

## Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights shapes domestic judicial design

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### 1. Introduction

In *Borgers v. Belgium* the European Court of Human Rights (hereinafter the 'ECtHR' or the 'Strasbourg Court') held that the opinion of the Advocate General at the Belgian Court of Cassation cannot be regarded as neutral from the point of view of the parties to the cassation proceedings.<sup>1</sup> It concluded that the Advocate General's participation in the Court's deliberations, coupled with the absence of the ability for the applicant to submit his observations on the Advocate General's arguments, were incompatible with Article 6(1) of the European Convention on Human Rights (hereinafter the 'ECHR' or the 'Convention').<sup>2</sup> Since then, the ECtHR has been engaged in something of a quest against advocates general and similar judicial officers.<sup>3</sup> As a result, Belgium, Portugal, the Netherlands and France have had to revamp the role of the advocate general, an institution that has worked rather well for centuries.<sup>4</sup>

However, this is an example of just one judicial design issue, where the ECtHR forced the Member States of the Council of Europe (hereinafter the 'CoE') to adopt wide-ranging judicial reform and to restructure their judicial systems in a way that goes far beyond remedying individual violations. To give a few more examples, the United Kingdom had to revamp its system of military courts,<sup>5</sup> Turkey was forced to abolish its State Security Courts altogether,<sup>6</sup> the Netherlands was required to allow a full judicial review of administrative decisions of the Crown,<sup>7</sup> francophone countries had to revise the dual role of their Councils of State that

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1 ECtHR, *Borgers v. Belgium*, 30 October 1991, application no. 12005/86, para. 26.

2 *Ibid.*, para. 29.

3 For further details, see Section 2.1.

4 See M. Lasser, 'The European Pasteurization of French Law', (2005) 90 *Cornell Law Review*, pp. 1049-1051, 1060-1062; F. Sudre, 'Vers la normalisation des relations entre le Conseil d'Etat et la Cour européenne des droits de l'homme', (2006) *Revue française de droit administratif*, p. 286; N. Krisch, 'The Open Architecture of European Human Rights Law', (2008) 71 *Modern Law Review*, pp. 194-196; and J. Bell, 'Interpretative Resistance' Faced with the Case-law of the Strasbourg Court', (2008) 14 *European Public Law*, p. 134; K. Lemmens, 'But Pasteur was French: Comments on Mitchel Lasser's "The European Pasteurization of French Law"', in N. Huls et al. (eds), *The Legitimacy of Highest Courts Rulings: Judicial Deliberations and Beyond* (2009), pp. 166-174; B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (2010).

5 For further details, see Section 2.2.

6 This was the result of a series of Strasbourg judgments in the ECtHR, *Incal v. Turkey* [GC], 9 June 1998, application no. 22678/93, paras. 67-72; ECtHR, *Ciraklar v. Turkey*, 28 October 1998, application no. 19601/92, para. 39; ECtHR, *Şahiner v. Turkey*, 25 September 2001, application no. 29279/95, paras. 33-47.

7 This was the result of the *Bentham* judgment (ECtHR, *Bentham v. the Netherlands* [GC], 23 October 1985, application no. 8848/80, paras. 32-44). For further details see P. van Dijk, 'The Bentham Case and its Aftermath in the Netherlands', (1987) 34 *Netherlands International Law Review*, no. 1, pp. 5-24.

operated both as decision-making and advisory bodies,<sup>8</sup> Turkey and Ukraine were asked to change the composition of their judicial councils,<sup>9</sup> the Prince of Liechtenstein was indirectly asked to reinstate the President of the Liechtenstein Administrative Court who openly disagreed with him,<sup>10</sup> and, finally, many believe that the Blair Government's constitutional reform that transformed the Appellate Committee of the House of Lords into the Supreme Court of the United Kingdom was triggered by Strasbourg's interpretation of the right to a fair trial.<sup>11</sup>

This list of judicial reforms demonstrates the far-reaching effects of Strasbourg judgments on the structural features of domestic judicial systems. Interestingly, it also shows that the ECtHR has influenced not only judiciaries in countries in transition towards democracy, but also judicial systems in developed democracies. In fact, the ECtHR's case law has hit those judicial institutions with long traditions, such as advocates general, the House of Lords, and the Councils of State, particularly badly. Even though there is a growing body of literature on compliance with the Strasbourg case law in general,<sup>12</sup> as well as some more specific studies,<sup>13</sup> very little has been written on the impact of the ECtHR's case law on domestic judicial reforms in a systematic way.<sup>14</sup> This article attempts to fill this gap. It explains how the ECtHR has managed to interfere with domestic judicial design in the first place, in which areas the Strasbourg Court's interference with domestic judicial design has been the most intensive, and what broader repercussions this ECtHR case law has.

The structure of the paper is as follows. Section 2 identifies the 'judicial design agenda' of the ECtHR and the three judicial design issues that this article will delve into in more detail: advocates general, military courts, and the disciplining of judges. It explains the puzzle of how the ECtHR can intervene in the domestic judicial design in the first place and in what areas it is most active. More specifically, it analyses what the ECtHR requires from the CoE Member States regarding advocates general, military courts, and the disciplining of judges. Section 3 explores the impact of the ECtHR's decisions on judicial politics and discusses the implications of the ECtHR's involvement in domestic judicial design. Section 4 concludes.

## 2. The 'judicial design agenda' of the ECtHR

The aim of this section is to show how domestic judicial design issues reach the ECtHR, what potential traps await the ECtHR in adjudicating these issues and how its institutional limits may affect the ECtHR's functioning as an engineer of domestic judicial systems and the separation of powers more generally. It argues that the ECtHR has been increasingly called upon to assess judicial design issues that have serious repercussions for the separation of powers within CoE Member States, and that this is going unnoticed to a large extent.

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8 This was the result of a series of Strasbourg judgments in the ECtHR, *Procola v. Luxembourg*, 28 September 1995, application no. 14570/89, paras. 43-45; ECtHR, *McGonnell v. the United Kingdom*, 8 February 2000, application no. 28488/95, para. 55; ECtHR, *Stafford v. United Kingdom* [GC], 28 May 2002, application no. 46295/99, para. 78; ECtHR, *Kleyn and Others v. the Netherlands* [GC], 6 May 2003, application nos. 39343/98, 39651/98, 43147/98 and 46664/99, paras. 198-200. For further details see D. Kosaf, 'Policing Separation of Powers: A New Role for the European Court of Human Rights?', (2012) 8 *European Constitutional Law Review*, pp. 41-46.

9 For further details, see Section 2.3.

10 ECtHR, *Wille v. Liechtenstein* [GC], 28 October 1999, application no. 28396/95. See also ECtHR, *Volkov v. Ukraine*, 9 January 2013, application no. 21722/11, para. 208 (discussed in Section 2.3).

11 See e.g. Lord David Hope of Craighead, *The Reform of the House of Lords*, (2008) 60 *Revue internationale de droit comparé*, no. 2, pp. 257-264, at paras. 1.4 and 3.1-3.3. See also M. Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (2004), p. 179.

12 See e.g. J.P. Trachtman, 'International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law', (2010) 11 *Chicago Journal of International Law*, p. 127; C. Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (2014); K.J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014); C. Hillebrecht, 'The Power of Human Rights Tribunals: Compliance with the European Court of Human Rights and Domestic Policy Change', (2014) 20 *European Journal of International Relations*, p. 1100; J. Gerards & J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (2014); A. Donald & P. Leach, *Parliaments and the European Court of Human Rights* (2016).

13 See e.g. M. Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject', (2003) 14 *European Journal of International Law*, p. 1023; B. Algan, 'The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey', (2008) 9 *German Law Journal*, p. 2237; N. Krisch, 'The Open Architecture of European Human Rights Law', (2008) 71 *Modern Law Review*, p. 183; L. Helfer & E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', (2014) 68 *International Organization*, p. 77.

14 For an exception see D. Kosaf & L. Lixinski, 'Domestic Judicial Design by International Human Rights Courts', (2015) 105 *American Journal of International Law*, p. 713.

The structure of this section departs from a traditional treatment of the ECtHR's case law. It proceeds neither on a chronological basis<sup>15</sup> nor on the basis of relevant articles. Instead, it centres on 'judicial design issues', irrespective of the article of the ECHR under which a particular issue has been raised. The reason why this section proceeds on an 'issues' basis is threefold. First, it looks at the ECtHR's case law from the separation of powers angle instead of the conventional human rights angle. Second, it groups together cases that have rarely been considered as having something in common and thus it reveals unexplored connections in the ECtHR's case law. Third, it examines the ECtHR's case law from the point of view of national politicians who are concerned more about what the ECtHR requires them to do in order to bring their judiciaries into line with the Convention rather than under which article the ECtHR eventually tackled a particular judicial design issue.

Due to the limited scope, only measures affecting professional judges will be addressed. More specifically, this section will look at the following three sets of issues: (1) the role of *commissaires du gouvernement*, advocates general and similar judicial officers; (2) the jurisdiction and composition of military courts; and (3) the disciplining of judges.

### 2.1. *Commissaires du gouvernement*, advocates general and similar judicial officers

Before this section delves into the relevant Strasbourg case law, it is necessary to explain the role of *commissaires du gouvernement* and advocates general, since they are peculiar to (primarily) francophone judicial systems and many countries do not have an equivalent institution. *Le commissaire du gouvernement* at the French Council of State, contrary to what the title suggests, was not at all the commissaire sent by the Government, but a member of the Council of State itself to whom was 'entrusted the task of advising the judicial body as to the proper grounds for decision, according to his particular view of administrative law'.<sup>16</sup> Unlike the *amicus curiae* in most common law systems, he was not a party to the proceedings. He was conceived as part of the judicial function and he was a judge.<sup>17</sup>

*Le commissaire du gouvernement* in particular ensured the consistency of the case law and its coherence with the existing corpus of administrative law, assisted in the development of the case law and doctrine more generally, and signaled a potential reversal of precedent.<sup>18</sup> For that reason, he put his conclusions in writing, published his opinions separately and attended (but did not vote and generally did not speak at) the deliberation of the judges. A more proper translation into English that would remove the ambiguous connotations of the French title is thus 'the commissioner of the law'.<sup>19</sup> This institution was considered so successful that other francophone countries soon transplanted it into their judicial systems and even the office of the Advocate General of the European Court of Justice was modelled thereon.<sup>20</sup> Even though there are differences between these 'judicial officers', for the sake of simplicity this article will from now on, when discussing their role without a link to a particular country, refer to them as advocates general.

The ECtHR initially considered advocates general to be compatible with the Convention. In 1970 it held in *Delcourt v. Belgium* that the independence and impartiality of the Belgian Court of Cassation was not adversely affected by the presence of the *avocat général* (a member of the *Procureur général's* department),<sup>21</sup> a person representing another branch of government, at its deliberations. However, as mentioned in the introduction, it changed its view in *Borgers v. Belgium* two decades later and found the privileged position of the Advocate

15 For a chronological analysis of the ECtHR's case law on the concept of the separation of powers see D. Popović, 'European Court of Human Rights and the Concept of Separation of Powers', in M. Prabhakar (ed.), *Separation of Powers: Global Perspectives* (2008), p. 194. See also D. Kosař, *Policing Separation of Powers: A New Role for the European Court of Human Rights?*, (2012) 8 *European Constitutional Law Review*, p. 33.

16 B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (2010), p. 7.

17 See the decision of the Council of State (France), CE 10 July 1957, *Gervaise*, Leb. 365; J. Bell, 'Interpretative Resistance' Faced with the Case-law of the Strasbourg Court', (2008) 14 *European Public Law*, p. 134.

18 For further details, see B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (2010), pp. 7-21, 45, 166, 217-220; N. Rainaud, *Le commissaire du gouvernement près le Conseil d'État* (1996).

19 B. Latour, *The Making of Law: An Ethnography of the Conseil d'État* (2010), p. 7. Latour tries to distinguish the 'commissioner of the law' (*le commissaire du gouvernement* in French) from the 'government envoy' (also *le commissaire du gouvernement* in French).

20 N. Burrows & R. Greaves, *The Advocate General and EC Law* (2007), p. 2.

21 ECtHR, *Delcourt v. Belgium*, 17 January 1970, application no. 2689/65, paras. 27-38.

General in the Belgian Court of Cassation to violate the Convention.<sup>22</sup> Since then the ECtHR has questioned the role of the Attorney General at the Supreme Court of Portugal,<sup>23</sup> the Advocates General at the French<sup>24</sup> and the Dutch<sup>25</sup> Courts of Cassation, and the *commissaires du gouvernement* at the French Council of State.<sup>26</sup>

On what ground did the ECtHR find the advocates general incompatible with the Convention? It is not possible to do justice to the complexity of the relevant Strasbourg case law in this short article,<sup>27</sup> but it can be summarised as follows. In all of the cases mentioned above the ECtHR found a violation of the right to a fair trial. Most often, it spoke of a breach of the right to adversarial proceedings, but its case law was inconsistent on this point.<sup>28</sup> The ECtHR was particularly concerned about three issues concerning advocates general: (1) their presence at the deliberations of the bench of the respective court; (2) the fact that litigants were not informed about the advocate general's conclusions in advance and were unable to reply to the submissions of the advocate general at the end of the hearing; and (3) the fact that the advocate general was given the reporting judge's draft judgment prior to the hearing, but the parties were not.

Initially, the ECtHR found all these three aspects of the privileged position of the advocate general to be incompatible with the right to a fair trial.<sup>29</sup> Later on, it revised its staunch position on the second and third aspects. On the second aspect, the ECtHR proved to be far more lenient in *Kress v. France* than in earlier cases and gave the domestic authorities some discretion regarding the precise form in which the parties are informed about the tenor of the advocate general's conclusions and can respond to them.<sup>30</sup> Interestingly, the ECtHR declined to revisit this issue in the context of the privileges of the Advocate General before the European Court of Justice.<sup>31</sup> Regarding the third aspect, the shift in the ECtHR's position was even more obvious. While in *Reinhardt and Slimane-Kaïd v. France* it found the privileged access of the Advocate General at the French Court of Cassation to the reporting judge's draft judgment clearly incompatible with the Convention,<sup>32</sup> in *Kress v. France* and *Martinie v France* it did not question the same privileged access of the *commissaire du gouvernement* at all.<sup>33</sup>

However, the Strasbourg Court remained firm on the first aspect and consistently found the presence of the advocate general at the deliberations of the bench to be in violation of the right to a fair trial, regardless of whether his participation was active or passive.<sup>34</sup> Its position eventually brought about significant changes in the French Court of Cassation's organization and procedure<sup>35</sup> and caused even more far-reaching changes to the role of the *commissaire du gouvernement* at the French Council of State. In 2009, after almost 180 years of existence, the *commissaire du gouvernement* was renamed '*rapporteur public*', he can no longer attend the deliberation of judges and at the hearing parties may present brief oral comments after the delivery of the public rapporteur's conclusions.<sup>36</sup> Portugal and the Netherlands buckled under the Strasbourg pressure even earlier.

22 See also ECtHR, *Vermeulen v. Belgium*, 20 February 1996, application no. 19075/91, para. 33; ECtHR, *Van Orshoven v. Belgium*, 25 June 1997, application no. 20122/92, paras. 39-42.

23 ECtHR, *Lobo Machado v. Portugal* [GC], 20 February 1996, application no. 15764/89, paras. 28-32.

24 ECtHR, *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, application nos. 23043/93 and 22921/93, paras. 105-107.

25 ECtHR, *K. D. B. v. the Netherlands*, 27 March 1998, application no. 21981/93, paras. 43-44.

26 ECtHR, *Kress v. France* [GC], 7 June 2001, application no. 39594/98, paras. 63-87; ECtHR, *Martinie v. France* [GC], 12 April 2006, application no. 58765/00, paras. 53-55.

27 For an overview of the development of the Strasbourg jurisprudence on this issue, see N. Krisch, 'The Open Architecture of European Human Rights Law', (2008) 71 *Modern Law Review*, pp. 192-196; J. Bell, 'Interpretative Resistance' Faced with the Case-law of the Strasbourg Court', (2008) 14 *European Public Law*, p. 134 (and references cited by these two authors).

28 See e.g. Concurring Opinion of Judge Pettiti and Partly Dissenting Opinion of Judge de Meyer in *Reinhardt and Slimane-Kaïd v. France*, application nos. 23043/93 and 22921/93.

29 See e.g. ECtHR, *Lobo Machado v. Portugal* [GC], 20 February 1996, application no. 15764/89, paras. 31-32; ECtHR, *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, application nos. 23043/93 and 22921/93, paras. 105-107.

30 ECtHR, *Kress v. France* [GC], 7 June 2001, application no. 39594/98, para. 76.

31 ECtHR, *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), 20 January 2009, application no. 13645/05.

32 ECtHR, *Reinhardt and Slimane-Kaïd v. France*, 31 March 1998, application nos. 23043/93 and 22921/93, para. 105.

33 ECtHR, *Kress v. France* [GC], 7 June 2001, application no. 39594/98; ECtHR, *Martinie v. France* [GC], 12 April 2006, application no. 58765/00.

34 ECtHR, *Martinie v. France* [GC], 12 April 2006, application no. 58765/00, paras. 53-55.

35 See M. Lasser, 'The European Pasteurization of French Law', (2005) 90 *Cornell Law Review*, pp. 1049-1051, 1060-1062; and the speech by Procureur général Burgelin of 11 January 2002, available at <<http://www.courdecassation.fr/rubrique36.html>> (last visited 10 March 2017).

36 See *Décret n° 2009-14 du 7 janvier 2009 relatif au rapporteur public des juridictions administratives et au déroulement de l'audience devant ces juridictions*, available at <<http://www.legifrance.gouv.fr>> (last visited 10 March 2017).

## 2.2. Military courts

The second category of judicial design issues to be analysed in this article concerns military courts. The compatibility of military courts with the Convention was mostly addressed in Turkish<sup>37</sup> and British cases.<sup>38</sup> Given the focus of this article, this section will focus primarily on British cases as the Strasbourg case law on the British courts martial shows the interference in the domestic judicial design more clearly than the Turkish cases.

As with its position on advocates general, the ECtHR initially took a deferential stance towards military courts. For instance, in the *Engel* case it held that the majority of military judges on the panel of the then Dutch Supreme Military Court (composed of two civilian judges and four military judges), in a case involving offences against military discipline, met the requirements of Article 6 ECHR.<sup>39</sup>

However, in the more recent line of case law on British courts martial the ECtHR intensified its review and made clear its institutional choices. In *Findlay* it held that the General Court Martial did not satisfy Article 6 ECHR, because of the multiple roles played in the proceedings by the ‘convening officer’.<sup>40</sup> The ‘convening officer’ played a key prosecuting role, but at the same time appointed the members of the court martial, had the power to dissolve it, and, in addition, acted as a ‘confirming officer’ who ratified the decision of the court martial.<sup>41</sup>

In the meantime, the United Kingdom revamped its system of military courts and abolished the posts of ‘convening officer’ and ‘confirming officer’.<sup>42</sup> Under the new model, a court martial consisted of the Permanent President of Courts Martial (an army Lieutenant Colonel due to remain in his post for four years until his retirement), a legally qualified civilian judge advocate and two Captains.

But this institutional change still did not satisfy the Strasbourg judges who in *Morris v. UK* again found the new model in violation of Article 6 ECHR.<sup>43</sup> The ECtHR, not unlike a Kelsenian constitutional court in an abstract review procedure, scrutinised all the institutional features of the revamped courts martial and held that while considering the permanent president to be a ‘significant guarantee of independence’ and the presence of the judge advocate to be an ‘important guarantee’, these and other safeguards (rules on eligibility for selection and the oath taken by members) were considered insufficient to exclude the risk of outside pressure being brought to bear on the ordinary officer members, because they were appointed on an ad hoc basis,<sup>44</sup> were of relatively junior rank,<sup>45</sup> ‘had no legal training, (...) [and] remained subject to army discipline and reports’.<sup>46</sup> This rule de facto meant that military courts must meet the same requirements as civilian courts not only if they try civilians, but also if they try military officers. By so holding, the *Morris* judgment questioned the very raison d’être of military tribunals, and again pushed them towards being much more like ordinary courts.

Less than two years later, the Grand Chamber stepped in and revisited these issues in the *Cooper*<sup>47</sup> and *Grievés*<sup>48</sup> cases. The ECtHR eventually found no violation of the principle of judicial independence in

37 See e.g. ECtHR, *Incal v. Turkey* [GC], 9 June 1998, application no. 22678/93, paras. 67-72; ECtHR, *Ciraklar v. Turkey*, 28 October 1998, application no. 19601/92, para. 39; ECtHR, *Şahiner v. Turkey*, 25 September 2001, application no. 29279/95, paras. 33-47.

38 Applications concerning military courts were also lodged against other countries. However, most of these cases are rather old and were often decided by the European Commission of Human Rights (and not by the ECtHR). For an exception see ECtHR, *Maszni v. Romania*, 21 September 2006, application no. 59892/00.

39 ECtHR, *Engel and Others v. The Netherlands* [GC], 8 June 1976, application nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 89.

40 ECtHR, *Findlay v. the United Kingdom*, 25 February 1997, application no. 22107/93, paras. 74-78. See also ECtHR, *Coyne v. the United Kingdom*, 24 September, application no. 25942/94, para. 58; ECtHR, *Cable and Others v. the United Kingdom*, 18 February 1999, application no. 24436/94, para. 21; ECtHR, *Wilkinson and Allen v. the United Kingdom*, 6 February 2001, application nos. 31145/96 and 35580/97, para. 24; ECtHR, *Mills v. the United Kingdom*, 5 June 2001, application no. 35685/97, para. 25.

41 That meant that the decision of the court martial was not effective until he ratified it.

42 See the United Kingdom Armed Forces Act 1996.

43 ECtHR, *Morris v. the United Kingdom*, 26 February 2002, application no. 38784/97, paras. 59-72.

44 *Ibid.*, para. 70.

45 *Ibid.*, para. 72.

46 *Ibid.*, para. 72. The ECtHR also made clear that ‘[t]he position of the military members of the court martial cannot generally be compared with that of a member of a civilian jury, who is not open to the risk of such pressures’ (para. 72 *in fine*).

47 ECtHR, *Cooper v. the United Kingdom* [GC], 16 December 2003, application no. 48843/99.

48 ECtHR, *Grievés v. the United Kingdom* [GC], 16 December 2003, application no. 57067/00.

*Cooper*,<sup>49</sup> which concerned the Air Force court martial system. It distinguished the Air Force system from the army system reviewed in *Morris* on the very narrow ground that the lack of legal training of the two 'ordinary' members of the RAF court martial – a flight lieutenant and a squadron leader – was made up for by the directions given by the judge advocate and by the briefing notes drawn up by the RAF's Courts-Martial Administration Unit.<sup>50</sup> However, the Grand Chamber reached the opposite conclusion in *Grievés*, which concerned the Royal Navy court martial system.<sup>51</sup> The Royal Navy system differed from the Air Force system in the following aspects: the post of the permanent president did not exist in the naval system, judge advocates were serving naval officers instead of civilians and the briefing notes were less detailed.<sup>52</sup> These minor distinctions, some of which clearly reflected the specifics of the navy,<sup>53</sup> led the Grand Chamber to the opposite conclusion from that in the *Cooper* case.

This pair of cases shows that serving military officers cannot sit on the military court as they could be subject to reporting; the presence of a civilian and a permanent military judge on the military bench is required; and all members of military tribunals, including ordinary members, must either have legal qualifications or be properly instructed by an experienced lawyer, because otherwise their lack of legal qualifications would undermine their independence. In other words, if the military courts are to survive Strasbourg scrutiny they must resemble ordinary courts in their composition and other key features.

Regarding the Strasbourg stance on military judges and tribunals, we might thus conclude that the ECtHR not only de facto outlawed the jurisdiction of military courts over civilians<sup>54</sup> in times of peace and the presence of military judges in criminal trials against civilians, but also significantly curbed the States' design choices regarding the structuring of military courts established in order to try members of the armed forces.<sup>55</sup> All of these powers that cannot be exercised by military courts thus de facto must be transferred to ordinary courts. At the same time, this process often brings military courts to the brink of their abolition, because they no longer provide extra value in comparison with ordinary courts. This is precisely what happened in Turkey which was forced to transfer the power to try military personnel threatening national security or linked to organised crime (i.e. for other than military crimes) from the military courts to civilian courts<sup>56</sup> and to abolish its State Security Courts altogether in 2004.

### 2.3. The disciplining of judges

The third category of domestic judicial design issues the ECtHR has engaged in concerns the disciplining of judges. It is understandable that the ECtHR has been particularly vigilant in this area as disciplinary proceedings may effectively end a judge's career on the bench, which may interfere with judicial independence, the cornerstone of the rule of law.

The first cases reviewing the decisions of disciplinary panels against judges that came before the Strasbourg Court, *Pitkevich v. Russia*<sup>57</sup> and the Italian cases,<sup>58</sup> were not so much about institutional design, but they are important for another reason. They show that disciplined judges may invoke before the ECtHR not only their right to a fair trial, but also other rights guaranteed by the Convention.<sup>59</sup>

49 *Cooper*, supra note 47, paras. 105-134. However, the Concurring Opinion of Judge Costa attests that it was a very close call.

50 *Ibid.*, paras. 123-124. The Grand Chamber also took into account that the members of a court martial cannot be reported on in relation to their judicial decision-making (para. 125).

51 *Grievés*, supra note 48, paras. 74-91.

52 *Ibid.*, paras. 81-82 and 85-90.

53 See United Kingdom Government's argument in *Grievés*, supra note 48, para. 88.

54 See the Turkish cases cited in note 37, supra; ECtHR, *Maszni v. Romania*, 21 September 2006, application no. 59892/00, para. 51.

55 See the cases against the United Kingdom discussed in this section.

56 The competence to try military personnel for non-military offences was also restricted. See 'Turkey military court law passed', BBC News, 9 July 2009, available at <<http://news.bbc.co.uk/2/hi/europe/8142257.stm>> (last visited 10 March 2017).

57 ECtHR, *Pitkevich v. Russia* (dec.), 8 February 2001, application no. 47936/99.

58 See ECtHR, *N. F. v. Italy*, 2 August 2001, application no. 37119/97, paras. 26-34; ECtHR, *Maestri v. Italy* [GC], 17 February 2004, application no. 39748/98, para. 43.

59 In the *Pitkevich* case, the applicant was dismissed for proselytising on the bench and before the ECtHR she invoked freedom of religion (Art. 9 ECHR), freedom of expression (Art. 10 ECHR), freedom of association (Art. 11 ECHR), and the prohibition of discrimination (Art. 14 ECHR). In *N. F. v. Italy* the applicant was reprimanded by the National Council of the Judiciary for his membership of the Freemasons, which the ECtHR found to be in violation of his freedom of association (Art. 11 ECHR).

The reliance of domestic judges on other than fair trial rights was understandable, since until recently the ECtHR has not considered disciplinary proceedings as falling within the ambit of the ‘civil limb’ of Article 6 ECHR. This changed in *Olujčić v. Croatia*.<sup>60</sup> The applicant was a judge and, at the same time, the President of the Supreme Court. In 1996 the National Judicial Council instituted disciplinary proceedings against him, among other things, about allegations that he used his position to protect the financial activities of two individuals known for their criminal activities. During the disciplinary proceedings the applicant stated that the proceedings against him had been politically motivated because of his opposition to the State’s senior officials with regard to the concept of the judiciary. In 1998 the National Judicial Council found the above-mentioned allegations established and the applicant was dismissed from his post as a judge of the Supreme Court.

Before the ECtHR Mr Olujčić alleged several violations of Article 6 ECHR. The ECtHR in its landmark judgment held that the National Judicial Council satisfied the criteria of an independent tribunal established by law under Article 6(1) ECHR<sup>61</sup> and, eventually, concluded that the ‘civil law’ limb of Article 6 ECHR was applicable to the case.<sup>62</sup> As to the substantive Article 6 claims, the ECtHR found four violations – the lack of objective impartiality of three members of the National Judicial Council, the unjustified exclusion of the public from the proceedings before the National Judicial Council, the violation of the principle of equality of arms, and the excessive length of the proceedings.<sup>63</sup>

Interestingly, in the follow-up case that raised similar issues, *Özpinar v. Turkey*,<sup>64</sup> the ECtHR avoided the Article 6 issues and chose a different path. The facts of the case are as follows. The applicant became a judge in 1997. In 2002 a disciplinary investigation was opened against her in particular due to her close relationship with a lawyer whose clients had allegedly benefited from favourable decisions on her part, her repeated lateness for work and her unsuitable clothing and make-up. The Turkish High Council of Judges and Public Prosecutors eventually decided to remove Ms Özpinar from office as a judge, mainly on the ground that ‘by her inappropriate attitudes and relationships’ she had ‘undermined the dignity and honour of the profession’.<sup>65</sup> Ms Özpinar subsequently lodged an application to the ECtHR, where she relied on Articles 6 (right to a fair hearing), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination), alleging that her dismissal by the judicial council had been based on aspects of her private life and that no effective remedy had been available to her.

As mentioned above, the ECtHR did not address the Article 6 issues. Instead, it held that the criteria for triggering the ‘civil law’ limb of Article 6 ECHR<sup>66</sup> were not met, because the Turkish Constitution explicitly prohibits judicial review of decisions of the Turkish High Council of Judges and Public Prosecutors.<sup>67</sup> However, this conclusion is highly problematic. The majority in *Özpinar* failed to distinguish the *Özpinar* case from the *Olujčić* case,<sup>68</sup> since the majority did not explain why the Croatian National Judicial Council is to be regarded as an independent tribunal established by law for the purposes of Article 6 ECHR,<sup>69</sup> whereas the Turkish High Council of Judges and Public Prosecutors is not.<sup>70</sup> A thorough analysis of this issue in the joint separate opinion of Judges Sajó and Popović, in fact, shows that there are strong arguments in favour of the conclusion that the Turkish High Council of Judges and Public Prosecutors meets the criteria for being a ‘tribunal’ under Article 6(1) ECHR.<sup>71</sup>

Nevertheless, as suggested above, the ECtHR found another way of tackling the dismissal of Ms Özpinar on the merits. It did so on the basis of her Article 8 and Article 13 complaints. As to the Article 8 claim, the ECtHR observed that the dismissal decision had been directly related to Ms Özpinar’s conduct, both

60 See ECtHR, *Olujčić v. Croatia*, 5 February 2009, application no. 22330/05, para. 16.

61 *Ibid.*, paras. 39-43.

62 *Ibid.*, para. 44.

63 *Ibid.*, paras. 68, 76, 85 and 91.

64 ECtHR, *Özpinar v. Turkey*, 19 November 2010, application no. 20999/04.

65 *Ibid.*, paras. 5-22.

66 *Ibid.*, para. 30. See also ECtHR, *Apay v. Turkey* (dec.), 11 December 2007, application no. 3964/05.

67 See Art. 159 of the Turkish Constitution. Cf. ECtHR, *Olujčić v. Croatia*, 5 February 2009, application no. 22330/05, paras. 35-37.

68 In fact, neither the majority nor judges writing separately refer to the *Olujčić* judgment.

69 See the discussion on the *Olujčić* case above.

70 Regarding this issue, see also ECtHR, *Nazsiz v. Turkey* (dec.), 26 May 2009, application no. 22412/05.

71 See the Joint Separate Opinion of Judge Sajó and Judge Popović in ECtHR, *Özpinar v. Turkey*, 19 November 2010, application no. 20999/04.

professionally and in private, and, moreover, her right to respect for her reputation had been at stake.<sup>72</sup> Hence there was interference with Ms Özpınar's right to respect for her private life. The ECtHR then distinguished between her 'on-the-bench' and 'off-the-bench' behaviour and concluded that the criticisms in the disciplinary proceedings against the applicant concerning her 'on-the-bench' behaviour had not constituted interference with her private life.<sup>73</sup> But the investigation, according to the ECtHR, had not substantiated those accusations and had taken into account numerous actions by Ms Özpınar that were unrelated to her professional activity,<sup>74</sup> and she was denied adversarial proceedings before an independent and impartial supervisory body.<sup>75</sup> For these reasons the ECtHR held that the interference with the applicant's private life had not been proportionate and found a violation of Article 8 ECHR.

The *Özpınar* case thus implicitly suggests that the High Council of the judiciary, which is composed of judges as well as non-judges, is not an appropriate body for disciplining judges. In other words, the message this judgment conveys is that judges should be judged only by judges, which arguably interferes with the domestic separation of powers.

However, the ECtHR went even further in *Volkov v. Ukraine*,<sup>76</sup> which concerned the dismissal of a Supreme Court judge. The first stage of the disciplinary proceedings took place before the Ukrainian High Council of Justice (hereinafter also 'UHCJ').<sup>77</sup> The ECtHR identified four structural deficiencies at this stage: (1) judges were in the minority on the UHCJ; (2) judges on the UHCJ were not elected by their peers; (3) only four out of twenty members of the UHCJ worked there on a full-time basis; and (4) the presence of the Prosecutor General on the UHCJ.

As regards the first issue, the ECtHR opined that in order for the tribunal to be considered impartial, at least half of its membership, including the Chairman, should be composed of judges.<sup>78</sup> In coming to this conclusion the ECtHR relied heavily on the European Charter on the statute for judges, which requires the substantial participation of judges in the relevant disciplinary body.<sup>79</sup> Since only three out of sixteen members of the UHCJ, who attended the hearing in the applicant's case, were judges, this criterion had not been met. The second design issue is closely related.<sup>80</sup> The ECtHR held, relying on the Venice Commission, that it is not enough to have at least half of the UHCJ membership appointed from the judiciary, but these judicial members of the UHCJ must also be elected by their peers.<sup>81</sup> Ukraine had failed to meet this criterion, because out of 20 members only three were judges elected by their peers.

Third, only four members of the UHCJ worked there on a full-time basis, while the other members continued to work and receive a salary outside the H CJ. According to the ECtHR, this inevitably 'involves their material, hierarchical and administrative dependence on their primary employers and endangers both their independence and impartiality'.<sup>82</sup> The ECtHR also suggested that the Minister of Justice and the Prosecutor General, who were *ex officio* members of the H CJ, should not sit on the UHCJ at all, since the loss of their primary job entailed resignation from the UHCJ.<sup>83</sup> Finally, the ECtHR again referred to the Venice Commission's views and suggested that the inclusion of the Prosecutor General and other prosecutors as members of the UHCJ raised further concerns, as it could have a deterrent effect on judges and be perceived as a potential threat.<sup>84</sup> Due to these structural deficiencies in the proceedings before the UHCJ,

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72 ECtHR, *Özpınar v. Turkey*, 19 November 2010, application no. 20999/04, para. 47.

73 *Ibid.*, para. 71.

74 *Ibid.*, para. 74. On this issue, see also ECtHR, *K.A. and A.D. v. Belgium*, 17 February 2005, application nos. 42758/98 and 45558/99 (dealing with a judge who took part in sadomasochistic practices).

75 ECtHR, *Özpınar v. Turkey*, 19 November 2010, application no. 20999/04, para. 77-78.

76 ECtHR, *Volkov v. Ukraine*, 9 January 2013, application no. 21722/11.

77 Due to limited space, this article cannot analyse the subsequent stages in the disciplinary proceedings, the parliamentary stage and judicial review by the Higher Administrative Court.

78 ECtHR, *Volkov v. Ukraine*, 9 January 2013, application no. 21722/11, para. 109.

79 *Ibid.*, para. 109.

80 *Ibid.*, para. 111.

81 *Ibid.*, para. 112.

82 *Ibid.*, para. 113.

83 *Ibid.*, para. 113.

84 *Ibid.*, para. 114.

the ECtHR concluded that those proceedings had not been compatible with the principles of independence and impartiality required by Article 6(1) ECHR.<sup>85</sup>

The Strasbourg case law on disciplining judges reveals several important insights. First, institutional changes in this area are driven by judges themselves who, interestingly, often rely on their substantive rather than fair trial rights. Second, by requiring at least half the members of the disciplinary panels to be judges, the ECtHR de facto rules out impeachment and other special mechanisms, and instead suggests that judges should be judged only by judges. Finally, in *Volkov* the ECtHR read the non-binding soft law on judicial councils,<sup>86</sup> created mainly by judges themselves,<sup>87</sup> into the Convention, and thus indirectly prioritised a particular model of court administration, namely the strong judicial council model based on the Italian *Consiglio Superiore de la Magistratura*, which was heavily endorsed by the European Union and the Council of Europe in the new EU Member States during the accession process.<sup>88</sup> It remains to be seen whether this incorporation in the Convention of the soft law on judicial design will become a widespread practice.

### 3. The ECtHR's 'judicial design agenda' and domestic (judicial) politics

The previous section shows that the ECtHR has been increasingly engaging in domestic judicial design. It has forced francophone countries to change the role of advocates general before civil, criminal and administrative courts and prompted the United Kingdom to revamp the structure of its military courts. But this is just the tip of the iceberg. The ECtHR also, among other things, required the Netherlands to allow full judicial review of administrative decisions of the Crown,<sup>89</sup> asked francophone countries to revise the dual role of their Councils of State that operated both as decision-making and advisory bodies,<sup>90</sup> and triggered the transformation of the Appellate Committee of the House of Lords into the Supreme Court of the United Kingdom. These are far-reaching changes that go beyond the remedy for a violation in an individual case. Moreover, even those cases that seemingly concern only developing democracies, such as the *Volkov* judgment, have significant repercussions for old democracies. As the ECtHR cannot maintain double standards in its case law, its requirements regarding the composition of judicial councils, developed in *Volkov*, may soon start haunting the Western democracies.

Second, the ECtHR also leaves little room for manoeuvre for domestic authorities in how to implement its judgments touching upon judicial design. In *Martinie v. France* the ECtHR was not willing to engage in the judicial dialogue and made clear that the presence of the advocate general at the deliberation of the bench, regardless of whether it was active participation or mere attendance, violates the Convention.<sup>91</sup> Similarly, in *Morris* the ECtHR rejected minimalist compliance with the *Findlay* ruling and, once the United Kingdom revamped its courts martial, it did so again in *Grievies*. In *Volkov* it went even further and ordered the Ukraine also to take a number of general measures aimed at reforming the system of judicial discipline, including 'legislative reform involving the restructuring of the institutional basis of the system',<sup>92</sup> and, for the first time in its history, to reinstate the applicant in the post of judge of the Supreme Court of the

85 Ibid., para. 117.

86 Judicial councils are independent intermediary organizations positioned between the judiciary and the politically responsible administrators in the executive or parliament, which are given significant powers in particular in appointing, promoting and disciplining judges. See M. Bobek & D. Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', (2014) 15 *German Law Journal*, p. 1257.

87 See Section 3.

88 See C. Parau, 'The Drive for Judicial Supremacy', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (2012), pp. 619, 655; Bobek & Kosař, supra note 86, pp. 1258-1262.

89 See note 7, supra.

90 See note 8, supra.

91 See the Joint Partly Dissenting Opinion of Judges Costa, Caflich and Jungwiert in *Martinie v. France* [GC], 12 April 2006, application no. 58675/00, para. 13; F. Sudre, 'Vers la normalisation des relations entre le Conseil d'Etat et la Cour européenne des droits de l'homme', (2006) *Revue française de droit administratif*, p. 286.

92 ECtHR, *Volkov v. Ukraine*, 9 January 2013, application no. 21722/11, para. 200.

Ukraine at the earliest possible date.<sup>93</sup> As a result, local expertise<sup>94</sup> and local specifics<sup>95</sup> in implementation are reduced, and the ECtHR may sometimes be perceived as remote and uncomprehending in relation to domestic concerns.<sup>96</sup>

This brings us to the third insight. The ECtHR shows a tendency towards uniformity and treats distinctive features of a given judicial system and a broader constitutional and international ecosystem it operates in perhaps too cavalierly. Many scholars and judges, not just from francophone countries, generally considered the Strasbourg case law on advocates general to be particularly insensitive.<sup>97</sup> The institution of *commissaire du gouvernement* was created in 1831<sup>98</sup> and worked well for more than a century and a half. Even the ECtHR acknowledged that *commissaires* traditionally played an important role in the creation of administrative case law and complemented often elliptical judgments of the Council of State.<sup>99</sup> Yet the majority of the Strasbourg judges found this distinct feature of French administrative law in violation of the Convention. However, it is one thing to say that the rights were violated in an individual case, but another to suggest that the way justice was delivered for centuries is deficient. A practice that had secured justice for almost 180 years should not be overturned simply because it is misunderstood, somewhat foreign to lawyers from other European countries with other traditions or because it does not fit a ‘purist’ concept of just procedure.<sup>100</sup> As the then president of the ECtHR Luzius Wildhaber argued, too much emphasis on the doctrine of appearances works to the detriment not only of respectable national traditions, but also, ultimately, of litigants’ real interests.<sup>101</sup>

Similarly, the Strasbourg position on British military courts fails to take into account the United Kingdom’s permanent membership of the United Nations Security Council and its special responsibility for the maintenance of international peace and security. Due to this role the United Kingdom often deploys its troops overseas and thus needs a flexible system of military courts to deliver speedy justice. Finally, in the *Volkov* case, the ECtHR did not explain why the Ukrainian judicial council, operating in a country plagued by widespread judicial corruption,<sup>102</sup> which does not necessarily stem from political branches, should be controlled by judges elected by their peers and why judges should be judged in disciplinary proceedings primarily by other judges.<sup>103</sup> As Parau put it, ‘[i]t is doubtful that professional or peer accountability (...) can

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93 Ibid., para. 208.

94 J. Jahn, ‘Ruling (In)directly through Individual Measures? – Effect and Legitimacy of the ECtHR’s New Remedial Power’, (2014) 74 *Heidelberg Journal of International Law*, p. 26.

95 The Head of the High Council of Justice, Mr. Lavrynovych, stated in an interview on 8.10.2013 that, according to Ukrainian legislation, Mr. Volkov can only be newly appointed to the post but not reinstated. The subsequent problem was that the Law on the ‘Judiciary and Status of Judges’ (available in English translation at <<http://cis-legislation.com>>) limited the number of judges to 48; see also Judge Yudkivska’s Concurring Opinion in *Volkov v. Ukraine*, supra note 92. However, despite these problems Judge Volkov was eventually reinstated to the Supreme Court of Ukraine in February 2015; see EHRAC, ‘Oleksandr Volkov reinstated as Supreme Court Judge in Ukraine’, 2 February 2015, available at <<http://www.ehrac.org.uk/news/oleksandr-volkov-reinstated-as-supreme-court-judge-in-ukraine/>> (last visited 10 March 2017).

96 See, mutatis mutandis, J. Bell, ‘“Interpretative Resistance” Faced with the Case-law of the Strasbourg Court’, (2008) 14 *European Public Law*, p. 142.

97 See literature in note 4, supra.

98 F. Burdeau, *Histoire du droit administratif* (1995), p. 93; see also N. Rainaud, *Le commissaire du gouvernement près le Conseil d’État* (1996).

99 ECtHR, *Kress v. France* [GC], 7 June 2001, application no. 39594/98, para. 42.

100 See e.g. the Partly Dissenting Opinion of Judge De Meyer in *Reinhardt and Slimane-Kaïd v. France*, supra note 24; the Joint Partly Dissenting Opinion of Judges Wildhaber, Costa, Pastor Ridruejo, Kūris, Birsan, Botoucharova and Ugrekhelidze in *Kress v. France*, supra note 26; and the Joint Partly Dissenting Opinion of Judges Costa, Caflich and Jungwiert in *Martinie v. France*, supra note 26. See also the sources in note 4, supra.

101 Declaration of Judge Wildhaber in *Martinie v. France*, supra note 26. See also the Joint Partly Dissenting Opinion of Judges Wildhaber, Costa, Pastor Ridruejo, Kūris, Birsan, Botoucharova and Ugrekhelidze in *Kress v. France*, supra note 26.

102 See M. Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (2012); and A. Trochev, ‘Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine’, (2010) 18 *Democratizatsiya*, p. 135. This is in fact a common phenomenon in post-communist judiciaries; see e.g. C. Parau, ‘The Drive for Judicial Supremacy’, in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (2012), pp. 639-643 and 649-656 (on Romania); D. Bozhilova, ‘Measuring Success and Failure of EU-Europeanization in the Eastern Enlargement: Judicial Reform in Bulgaria’, (2007) 9 *Eur. J.L. Reform*, p. 285; and M. Popova, ‘Why Doesn’t the Bulgarian Judiciary Prosecute Corruption?’, (2012) 59 *Problems of Post-Communism*, no. 5, pp. 35-49 (both on Bulgaria).

103 In fact, in many CEE countries disciplinary motions are abused primarily by court presidents, and not by politicians. Apart from the *Volkov* judgment, see also P.H. Solomon, ‘Authoritarian legality and informal practices: Judges, lawyers and the state in Russia and China’, (2010) 43 *Communist and Post-Communist Studies*, p. 354 (regarding Russia); D. Kosař, *Perils of Judicial Self-Government* (2016) (regarding Slovakia).

work [in post-communist countries] if the peers themselves are corrupt'.<sup>104</sup> The ECtHR instead borrowed the soft law standards of various advisory bodies.

This is actually the fourth insight that can be inferred from the Strasbourg case law discussed in the previous section. The ECtHR has recently started to increasingly refer to the soft law standards on court administration in the operative parts of its judgments and to read these standards into the Convention. This trend is particularly visible in the *Volkov* judgment, where the ECtHR on several occasions adopted the standards from the European Charter on the Statute of Judges,<sup>105</sup> the Opinion of the Venice Commission on the Ukrainian judicial reforms,<sup>106</sup> and the Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe on Ukraine.<sup>107</sup>

This practice raises two concerns. First, many of these standards are drafted by bodies controlled by judges, who have their own interests at stake, and are often adopted at closed sessions, without public debate and the input of other branches of government. Second, the role of these advisory bodies is different from the role of the ECtHR. Most importantly, the views of the Venice Commission and the Commissioner for Human Rights as well as the European Charter on the Statute of Judges are non-binding documents that can, and arguably also should, go beyond what is required by current international law obligations, while the ECtHR's pronouncements are binding. Moreover, the opinions of the Venice Commission and the Commissioner for Human Rights are tailored to the specifics of a given country and apply different standards to transition democracies, on the one hand, and the established democracies, on the other, whereas the ECtHR cannot maintain double standards for the signatory states to the Convention. In fact, the Venice Commission in its opinion, which was borrowed by the ECtHR in *Volkov* and on which the Commissioner for Human Rights relied in his report, explicitly distinguished standards for new and old democracies. More specifically, the Venice Commission opined that since '[n]ew democracies (...) did not yet have a chance to develop (...) traditions [akin to those in developed democracies], which can prevent abuse and therefore, *at least in these countries*, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges'.<sup>108</sup> The ECtHR has not said and could not say the same and, therefore, the standard adopted in *Volkov* applies to the established democracies as well.

Finally, all of these insights, taken together, show that the ECtHR has been increasingly interfering with the domestic separation of powers.<sup>109</sup> More specifically, it has been empowering domestic judiciaries and, within the judicial branch itself, strongly favouring ordinary courts composed of professional judges over special tribunals with lay judges and representatives of other branches of government. This is neither novel nor surprising. Several scholars have already argued that the strengthening of national institutions is one of the three functions of international law<sup>110</sup> and that the Strasbourg Court's case law strengthens the position of domestic courts *vis-à-vis* the other branches of government.<sup>111</sup> However, this article reveals the true scope and the structural nature of this effort. The *Özpinar* judgment may serve as a good example here – if Turkey wants to comply with this judgment, it has no other option but to adopt a constitutional amendment. In addition, while the ECtHR has repeatedly stressed that it does not favour any particular theory of separation of powers,<sup>112</sup> its case law on the judicial design issues suggests otherwise. It might

104 C. Parau, 'Piana, Daniela (2010) Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice (book review)', (2011) 45 *Law & Society Review*, p. 792.

105 European Charter on the statute for judges of 8-10 July 1998 (Department of Legal Affairs of the Council of Europe Document (98)23).

106 Joint Opinion on the Law Amending Certain Legislative Acts of Ukraine in Relation to the Prevention of Abuse of the Right to Appeal by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010, CDL-AD(2010)029).

107 The Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Ukraine (19-26 November 2011), CommDH(2012)10, 23 February 2012.

108 Opinion of the Venice Commission on Ukraine, *supra* note 106, para. 29 (emphasis added).

109 See the publications cited in note 15, *supra*.

110 A.-M. Slaughter & W. Burke-White, 'The Future of International Law is Domestic (or, the European Way of Law)', (2006) 47 *Harv. Int'l L. J.*, pp. 334-339.

111 A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe', (2012) 1 *Global Constitutionalism*, p. 68.

112 See e.g. ECtHR, *Kleyn and Others v. the Netherlands* [GC], 6 May 2003, application nos. 39343/98, 39651/98, 43147/98 and 46664/99, para. 193; ECtHR, *Pabla Ky v. Finland*, 22 June 2004, application no. 47221/99, para. 29; or ECtHR, *Sacilor Lormines v. France*, 11 September 2006, application no. 65411/01, para. 59. For a more detailed discussion of this phenomenon see D. Kosař, 'Policing Separation of Powers: A New Role for the European Court of Human Rights?', (2012) 8 *European Constitutional Law Review*, p. 33.

seem like a stretch, but the Strasbourg Court has been gradually defining the contours of a uniform ‘ideal judiciary’ – a judiciary with a limited role for or without military courts and special judicial officers, which is governed by a judicial council controlled by judges elected by their peers, and where judges’ discipline is judged by judges themselves.<sup>113</sup> While the transnational networks of judges<sup>114</sup> and some scholars<sup>115</sup> would perceive this developing standard positively, such an ‘ideal’ standard suffers from the lack of democratic legitimacy.<sup>116</sup> Moreover, this standard might not even be ‘ideal’ as recent empirical scholarship suggests that the strong judicial council model of court administration may actually bring about undesirable results and in fact threaten the judicial independence that this model was originally supposed to protect. While this empirical evidence is not conclusive and does not mean that the strong judicial council model yields such problematic results in all contexts, it strongly counsels against the entrenchment of this Pan-European standard into the Convention.

#### 4. Conclusion

This article has shown that the ECtHR has been increasingly intervening in domestic judicial design and, ultimately, in the separation of powers within CoE Member States. It has done so indirectly – via individual applications. To illustrate this phenomenon, the ECtHR’s case law dealing with advocates general, military courts and disciplinary panels was analysed. Four specific insights can be inferred from this analysis: the Strasbourg Court influences the judiciaries not only of developing democracies but also developed ones, leaves little room for manoeuvre for domestic authorities on how to implement its judgments touching upon judicial design, does not attach much importance to distinctive features of a given judicial system, and has recently been increasingly referring to the soft law standards on court administration in its reasoning. Interestingly, neither established nor transitional democracies have shown much resistance to the far-reaching ECtHR requirements that impinge upon the cornerstones of their judicial and legal systems. As a result, the Strasbourg Court has become a key player in domestic judicial politics.<sup>117</sup> ■

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113 For further details see D. Kosař & L. Lixinski, ‘Domestic Judicial Design by International Human Rights Courts’, (2015) 105 *American Journal of International Law*, pp. 755-759.

114 See e.g. the standards developed by the European Network of the Councils for the Judiciary that to a large extent overlap with the ECtHR’s ‘ideal’ model; see e.g. European Network of Councils for the Judiciary, ‘Independence and Accountability of the Judiciary’, ENJ Report (2013-2014).

115 See e.g. V. Autheman & S. Elena, *Global Best Practices-Judicial Councils: Lessons Learned from Europe and Latin America* (2004); P.-A. Albrecht & J. Thomas (eds.), *Strengthen the Judiciary’s Independence in Europe!* (2009); D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (2010).

116 See e.g. A. Uzelac, ‘Role and Status of Judges in Croatia’, in P. Oberhammer (ed.), *Richterbild und Rechtsreform in Mitteleuropa* (2001), p. 23, at pp. 43-57 (on Croatia); M. Popova, ‘Why Doesn’t the Bulgarian Judiciary Prosecute Corruption?’, (2012) 59 *Problems of Post Communism*, no. 5, p. 35 (on Bulgaria); D. Kosař, *Perils of Judicial Self-Government* (2016), pp. 236-333 (on Slovakia); D. Preshova et al., ‘The Effectiveness of the ‘European Model’ of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms’, Centre for the Law of EU External Relations, CLEER Papers 2017/1 (on the West Balkan countries); and, more generally, M. Bobek & D. Kosař, ‘Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe’, (2014) 15 *German Law Journal*, p. 1257.

117 See, most recently, ECtHR, *Ivanovski v. FYROM*, 21 January 2016, application no. 29908/11; ECtHR, *Baka v. Hungary* [GC], 23 June 2016, application no. 20261/12.