et de ce qu'en disent ses acteurs. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 159.

Furthermore, it poses several problems with regard to the independence and impartiality of the FCC. The first problem is an evident one as former heads of state may be called to decide on laws or bills that they themselves introduced and adopted during their mandate or their government. In the same line, their presence may inhibit the other members of the FCC from expressing dissenting opinions. Furthermore, it is quite difficult to imagine that former heads of state may sincerely exercise self-restraint and deference, as their influence may be greater than the actual power exercised. Thus, from an EU law perspective, one may wonder whether the presence of former heads of state in the FCC does not create "a reasonable doubt in the minds of individuals as to the independence and the impartiality" of the FCC.

The second issue with regard to the politicization of the FCC relates to the fact that the appointing authorities have often nominated former politicians to exercise this duty. The composition of the FCC and its legal framework emphasize that there are not sufficient safeguards to limit the extent to which the appointing authorities may appoint members based on political criteria. The appointment of judges –be it ordinary or administrative judges–, law professors, or other lawyers is not comparable to the number of members who have been politicians.[51] On the contrary, many of them have been high-level politicians, such as prime minister, ministers, or members of Parliament[52] –and former heads of state. Some even argue that these appointments should be seen as rewards for good and loyal service.[53] This long-sustained practice is the result of the lack of requirement for legal knowledge, rather than a deliberate choice made by the legislature.[54] In the words of Perroud, "bringing politicians to a Constitutional Court is an unfortunate French specificity, which comes with a high risk of bias. Politicians who were involved in drafting laws will now be called to judge the constitutionality of these laws".[55]

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51 CHAMPEIL-DESPLATS, Véronique. Faut-il fixer des critères déontologiques pour les candidats aux fonctions de membre du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 25.

52 BAU, Nicolas ; ISRAËL, Liora. Quelques éclairages sociologiques sur la composition du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022, pp. 61-82.

53 CHAMPEIL-DESPLATS, Véronique. Faut-il fixer des critères déontologiques pour les candidats aux fonctions de membre du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022, p. 25; SZYMCZAK, David. Question prioritaire de constitutionnalité et Convention européenne des droits de l'homme. L'européanisation heurtée du Conseil constitutionnel français. **Jus Politicum IV**, Dalloz, 2012.

54 As Patrick Wachsmann rightly points out, this is to be compared with the Belgian System, where the constitutional and legal framework establish a mixed Constitutional Court, composed of an equal number of lawyers and politicians. WACHSMANN, Patrick. Les membres du Conseil constitutionnel au risque la déontologie. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 46.

55 PERROUD, Thomas. A Male, White and Conservative Constitutional Judge. **Verfassungblog**, 3 May 2022. Retrieved from: https://verfassungsblog.de/a-male-white-and-conservative-constitutional-judge/.

Likewise, as the FCC is competent to rule on the validity of the elections, some of its members may be called to judge the validity of the elections of candidates they used to work with (or against).[56] The rules of procedure of the Constitutional Court actually acknowledge and endorse such a situation, as they state that the mere fact that a member of the FCC participated in the drafting of a provision whose constitutionality is challenged does not constitute a ground for recusal.

Furthermore, even though impartiality is a principle recognized by the Council itself, it is not included in the rules governing the FCC [57] and does not seem to reflect its practice. On the one hand, the latest appointments reveal potential conflicts of interests: one is a former politician; another is a civil judge who supervised the public prosecutor who closed a complaint against the person who appointed her; and the last one was director of the cabinet of the president of the Senate, that is the person who appointed him.[58] On the other hand, even though the rules of procedure of the FCC provide for recusal, the conditions under which they should be exercised is left to the discretion of the member at stake, regardless of the intensity of the link between the member and the issue at stake.[59]

A quite significant illustration is the fact that former prime minister Laurent Fabius combined the presidencies of the FCC and the COP 21 held in Paris without much opposition, even though he may be called, as President of the FCC, to rule on matters dealing with the Charter of the Environment.[60] As emphasized by Waschmann, the French specificity also entails an overall indifference to the politicization of the FCC, as if it were a non-issue and the members of the Council were able to differentiate their former politicians' role from their present judicial one.[61] In fact, even though the rules on the independence of the members of the Council state that the members of the FCC should refrain from any action that would undermine their independence and the dignity of their functions,[62] they do not even provide that they cannot receive instructions

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56 CHAMPEIL-DESPLATS, Véronique. Faut-il fixer des critères déontologiques pour les candidats aux fonctions de membre du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022, p. 25.

57 WACHSMANN, Patrick. Les membres du Conseil constitutionnel au risque la déontologie. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022, p. 45.

58 PERROUD, Thomas. A Male, White and Conservative Constitutional Judge. **Verfassungblog**, 3 May 2022. Retrieved from: https://verfassungsblog.de/a-male-white-and-conservative-constitutional-judge/

59 For an overview of this aspect, see: WACHSMANN, Patrick. pp. 51-59.

60 WACHSMANN, Patrick. Les membres du Conseil constitutionnel au risque la déontologie. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 33.

61 Ibid, p. 34.

62 Article 1, Decree nº 59-1292 of 13 November 1959 on the obligations of the Constitutional Council.

from any authority, as if it were a given.[63] However, there is little doubt that this situation further delegitimizes the FCC in the eyes of the general public and is hardly compatible with European standards.

Some elements, such as the fact that the President of the Republic chooses the President of the FCC, are highly questionable from the perspective of judicial independence. Other aspects are not as problematic; for example, some scholars consider that the guarantees that are associated with the status of constitutional judges are probably sufficient to guarantee their independence.[64] Nevertheless, the current system maintains the confusion between politics and constitutional justice, suggesting that while there is no intent to subject the FCC to the executive branch, there is a need to keep constitutional justice within the realm of politics. It is therefore quite difficult to ascertain the compatibility of this system with the principle of judicial independence and impartiality as developed by the CJEU.

3.2. The Spanish case. A problematic practice.

In its 2021 edition, the Democracy Index downgraded Spain to a 'flawed democracy'. Even though its status of full democracy was restored starting from the 2022 edition, the Democracy Index pinpoints an important flaw regarding judicial independence. Indeed, the main reason for such a downgrade was the deterioration of the principle of judicial independence as a result of the "political divisions over the appointment of new magistrates to the General Council of the Judiciary,"[65] a phenomenon that has also occurred with regard to the appointment of new magistrates to the Constitutional Court. This is not a new problem, but it should be framed within a general context of polarization of politics and institutional obstruction in recent years.

In this respect, while the legal framework regulating the appointment procedures of the Spanish Constitutional Court (SCC) is perfectible, it is nonetheless acceptable both from a constitutional and European perspective (3.2.1.). On the contrary, political parties have exploited the weaknesses of the legal framework to their advantage and thereby undermined the legitimacy of the Court (3.2.2.).

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63 WACHSMANN, Patrick. Les membres du Conseil constitutionnel au risque la déontologie. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022. p. 38.

64 Such as, for instance, the length of the mandate (nine years), which is a legal requirement. Even though the practice has been respectful of this criterion, also considering that the members appointed are often at the end of their professional career, this argument may easily be rebutted. Indeed, the practice may change depending on the appointing authorities. This is the reason why Nicolas Bau and Liora Israël consider on the contrary that a nine-year mandate is not sufficient to counter the other problematic aspects of the appointment procedures in terms in judicial independence and argue that an indefinite mandate would be more appropriate. See: BAU, Nicolas ; ISRAËL, Liora. Quelques éclairages sociologiques sur la composition du Conseil constitutionnel. In: LEMAIRE, E.; PERROUD, T. **Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence**. Institut Francophone pour la Justice et la Démocratie, 2022, p. 62.

65 Economist Intelligence Unit. **Democracy Index 2021**, 2022, p. 10.

3.2.1. A legal framework compatible with European standards

Upon restoration of democracy, the constituent power of 1978 opted for the continental model of constitutional justice, based on a specialized court in charge of revising the constitutionality of laws. In its quality as guardian of the supreme norm of the Spanish legal order, the SCC has become an essential organ for the good functioning of constitutional democracy and the respect for fundamental rights. Due to its instrumental role, the independence of its members is of utmost importance.

In this respect, the constituent followed the tradition of other European states and established the following appointment procedure: pursuant to article 159(1) of the Constitution, the Court is composed of twelve members, appointed by the King. From among them, eight are nominated by the Parliament (four by each chamber of the Parliament) by a three-fifths majority vote, while two are nominated by the Government and two by the General Council of the Judiciary (CGPJ). Furthermore, the ninth transitory provision of the Constitution states that the members nominated by the Government and the GCPJ should be grouped together.

Art. 159(2) states that the members of the SCC shall be appointed from amongst "Magistrates and Prosecutors, University professors, public officials and lawyers, all of whom must be jurists of recognized standing with at least 15 years of experience in the professional exercise". This criterion thus aims to ensure that the members of the SCC are competent and able to fulfil their function independently, although the expression "jurists of recognized standing" leaves quite some room for interpretation.

The mandate of the members of the SCC lasts nine years, and article 159(3) of the Constitution also establishes the obligation to renew the Court by thirds every three years. The underpinning of these provisions is quite straightforward, as it intends to avoid reproducing the political majorities at a given moment in parliament within the SCC. Likewise, the three-fifths majority vote requirement reflects the intent of the constituent power to respect political pluralism and generate consensus among several political forces on the members of the SCC.

These principles are not problematic *per se* in light of European standards: they are shared with the traditions that exist in other European states and have been ratified by supranational organizations. However, the polarization of the political landscape has led to a distortion of the system in practice.

3.2.2. A problematic practice

As mentioned above, the SCC must be renewed by thirds every three years; however, the renewal of the four members elected by the low chamber of the Parliament was blocked for two years. In November 2021, the long-awaited renewal of the SCC eventually took place, thus ending the obstruction operated by the main political

forces. Indeed, pursuant to the Spanish Constitution, the lower court of the Parliament must appoint four of the twelve members of the SCC according to a qualified majority vote. Nonetheless, the increasing polarization of the current Spanish political landscape has led to a two-year obstruction, as the main political parties were unable to agree on suitable candidates. While the instrumentalization of the renewal was problematic, so is the solution that was found. Indeed, the two main political parties did not commonly agree on certain personalities that would comply with the highest standards; rather, they agreed not to veto the candidates put forward by the other party, thus contradicting the spirit of the Constitution.

Furthermore, another issue arose as a new third of members was supposed to take place in June 2022: the two members appointed by the Government and the two members appointed by the CGPJ. However, the renewal of the CGPJ was also paralyzed by the main opposing political party,[66] so that the governing majority adopted a reform restricting the competence of the acting CGPJ on some judicial appointments was adopted in 2021,[67] which includes the appointment of the members of the SCC by the CGPJ, in order to compel the opposing political party to put an end to the deadlock. The obstruction concerning the CGPJ therefore also has an impact on the renewal of the members of the SCC. On a parallel move, the Spanish Government decided to unilaterally appoint two magistrates to the SCC, thus giving rise to a debate as to whether the Government is allowed to appoint two candidates while the CGPJ remains unable to do so, although they have normally been grouped together.[68] Eventually, a reform allowing the CGPJ to proceed with the appointment of the two members of the SCC was passed in July 2022. Even though the appointment of the CGPJ's two magistrates was delayed due to internal conflict, the members of the CGPJ eventually agreed on two candidates.[69] As a result, the two candidates of the Government and the two candidates of the CGPJ were appointed as new members of the SCC in December 2022.

This practice presents a series of difficulties from the perspective of judicial independence and impartiality. Firstly, it leads to prolonged deadlocks and political

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[66] The renewal of the CGPJ has also been paralysed for more than five years, until the main political forces reached an agreement in June 2024.

[67] Organic Law 4/2021, of 29 March. It adds a new article 570 bis to the Organic Law on the Judiciary that restricts some judicial appointments.

[68] On this debate, see, e.g.: AZPITARTE SÁNCHEZ, Miguel. El CGPJ y la renovación del Constitucional. **El País**, 05 Nov. 2022. Retrieved from: https://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1227455; CAMONI RODRÍGUEZ, Daniel. Una pequeña nota sobre el posible nombramiento de dos magistrados del Tribunal Constitucional por parte del gobierno. **Fundación Manuel Giménez Abad**, 2022. Retrieved from https://www.fundacionmgimenezabad.es/es/una-pequena-nota-sobre-el-posible-nombramiento-de-dos-magistrados-del-tribunal-constitucional-por.

[69] This chronology is voluntarily simplified, as it involves a series of constitutional issues that go beyond the scope of this paper. For a detailed account of these developments, see: AZPITARTE SÁNCHEZ, Miguel. Estabilización del sistema político y fractura interna de los partidos. Crónica política y legislativa del año 2022. **Revista española de derecho constitucional**, n. 127, p.151-176, 2023. p. 157-164.

bargains that condition the approval of candidates on the basis of the approval of other policies that do not bear any relationship with the composition of the SCC, even though the most fundamental appointment rules are clearly established in the Constitution. It therefore makes prevail partisan interests to the general interest. The opinions of the Venice Commission are worth mentioning in this respect. Indeed, it considered that even though qualified majorities are important, they also entail "the risk of stalemates". The Venice Commission therefore also "recommended to devise effective and solid anti-deadlock mechanisms".[70] However,

> *anti-deadlock mechanisms have to discourage the opposition from behaving irresponsibly but should not create opportunities for the majority by impossible proposals to lead to the necessity for the application of such mechanisms. This is why they should be limited in time and, while avoiding permanent blockages they should not aim at avoiding any blockage at all, which can be an expression of the need for political change.*

Secondly, as regards the 2021 appointments, in the opinion of some scholars,[71] the trade-offs between the two main political parties led both sides to accept less qualified candidates in exchange for the acceptance of their own less qualified candidates. They consider that it deteriorates the legitimacy of the SCC and reinforces the perception that the members of the SCC are not independent among the general public. Such negative assessment is the result of the vagueness of the criterion of 'recognized standing', which entails some subjectivity and may be interpreted in many different ways. It is also therefore difficult to challenge. Be that as it may, the Venice Commission warned against the risk of accepting less qualified candidates in its Opinion on the Draft Amendments to the Constitution of Armenia; it underlined that a political culture must be "well developed, allowing for compromises between majority and opposition forces. At the same time, trade-offs, where both sides accept less qualified candidates in exchange for the acceptance of their own less qualified candidates, are discouraged".[72] In any case, accepting not to veto the other candidate rather than agreeing on common candidates is most likely in contradiction with the spirit of the Constitution and a denaturation of the system established under the Constitution.

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[70] Venice Commission, Opinion on the draft law on amendments to the law on the Judicial Council and Judges concerning Montenegro, adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018), CDL-AD(2018)015-e, para. 12.

[71] See, e.g.: BELTRÁN DE FELIPE, M.; SARMIENTO RAMÍREZ-ESCUDERO, D. Por favor, salven al Tribunal Constitucional. **El Mundo**, 10 Nov. 2021. Retrieved from https://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1216644; DOMÉNECH, G. Los nuevos magistrados del Tribunal Constitucional: un modelo a imitar. **Valencia Plaza**, 2021. Retrieved from https://valenciaplaza.com/nuevos-magistrados-tribunal-constitucional-modelo-imitar.

[72] Venice Commission, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), CDL-AD(2015)037-e, para. 162.

Thirdly, this practice leads to the creation of political blocs within the SCC, thus abandoning the principle of collegiality that should characterize it.[73] A corollary is that this causes citizens to attribute the decision to a majority within the Court rather than to the Court as a collegial body, where it is increasingly uncommon to make decisions by consensus.[74] This perception is well ingrained in the society. For instance, the general press routinely refers to the 'conservative' and 'progressist' blocs to predict the outcome of a judgement or to comment a ruling. Its members are seen as allegiant to the political force that originally proposed the magistrates as candidates rather than to respect the Constitution in an independent and impartial manner. This practice is therefore damaging the perception of the public towards judicial independence. According to the last Eurobarometer on the matter, only 34% of the general population consider that the justice system is very good or fairly good in terms of judicial independence.[75] The respondents consider that the main reason to explain such a negative assessment is their perceived interference from the government and politicians (71%).

It may be argued that it is necessary to reflect political majorities within the SCC to guarantee the democratic legitimacy of this institution. However, this is questionable. At some point, it is true that there should not be such a gap that the SCC is unable to interpret the Constitution in accordance with the evolution of society, because its composition largely reflects only one sector of the population or is largely disconnected from the population. Likewise, it is important to avoid an ivory tower effect and corporatist reflexes. Nonetheless, guaranteeing the democratic legitimacy of the SCC is achievable without resorting to such a clear politicization and without making the SCC some sort of representative body. This is feasible by returning to the spirit of the Constitution and the need to embrace real consensus on the candidates put forward in the appointment processes.

One may then wonder whether the current practice of appointing members to the SCC is compatible with European standards. The answer to this question is not straightforward. Regarding the existence of irregularities, it may be argued that the obstruction and corresponding prolonged deadlocks indeed constitute irregularities in the appointment process. They contradict the Constitution, insofar as the renewal of the SCC by thirds every three years and the length of the mandate of its members are not properly respected. As for the gravity of the irregularities, they involve fundamental rules, to the extent that they are enshrined in the Constitution and aim to ensure

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[73] MARTÍN GUARDADO, Sergio. La última crisis de legitimidad de la jurisdicción constitucional en España. **Revista de Investigações Constitucionais**, Curitiba, vol. 11, n. 1, e255, jan./abr. 2024. DOI: 10.5380/rinc.v11i1.91471.

[74] Ibid.

[75] Flash Eurobarometer 503, Perceived independence of the national justice Systems in the EU among the general public, 2022. Available at: https://europa.eu/eurobarometer/surveys/detail/2667.

the independence of the members of the SCC. On the other hand, some may argue that even though they are constitutional norms, they contain only formal rules, and delays and political bargaining do not necessarily indicate a breach of fundamental rules but rather reflect the challenges of achieving broad consensus in a polarized political environment.

Regarding the existence of a real risk of undue influence, a relationship of subordination or direct influence from the executive is quite unlikely, also considering the other constitutional guarantees that are associated to the members of the SCC. Rather than being subjected to the executive, the appointment procedures were captured by political parties, including and especially the main opposing party. Therefore, this is not a situation in which the executive branch is attempting to subject the Constitutional Court in a broader context of attacks to the rule of law. Nevertheless, this still poses difficulties. In particular, doubts may exist regarding the impartiality of the appointed judges due to the well-known ideological connivence that exists among judges and political parties. This perception is reinforced by the visible formation of political blocs within the SCC, which are often highlighted in media predictions and analyses of the Court's rulings. Following the appearance theory, it may then be argued that this practice could "give rise to reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned", pursuant to CJEU standards.

Therefore, the political maneuvering surrounding the appointment procedures of the SCC, in a context of long-lasting obstruction of the renewal of the CGPJ, casts a suspicious light on the respect for judicial independence and impartiality. As a consequence, addressing this problematic practice is necessary from both the European and constitutional perspectives, in order to restore trust in Spain's guardian of the Constitution.

4. RECONCILING EU JUDICIAL INDEPENDENCE STANDARDS WITH NATIONAL FRAMEWORKS

Some minimum standards must be ensured in all EU member states in accordance with the case of the CJEU, which includes constitutional courts. This highlights how the development of the EU case law may appear to conflict with national constitutional identity (4.1.) Nonetheless, differentiation is still possible and desirable, as EU member states are free to design their own model of constitutional justice, provided that they respect this bare minimum. Therefore, rather than interpreting the CJEU case law as a possible attack to national constitutional identity, it may be used within a broader European dialogue on judicial independence (4.2.), whereby member states address their deficiencies, which are not only problematic from the standpoint

of European standards, but also national ones, and promote in turn their systems as exemplary models within this dialogue.

4.1. Challenges in aligning EU standards with national constitutional models of justice

Contrarily to the ECtHR, which has competence to rule on these matters,[76] the caselaw of the CJEU may be prone to criticism, on the grounds that it does not hold competence in the field of the organization of justice at national level. This is an even more sensitive matter regarding constitutional courts. While the CJEU asserts that it does not impose any specific model, its caselaw is still binding on all EU member states. Therefore, even though there may be differences among member states as regards the model of constitutional justice, "member states must nonetheless comply, inter alia, with the requirements of judicial independence stemming from those provisions of EU law".[77] Some may then consider that the Court is acting ultra vires and is stepping on national constitutional identity, as recognized under art. 4(2) TEU.

The CJEU brought some elements of clarification regarding the extent of its reach in its judgments on the so-called Conditionality Regulation,[78] as they contributed to defining what European and national constitutional identities entail. First of all, it confirmed that even though the EU must be able to defend its values, as they constitute its constitutional identity, it must do so "within the limits of its powers as laid down by the Treaties".[79] It therefore seems to shut the door to excessively extensive interpretations of EU values and confirm proposals in the scholarship according to which, except if its content can be linked to other Treaty provisions, art. 2 TEU serves as a minimum safeguard and establishes only red lines that may not be crossed by member states.[80] The recent caselaw provides more content as to what this minimum safeguard is.

Indeed, the CJEU deduced "principles containing legally binding obligations for the Member States", thereby confirming the assumption by part of the scholarship that EU values are not only moral principles but also legal obligations.[81] Pursuant to the

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[76] Even though criticism may always occur regarding the margin of appreciation left to member states.

[77] CJEU, Judgment of the Court (Grand Chamber) of 21 December 2021, Euro Box Promotion, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034.

[78] CJEU, joined cases C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council, 16 February 2022.

[79] CJEU, case C-156/21, Hungary v. Parliament and Council, para. 127; case C-157/21, Poland v. Parliament and Council, para. 145.

[80] SPIEKER, Luke Dimitrios. Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis. German Law Journal, vol. 20, n. 8, p. 1182-1213, 2019.

[81] See, in particular: SCHEPPELE, Kim Lane; KOCHENOV, Dimitry; GRABOWSKA-MOROZ, Barbara. EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union. **Yearbook of European Law**, vol. 39, p. 3-121, 2020.

CJEU, respecting the rule of law, including judicial independence, is "an obligation as to the result to be achieved" derived from EU membership.[82] It is therefore applicable to all EU member states. However, it should be noted that the obligations contained in art. 2 TEU only establish a minimum threshold.

The CJEU indeed expressed the idea of a common denominator to all EU member states, which establishes red lines not to be crossed under any circumstances, while variations are admissible as long as they respect this threshold. EU institutions indeed consider that the rule of law has a specific content at the EU level, rooted in the common constitutional traditions to the EU member states,[83] and which member states cannot depart from. According to this view, the content of the rule of law under article 2 TEU is sufficiently clear and shared by all member states, as it is the result of the combination of constitutional and supranational sources, which have been endorsed by candidate and member states alike.[84] It has been further developed by the CJEU in its caselaw in response to illiberal decline since the ASJP judgment[85] and the recognition of the principle of non-regression in relation to EU values in the Repubblika case[86] also provides indications on the minimum threshold at stake. While doubts remain as to the exact reference point that should be used to assess the principle of non-regression,[87] it nevertheless gives specific content regarding the minimum standard that should be respected by member states. Thus, it is because "the rule of law is a well-established principle, well-defined in its core meaning",[88] at the heart of European constitutional identity, that member states cannot invoke their national constitutional identity to undermine it.[89] This is why the Court highlighted that even though national constitutional identity may imply "a certain degree of discretion in implementing the principles of the

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82 CJEU, case C-156/21, Hungary v. Parliament and Council, para. 231; case C-157/21, Poland v. Parliament and Council, para.169.

83 CJEU, case C-157/21, Poland v. Parliament and Council, para. 291.

84 HILLION, Christophe. **Overseeing the rule of law in the European Union**. SIEPS European Policy Analysis. 2016. Retrieved from: https://www.sieps.se/en/publications/2016/overseeing-the-rule-of-law-in-the-european-union-legal-mandate-and-means-20161epa/Sieps_2016_1_epa, pp. 5-6.

85 CJEU, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses c. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117

86 CJEU, Judgment of the Court (Grand Chamber) of 20 April 2021, Repubblika v. Il-Prim Ministru, ECLI:EU:C:2021:311.

87 See: STEIBLE, Bettina. El continuum de los criterios de Copenhague en un contexto de crisis del Estado de Derecho. Antonio PÉREZ MIRAS, Germán M. TERUEL LOZANO, Silvia ROMBOLI, Giacomo PALOMBINO (dirs.). **Constitucionalismo: diálogos intergenacionales entre España e Italia**, Madrid: BOE-CEPC.; LELOUP, Mathieu, KOCHENOV, Dimitry, & DIMITROVS, A. Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru. **RECONNECT Working Paper**, Leuven, n. 15, 2021. Retrieved from https://ssrn.com/abstract=3875749.

88 COM/2019/343 final.

89 CJEU, case C-156/21, Hungary v. Parliament and Council, para. 234.

rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another".[90]

In this context, the concretization of the rule of law at EU level concerning the appointment procedures of members of constitutional courts may challenge the diversity of constitutional models of justice within the EU and lead to favoring models that are more technical and less political. If the applicability of its caselaw may be understandable when dealing with serious illiberal tendencies that blatantly undermine the core of the common European constitutional heritage, and therefore, the EU constitutional identity,[91] this is more delicate when dealing with other EU member states, as they may indeed consider that it contradicts the principles of conferral and of national constitutional identity. It therefore remains to be seen how the CJEU would resolve cases relating to the appointment procedures of other member states, such as Spain and France, and if its in concreto analysis of such cases would lead to greater lenience towards other models or not. These elements thus emphasize the difficult balance to achieve between establishing European standards on judicial independence while respecting the principles of attribution and national constitutional identity.

4.2. Enhancing rule of law culture through European dialogue on judicial independence and impartiality

However, another interpretation is possible. Indeed, the developments that have taken place at the European level in response to the rule of law crisis actually constitute a useful opportunity to improve the existing deficiencies that exist across EU member states. These should take advantage of this momentum on the rediscovery of the importance of judicial independence in well-functioning democracies and of the sophistication of European standards on judicial independence and impartiality in order to improve their internal systems. It is indeed necessary to restore trust between citizens and their institutions, and to predicate exemplarity, transparency, and impartiality as values that guide public authorities, especially constitutional courts. This is all the more relevant if the national authorities of these states are called to confront the authorities in the states where the rule of law is undermined, either through infringement proceedings or the mechanism provided under article 7 TEU.

It is thus an opportunity to trigger a conversation both at national and European levels on the definition of judicial independence. At the national level, it gives those who advocate for reform in the sense of improving judicial independence and impartiality some leverage. In turn, this may initiate a dialogue at the European level

[90] CJEU, case C-156/21, Hungary v. Parliament and Council, para. 233.

[91] CJEU, joined cases C-156/21, Hungary v. Parliament and Council and C-157/21, Poland v. Parliament and Council, 16 February 2022.

on the different models of constitutional justice that exist at the national level and are compatible with European standards. More importantly, this dialogue should be an opportunity to get national actors back into the definition of judicial models, which, within the frame of the EU, fall within the remit of member states. Therefore, a virtuous dialogue could take place, whereby national authorities identify their own deficiencies in light of European standards, correct them while still defining their own national model of justice, which can in turn feed into the accepted European standards on judicial independence and impartiality. All in all, the response of the European courts – but also of other supranational bodies – to the rule of law crisis allows for the creation and consolidation of a rule of law culture throughout Europe, which should be seized by all relevant actors.

In regard to developing such a rule of law culture, soft law mechanisms also hold relevance. In this respect, the European Commission has reflected EU standards on the rule of law and judicial independence in, *inter alia*, the Rule of Law Framework, its communications on the rule of law, or the annual reports on the rule of law.[92] While these documents are not legally binding, they are useful to the extent that they promote the creation and consolidation of a political culture on the rule of law: the EU institutions' action not only serves to react to rule of law backsliding, but also to actively promote the rule of law as a common value and prevent its violation.[93] The European Commission's annual reports on the rule of law play an interesting role in this regard, as they scrutinize all EU member states. Pursuant to the Commission, this monitoring cycle applicable to all member states aims to develop "a stronger awareness and understanding of developments in the individual member states" and "facilitate cooperation and dialogue in order to prevent problems from reaching the point where a formal response is required".[94] Some scholars have criticized the adoption of such reports on the ground that they are inefficient to combat rule of law backsliding and that systemic attacks on the rule of law in some member states would be diluted in the general report.[95] While this criticism is not unfounded, the annual reports can still be useful to mitigate accusations of double standards and weaponization of EU values against certain member states. In the same line, scrutinizing all EU member states does not preclude to also

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92 MAŃKO, Rafał. **European Court of Justice case law on judicial independence**. Brussels: EPRS | European Parliamentary Research Service, 2023.

93 MARTÍN RODRÍGUEZ, Pablo M. **El Estado de Derecho en la Unión Europea**. Madrid: Marcial Pons, 2021, p. 93.

94 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final.

95 See, e.g.: KELEMEN, R. Daniel. The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools. **Journal of European Integration**, vol. 45, n. 2, p. 223-238, 2022; PECH, Laurent; BÁRD, Petra. **The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values**. European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 2022.

underline the most serious cases. Mirroring the work of the Venice Commission, the adoption of these reports, now published with recommendations, further strengthens the promotion of a rule of law culture within the EU.

5. CONCLUSIONS

The tension between politics and constitutional justice is inevitable. Constitutional courts are called to solve matters of great political and societal relevance, a phenomenon that is further exacerbated in instances of judicialization of politics. Nonetheless, these cases are solved on the basis of legal technique, employing legal arguments and methodology.[96] EU standards on judicial independence seem to emphasize this aspect, reinforcing a more technical approach to constitutional justice. While this approach may be controversial in states that adopt more political models, the analysis demonstrates that EU standards on judicial independence and impartiality, as developed by the CJEU, can positively influence member states, even those that have not experienced a rule of law decline. These standards help identify potential issues in the appointment procedures of national constitutional judges and foster a European dialogue on constitutional justice.

Both the French and Spanish cases are clearly not comparable to other states where the rule of law is under systemic attack and in which there is a clear intent to subject the judiciary, especially the Constitutional Court, to the current executive. However, the existing legal frameworks and/or practices in these states still exhibit areas of concern regarding judicial independence and impartiality. Even though it remains to be seen whether the CJEU would consider these areas of concern as violations of judicial independence and impartiality, they arguably can be questioned under EU law. Therefore, addressing these gaps through the lens of EU standards can enhance the legitimacy and impartiality of constitutional courts, reinforcing public trust in the judiciary. Furthermore, while these shortcomings pose no real threat to the rule of law as of now, they may well become one if certain political parties that are less respectful of democratic principles come to power – something that cannot be ruled out, as recent elections across Europe have shown.

On a bigger scale, the tension between EU standards and national practices highlights the need for a continuous and virtuous dialogue on the definition of constitutional justice. While EU law respects national models of constitutional justice, EU member states must respect the minimum standards elaborated by the CJEU. EU law thus comes to the rescue of national actors – civil society, scholars, judges, and politicians – in identifying and addressing the gaps in the national legal frameworks and

[96] GARCÍA DE ENTERRÍA, Eduardo. La posición jurídica del Tribunal Constitucional en el sistema español: posibilidades y perspectivas. **Revista Española de Derecho Constitucional**, n. 100, p. 39-131, 2014.

practices. In turn, the improved national models of constitutional justice may feed into the EU definition on judicial independence and impartiality, demonstrating that many diverse models are indeed acceptable under EU law. In other words, such dialogue should guarantee that both the EU and national constitutional identities are respected and mutually reinforcing. In sum, this dialogue can contribute to harmonizing the understanding and implementation of judicial independence across the EU, promoting a stronger rule of law culture. The development and enforcement of robust judicial independence standards at both the EU and national levels are crucial for maintaining the integrity of constitutional courts. By embracing these standards and engaging in meaningful dialogue, EU member states can ensure that their constitutional courts remain pillars of democratic societies.

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