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POTENTIAL CONTRIBUTION OF TWO RECENT EU SOFT LAW DOCUMENTS TO IMPROVED JUDICIAL GOVERNANCE STANDARDS**

Summary

Judicial governance is a vital component of judicial independence, and yet its manifestations vary considerably across European countries. Judicial self-governance standards are articulated in a range of soft law instruments, and have prompted extensive academic debates. Starting from the premise that soft law is a relevant source of judicial independence and judicial governance standards, the author posits that two soft law instruments developed by the OSCE and the European Law Institute over the past two years enhance both the understanding and implementation of judicial independence standards by bringing added value. The hypothesis regarding the added value of the two instruments is examined through an analysis of the judicial governance and judicial self-governance concepts. Employing primarily comparative and dogmatic methods, the author demonstrates how these two instruments formulate judicial governance standards by systematising existing soft law norms and incorporating new academic developments.

Keywords: judicial independence, judicial governance, soft law, judicial independence standards, Europe.

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POTENCIJAL DVA NEDAVNO USVOJENA EVROPSKA DOKUMENTA MEKOG PRAVA DA DOPRINESU UNAPREĐENJU STANDARDA KOJI SE ODNOSE NA SUDSKU UPRAVU

Sažetak

Sudska uprava predstavlja važan aspekt nezavisnog sudstva, ali su u praksi sudske uprave u evropskim državama veoma raznolike. Standardi koji se odnose na sudsku upravu oblikuju se u brojnim instrumentima mekog prava i daju povoda za plodne akademske rasprave. Polazeći od stanovišta da je meko pravo relevantan izvor standarda nezavisnog sudstva i sudske uprave, autorka ispituje hipotezu da dva instrumenta mekog prava razvijena od strane OEBS-a i Instituta za evropsko pravo u protekle dve godine mogu da doprinesu boljem razumevanju i primeni standarda sudske nezavisnosti. Hipoteza o dodatnoj vrednosti ova dva instrumenta se testira na način na koji su u njima određeni pojmovi sudske uprave i sudske samouprave. U radu autorka uglavnom koristi uporednopravni i dogmatski metod, utvrđujući da se u dva navedena dokumenta sistematizuje postojeće meko pravo i da se u standarde inkorporišu teorijskopravna dostignuća.

Ključne reči: nezavisno sudstvo, sudska uprava, meko pravo, standardi sudske nezavisnosti, Evropa.

1. Introduction

The relevance of soft law in international law and European Union (EU) *acquis* has become a salient topic in academia in recent years. As O'Hagan (2004, p. 380) aptly notes, soft law has multiple functions, including its roles in supplementing hard law and addressing policy areas of particular relevance that are lacking viable legislative prospects. Soft law is commonly understood as comprising "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and which are aimed at and may produce practical effects." (Senden, 2004, p. 112). Soft law gains particular prominence in areas such as the rule of law. In this paper, the term "soft law" will be used to refer to non-binding documents, declarations, opinions and reports.

The rule of law is a complex concept that encompasses a range of definitions.[1] A common thread among these definitions is that they recognise that judicial independence is an important principle underpinning the rule of law. As Shetreet (2012, p. 477) points out, the culture of judicial independence has been shaped by the concepts and ideas developed at both national and international levels. In the context of international law, treaties safeguarding the right to a fair trial, reinforced by jurisprudence of relevant international and supranational courts, have had a particularly significant role in Europe, and these include the European Convention on Human Rights (ECHR), and the jurisprudence of the European Court of Human Rights (ECtHR), particularly with regard to Article 6 of the ECHR and its interpretation of the "independent and impartial tribunal" standard.

The above instruments and caselaw have been further enriched and influenced by the standard-setting efforts of various professional and non-governmental organisations, as well as by the development of additional soft-law instruments by other authoritative bodies. In Europe, these initiatives have been led primarily by the Council of Europe (CoE), most notably through its advisory body – the Consultative Council of European Judges (CCJE) and its opinions, and the work of the European Commission for Democracy through Law (the Venice Commission), supported by the efforts of the Organisation for Security and Cooperation in Europe (OSCE) and the European Network of Judicial Councils (ENJC).

Last but not least, the developments in the European Union (EU) have paved the way to an even richer body of law on judicial independence. In terms of the hard EU *acquis*, the so-called Conditionality Regulation[2] explicitly identifies threats to judicial independence as a breach of the rule of law, as set out in Article 3.[3] Recital 16 of the Regulation further enumerates the sources for establishing the breaches of the principles of the rule of law, which include, *inter alia*, judgments of the Court of Justice of the European Union (CJEU), and conclusions and recommendations of relevant international organisations and networks, including CoE bodies such as the Venice Commission, and the ENJC. Even prior to these developments, the jurisprudence of the CJEU firmly established that the principle of judicial independence

[1] The full body of literature addressing the various definitions of the rule of law is too extensive to be exhaustively cited here. Therefore, the author will refer the reader to a selected number of relevant authoritative academic contributions to the definition of the rule, as presented here: Tamanaha, 2012, pp. 232-247; Tamanaha, 2004; Bingham, 2001; Møller & Skaaning, 2014.

[2] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (European Parliament and European Council Regulation, 2020).

[3] The definition of the rule of law provided in Article 2 of this Regulation, however, is not a universal one (Knežević Bojović & Ćorić, 2023, pp. 41-62) and is not the only one utilised by EU institutions (Pech, 2020).

is an essential component of the rule of law, as a fundamental value of the EU enshrined in Article 2 of the Treaty on the European Union (TEU). In addition, the CJEU caselaw has drawn upon on interpretations of Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union (EU, 2016). The CJEU ruling in the so-called Portuguese judges case (Judgment of the Court (Grand Chamber) of 27 February 2018 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* (Case C-64/16, ECLI:EU:C:2018:117)), as Turenne (2024, p. 257) points out, placed the "CJEU at the forefront of the battle for judicial independence within the European Union." Subsequent CJEU caselaw has further solidified both its competence and its willingness to examine domestic conditions of judicial independence and issue binding rulings on such matters (Jelić & Kapetanakis, 2021, pp. 45-77; Kochenov & Bárd, 2022, pp. 150-165). The relevance of the CJEU jurisprudence *vis-à-vis* judicial independence extends beyond the current borders of the EU, particularly to the EU accession candidates. Recent developments in the EU's accession methodology, and particularly the adoption of the "fundamentals first" approach, have given additional prominence to the rule of law and judicial independence in accession countries. The prominence of the rule of law in the accession process has been reinforced by the new accession methodology, where the CJEU's jurisprudence is especially relevant in the discussions with candidate countries, considering the absence of hard-law standards in EU *acquis* concerning the organisation of the judiciary (Matić Bošković, 2020, p. 332).

This paper begins with the premise that soft law is an important and relevant source for the development of standards concerning judicial independence in Europe. It further acknowledges Shetreet's (2012, p. 479) argument that international standards provide an incentive for societies to both strive for higher levels of judicial independence and present a clear statement of judicial independence to ensure protection against the influence of unofficial laws that may conflict with the broader interests of society.

With this in mind, the author posits that despite the criticism occasionally found in the literature concerning the proliferation of both hard and soft law instruments and standards on judicial independence (Kochenov & Bárd, 2022, pp. 150-165), the two soft-law instruments developed by the OSCE and the European Law Institute (ELI) over the past two years could contribute to a better understanding and implementation of judicial independence standards. This is particularly relevant in the context of accession countries, where these instruments offer added value by systematising existing standards and incorporating developments in jurisprudence and academic discourse. The hypothesis regarding the added value of these two instruments will be examined based on the concepts of judicial governance and judicial self-governance. The decision to focus on the concepts of judicial

governance and judicial self-governance is driven by their growing relevance. Judicial governance varies considerably across European countries and remains fragmented (ENCJ Report 2022- 2023, pp.23). Whilst judicial governance has emerged as a prominent topic in recent academic discourse, the definitions proposed in those discussions have not been fully reflected in the soft law instruments. Judicial self-governance, particularly as implemented through judicial council models, has been a central concern for judiciaries in EU accession countries since the adoption of the Copenhagen criteria in 1993. More recently, it has also become a pressing issue in EU Member States, resulting, *inter alia*, in cases before the CJEU or the ECtHR. Judicial self-governance standards are increasingly being articulated across a range of soft law instruments, which often exhibit a considerable degree of cross-referencing and cross-fertilisation. Nevertheless, these instruments collectively constitute a complex network of sources that at times propose slightly divergent standards.[4] Consequently, a clear articulation of the concepts of judicial governance and judicial self-governance within soft law instruments is of particular importance, as it is hypothesised that such clarification could also contribute to creating a more coherent and "accepted system of conceptual principles" on judicial governance (Shetreet, 2012, pp. 478).

The paper is structured as follows. First, it provides an overview of the purpose and scope of the two new standard-setting instruments, the ELI Mt. Scopus Standards of Judicial Independence (hereinafter, ELI Standards) and OSCE Recommendations on Judicial Independence and Accountability (hereinafter, Warsaw Recommendations). It proceeds to examine how the judicial governance and self-governance concepts are defined and/or determined in these two documents, and compares these formulations with those found in recent academic discourse and other soft law instruments. This analysis aims to establish whether the two instruments provide added value to the development of a fine-tuned common understanding of judicial governance and judicial self-governance. Finally, the conclusion summarises and reflects upon the key findings. The paper employs normative, comparative, and dogmatic methods.

[4] For example, with regard to the composition of judicial councils, there is a notable divergence between the standards proposed by the Venice Commission and those of the CCJE. The Venice Commission states that a substantial proportion, if not the majority, of judicial council members should be judges (Venice Commission, 2010, p. 8). In contrast, the CCJE firmly stands on the position that the majority of members of judicial councils should be judges elected by their peers (Opinion No. 24, 2021).

2. Two New European Standard-Setting Instruments on Judicial Independence

In the last couple of years, significant efforts have been put into systematising the plethora of judicial independence standards found in soft law and the jurisprudence of the two European courts. These efforts aim to formulate an operational set of rules and guidelines. The existing complex network of mutually reinforcing and complementary documents, which, at times, also specify slightly divergent standards, is not always easy to navigate, particularly when it comes to identifying and distilling the core elements of the judicial independence standard.

This task is further complicated by the necessity for any standard-setting exercise to take into consideration not only the existing international and supranational hard and soft law but also the multitude of variations in national laws, which are, influenced, to some extent, by international standards whilst simultaneously being deeply rooted in national traditions. Consequently, the challenge lies in identifying and articulating their common core.

The two most recent instruments designed to address this issue are the ELI Standards (ELI, 2024) and the Warsaw Recommendations (OSCE, 2023). These two instruments are complementary; however, the former appears to be more comprehensive and detailed. It is interesting to note that both these instruments build on earlier documents. Specifically, the ELI Standards build on the Mount Scopus Standards of Judicial Independence, which were approved in 2008 by the International Association of Judicial Independence and World Peace,[5] but are now adapted to focus exclusively on the European context. In contrast, the Warsaw Recommendations aim to supplement, rather than replace, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (hereinafter, Kyiv Recommendations), by elaborating on previously unaddressed issues, taking also into account the developments in the field of judicial independence in Europe following the adoption of the Kyiv Recommendations. However, whilst the Kyiv Recommendations were initially intended primarily for countries within a specific geographic location, the Warsaw Recommendations are intended for the entire OSCE region, reflecting the fact that even the Kyiv Recommendations were used more widely than initially intended (OSCE, 2023, p. 1). Both documents focus on the independence of the judiciary within national legal systems, and do not address the independence of international judges. Their scope overlaps significantly, and their contents show important similarities and convergence.

[5] Mount Scopus ELI Standards of Judicial Independence were, in fact, also a revision of the New Delhi Code of Minimum ELI Standards of Independence (see: Shetreet, 2024, pp. 251).

As noted above, the two new soft law instruments aim to consolidate the standard-setting efforts of multiple organisations, including the standards established through the jurisprudence of the ECtHR and the CJEU. Both documents clearly indicate that the standards they contain are not exhaustive. As previously indicated, the ELI Standards and the Warsaw Recommendations respond to the evolving legal landscape and recent developments concerning judicial independence in Europe over the past decade.

2.1. ELI – Mount Scopus European Standards of Judicial Independence

The ELI Standards were developed under the auspices of the ELI, a non-governmental organisation gathering both institutions and individuals with high professional reputation in the field of law. The process of revising the Mt. Scopus ELI Standards of Judicial Independence and adapting them to the European context and its challenges was led by four highly competent project reporters. Their draft texts were shared, reviewed and discussed extensively by the Advisory Committee members and ELI members at annual conferences (see: ELI, 2024). The endorsement of the ELI Standards by this organisation and its broad membership establishes them as a legitimate and authoritative source of soft law, particularly considering the broad consultative process underpinning their development and finalisation.

The approach adopted in the ELI Standards, with respect to balancing the universality of the standards against the need for more specific or concrete rules, favours finding a universal, common core (Turenne, 2024, p. 255). A fundamental premise of the ELI Standards is that they are designed to be adaptable to diverse legal and constitutional traditions "within and beyond Europe" (ELI Standards, 2024, p. 10). Having this in mind, the ELI Standards appear to function primarily as a benchmarking tool, rather than a monitoring tool, as they establish the standards but do not provide mechanisms for monitoring progress in their implementation. The intended role of the ELI Standards as a reference point for assessing the achievements of the existing national frameworks for judicial independence, both *de lege lata* and in practice, is emphasised in Standard 38: Assessing Consistency with the ELI-Mount Scopus Standards. This standard highlights that ELI Standards are designed as a "tool for actors who assess the need and consistency of judicial reform and practices with judicial independence."

The ELI Standards are structured into five sections: foundations of judicial independence, judicial governance, judicial appointments and promotion, ethical standards, and judicial discipline. Each standard consists of one to six paragraphs/points, accompanied by explanatory comments. The points constitute the core of the standard, whilst the comments provide detailed clarification and elaboration.

Finally, the ELI Standards include a comprehensive list of sources, which is an added value of the document. The sources are listed for each individual standard or a thematic cluster of standards, thereby referencing all relevant soft law documents and jurisprudence relied upon in their formulation. This facilitates easy tracing of the sources for each standard, thereby illustrating the complexity of the undertaking and providing an additional frame of reference.

2.2. Warsaw Recommendations

The Warsaw Recommendations were developed in a "comprehensive consultative and expert-driven process," with the aim to "deliver a practical tool for stakeholders across the OSCE region who engage with justice systems." As noted above, the Warsaw Recommendations are not a revision of the Kyiv Recommendations, but rather a supplementing document. Given that they are not intended to address the full range of issues related to judicial independence standards, the Warsaw Recommendations have a relatively limited scope. They address the following six broad topics: judicial councils and self-governing bodies; accountability of judicial councils and self-governing bodies; disciplinary bodies and proceedings; freedom of expression and freedom of association of judges; judicial tenure and the transfer of judges within or between courts; and equity, diversity and non-discrimination. Each of these sections is further subdivided into specific topics, with the recommendations elaborated in one or more paragraphs. The Warsaw Recommendations also include direct references to the Kyiv Recommendations, often using them as starting or departure points.

It can be concluded, based on the authority of the organisations that have developed both documents, that they have a potential to be recognised as relevant sources of soft law and as benchmarking instruments for the normative framework and practice related to judicial independence in European states.

3. The Determination of Judicial Governance and Judicial Self-Governance: A Step Closer to a More Coherent Understanding of the Concepts?

Whilst judicial governance and judicial self–governance have been widely discussed in academic circles over the past decade,[6] key standard-setting documents

[6] The body of law dedicated to addressing this issue is extensive; therefore, only a segment of the relevant literature can be cited here: Bunjevac (2020); Castillo-Ortiz (2023); Bobek & Kosař, D (2014); Spác, Šipulová & Urbániková (2018); Garoupa & Ginsburg (2009); Pérez (2018); Dallara & Piana, (2015); Kosař (2016); Kosař & Vincze (2022); Kosař & Šipulová (2023), Šipulová *et al*. (2023); Knežević Bojović & Ćorić (2024).

have yet to provide a clear definition or a comprehensive description of the judicial governance concept. Instead, soft law documents have tended to focus on particular judicial governance functions, or on the mandate and composition of bodies vested with certain aspects of judicial governance (CCJE Opinion No. 3; CCJE Opinion No. 4; CCJE Opinion No. 17; ENCJ Judicial Ethics Report 2009-2010). Moreover, a specific model of judicial governance – the judicial council model – has been strongly promoted in the EU accession process (Preshova, Damjanovski & Nechev, 2017; Castillo-Ortiz, 2019, pp. 503-520; Simović 2023, pp. 623-642).

Judicial governance has been addressed extensively by the ECtHR and the CJEU, primarily in the context of assessing whether specific judicial self-governance bodies meet the requirements of an independent and impartial court or tribunal (ECtHR Press Unit 2023; Manko, 2023). Some authors (Kosař & Vincze, 2022, pp. 491-501) posit that these two courts have increasingly treated soft law instruments related to judicial independence as hard law within their jurisprudence. This underscores the importance of ensuring a coherent and fine-tuned understanding of the concept of judicial governance in the soft law framework. Due to objective limitations, this paper will focus primarily on the definitions of judicial governance and judicial self-governance in the ELI Standards and the Warsaw Recommendations, without delving into the complex issue of how these instruments address the composition of judicial self-governance bodies.

3.1. Judicial Governance and Judicial Self-Governance – Definitions, Determinations, Fine-Tuning

The ELI Standards assert that judicial governance encompasses several key areas of responsibility that are essential for ensuring the independence of individual judges within an independent judiciary. According to these standards, these areas include: judicial appointment, training, evaluation and promotion; court administration, including case allocation and court composition; deployment and transfer of judges; financing of the judiciary and the court system; providing transparent and useful information to the public regarding the court system and its decisions; development and adoption of ethical standards of judicial conduct; judicial discipline; employing technology to ensure access to the courts and a more efficient administration of justice; and the examination of proposals for judicial reform. In contrast, the Warsaw Recommendations do not provide the definition of judicial governance.

The definition of judicial governance found in the ELI Standards closely aligns with those provided by legal scholars. Castillo-Ortiz (2023, p. 2), for example, describes judicial governance as encompassing various aspects of court operations, including the recruitment of judges, their disciplinary accountability, the

administration, management and financing of the judicial branch, as well as issues related to judicial independence and efficiency. Similarly, Piana (2010, p. 75), in her analysis of European rule of law promotion efforts, notes that in this context, the term "governance" commonly refers to "an institutional relationship that exists between the judiciary and the other organs of the political system – the legislature and the executive." Šipulova *et al.* (2023, p. 26) provide a broad definition of judicial governance, describing it as "a structured model of social coordination that produces and implements a set of institutions, rules, and practices which are collectively binding and which regulate how the judicial branch exercises its functions."

The ELI Standards also provide a definition of judicial self-governance in the commentary to Standard 16. According to this commentary, judicial self-governance refers primarily to judicial self-governing bodies that wield decisive influence over decisions related to judicial governance, either by sharing competences with others or by having a veto power over decisions taken by others. This definition is somewhat indirect, as it focuses more on the institutional actors exercising self-governance rather than the substantive elements of the self-governance itself. Nevertheless, it also reflects the positions found in academic literature where judicial self-governance is frequently determined from an institutional standpoint. For example, Kosař (2018, p. 1571) defines judicial self-governance bodies as "any institution in which a judge or judges sit, that has some powers regarding court administration and/or judicial careers." Other authors refrain from providing definitions and rather develop categorisations of various types of judicial governance or self-governance into different models. Voermans (2003, pp. 2133-2144) thus offers a categorisation of judicial councils, whilst Bobek & Kosař (2014, pp. 1257-1292) identify various types of judicial administrations and categorise them according to the body or institution that holds the primary responsibility for court administration and management. Lastly, but not of least importance, some authors have sought to systematise the various powers and competences of judicial administration or judicial self-governance bodies in five aspects[7] (Akutsu & de Aquino Guimarães, 2015, pp. 937-958), or in eight dimensions[8] (Šipulova *et al.*, 2023, pp. 22-42). Notably, the eight-dimension approach presented by Šipulova *et al.* recognises that judges do not "wield decisive influence" in all aspects of judicial governance. Instead, it emphasises the substantial and sometimes dominant roles of the executive and legislative powers, which in certain cases, have decisive influence or veto power.

The ELI Standards provide an important contribution to the body of soft law by explicitly articulating the standard definitions of judicial governance and judicial self-governance. There definitions both reflect the key points of the academic

[7] Efficiency, independence, accessibility, accountability, effectiveness.

[8] Regulatory, administrative, personal, financial, educational, informational, digital, and ethical dimension.

discourse on this subject and systematise the existing soft law instruments. The definitions of judicial governance and judicial self-governance provided in the ELI Standards can bring particular added value when read in conjunction.

The Warsaw Recommendations do not attempt to define judicial self-governance but do address the competences of judicial self-governance bodies. However, this is done within the context of judicial administration rather than governance more broadly. Specifically, in discussing the division of competences within judicial administrations, the Warsaw Recommendations acknowledge that, in order to prevent excessive concentration of power in a single judicial body and to avoid perceptions of corporatism, competences are distributed among judicial self-governing bodies. These competences include matters such as selection, promotion and training of judges, their discipline, performance evaluation, and budget. It is evident, both from the broader text of the Warsaw Recommendations and their reference to Point 2 of the Kyiv Recommendations, that judicial councils are recognised as the primary judicial self-governance bodies.

The positions articulated in these two instruments partially converge with each other and with the recent academic discourse, insofar as they recognise the multitude of competences involved in judicial governance and the notion that these competences may be vested, individually or jointly, in multiple bodies. Nevertheless, they diverge to some extent from the scholarly approaches that explicitly acknowledge the roles of other actors, such as the executive, in the domain of judicial governance (Bobek & Kosař, 2014, pp. 1257-1292).

Both the ELI Standards and the Warsaw Recommendations firmly assert that judicial governance bodies, regardless of whether they take the form of a judicial council, must be autonomous and independent. Specifically, both instruments explicitly state that the body responsible for judicial governance or self-governance must be autonomous and operate independently, particularly from the executive and the legislative branches (ELI Standards, 2024, Standard 14; Warsaw Recommendations, Point 4a). The Warsaw Recommendations require also that such bodies must be protected from any undue external pressures and that they must not be used to undermine the independence of other judicial self-governing bodies. This is an important development, as it firmly establishes judicial self-governing bodies as distinct from the executive branch, e.g., the line ministry in charge of the judiciary.

This raises the question whether only judicial councils are capable of meeting this standard. The answer, however, is neither straightforward, nor can it be simplified. The ELI Standards are notably cautious in avoiding a one-size-fits-all solution; similarly, unlike the Venice Commission (2010), they do not advocate for the introduction of judicial councils, and unlike the CCJE or even the Warsaw Recommendations, they do not refer primarily to judicial councils. Instead, the ELI Standards

recognise the plethora of bodies that may be vested with various judicial governance competences, such as appointing bodies, disciplinary bodies, or bodies in charge of monitoring ethical or professional conduct, judicial training institutions and others. This sets the bar even higher than the standard established by the ECtHR decision in the case of *Grzęda v. Poland,* Application No. 43572/18, Judgment (GC) of 15 March 2022, para. 307, where the Court put forward the requirement that, where a judicial council is established, "the State's authorities should be under an obligation to ensure its independence from the executive and legislative powers." This approach by the ECtHR has been criticised by Kosař & Leloup (2022) as having the potential to deter some states from adopting the judicial council model altogether.

The ELI Standards also underline (Standard 14, comment a) that, whilst there are differing solutions in various European states when it comes the responsibility for the functioning of the justice system – whether entrusted to the executive, an independent court administration agency, and/or self-governing judicial bodies – the body or official in charge must be autonomous and independent from both the executive and the legislature.

As pointed out in the ELI Standards (Standard 14, comment c), the executive may perform certain administrative functions related to the daily operation of the judiciary; however, such functions must be subject to judicial involvement and oversight. This requirement can be interpreted to mean, for instance, that the adoption of the Court Rules of Procedure, a legal act of critical importance for the day-to-day functioning of the courts, must involve judicial oversight, i.e., that judges would have to be consulted on the text or even granted veto power over its adoption. Such an interpretation would go hand in hand with the preliminary reference ruling adopted by the CJEU in *Hann-Invest* (Judgment of the Court [Grand Chamber] of 11 of 11 July 2024, Joined Cases C-554/21, C-622/21, and C-727/21, *Hann-Invest d.o.o. and Others,* ECLI:EU:C:2024:594), which further expanded the scope of scrutiny over judicial governance matters.

The *Hann-Invest* case concerns a mechanism for ensuring uniformity in jurisprudence, an issue commonly addressed in the Court Rules of Procedure, and one that falls within the scope of judicial self-governance.[9] In Croatia, this mechanism was introduced through both the Law on Courts (Art. 40, para. 2) and the Croatian

[9] The idea that the mechanism in question serves as a means of strengthening the judiciary, and a version of judicial self-governance intended as a reaction to systematic politicisation of the judiciary under communist rule, is advanced by Schmitd (2024), drawing on Bobek (2008, pp. 99-123). Schmitd, however, criticises the approach as *de facto* reverting authority back to legislator. In a similar, though not identical vein, Bačić Selanec & Petrić (2024, pp. 11-16) challenge the role of evidentiary judges within the Croatian legal system, not only from the standpoint of their procedural role in judicial decision-making, but also by considering broader implications of the *Hann-Invest* judgment on the day-to-day functioning of courts.

Court Rules of Procedure (Art. 177, para. 3), the latter adopted by the Minister of Justice without any formal consultative inputs from the judiciary (Croatian Law on Courts, Art. 76). In cases such as this, the emergence of a standard requiring judicial consultation on such matters becomes an important leverage for judges, granting them greater influence over how the day-to-day operation of the courts is regulated. At the same time, this increases the need for judges, as actors in judicial governance, to be more acutely aware of regulatory changes, the jurisprudence of international and supranational courts, and evolving standards.

The above requirement also casts a new light on the division of competences between the executive and the judiciary, an issue that is relevant both in EU Member States and in accession countries, where the ministries of justice or related bureaucratic agencies or services formally oversee court management and the adoption of rules of procedure. This is the case, for example, in Israel, as elaborated by Lurie, Reichmann & Sagy (2019, pp. 718-740), and in the Netherlands, as noted by Bovend'Eert (2016, pp. 342). Similar arrangements can be observed in other areas of judicial governance, such as judicial training (Slovenian Law on Courts, Art. 74a), court infrastructure, and judicial IT systems. For instance, in Italy, despite the existence of a strong judicial council, the Ministry of Justice remains responsible for funding and managing court services (Reiling & Contini, 2022, pp. 1-19). In Greece, it was the Ministry of Justice that introduced the first systemic IT solutions in the judiciary, as noted by Deligiannis & Anagnostopoulos (2017, pp. 82-91). The requirement for judicial involvement in such matters is further reinforced by the ELI Standards, which underline that the central responsibility for court administration, when not directly related to the exercise of judicial functions, must be vested jointly in the judiciary and the executive, or preferably, in the judiciary alone. This includes a range of non-judicial matters such as administrative planning, budgeting, human resources, the implementation and use of technology in courts, court infrastructure, court security, and other judicial support functions.

Therefore, it could be argued that this emerging standard reflects a shift towards requiring judicial involvement in decision-making on matters that have traditionally fallen within scope of the executive. At a minimum, this implies a procedural right for judges to be consulted on the key decisions. Consequently, a national framework in which judges have no input in the decisions concerning various aspects of court administration would constitute a departure from this standard.

Whilst this might be viewed by some as setting the bar too high in terms of judicial governance, it is important to note that this approach is not inconsistent with the positions taken by the CCJE in its opinions or with the jurisprudence of the two European courts – the CJEU and the ECtHR. Thus, for instance, the CCJE has already affirmed that the responsibility for the selection of judicial assistants,

whose work is essential to the day-to-day functioning of the courts, should lie with the judiciary, rather than the executive (CCJE Opinion No. 22 (2019) Conclusion/ Recommendation 8). In a similar vein, in the CCJE Opinion No. 14 (2011) states in its Conclusions-Recommendations, in Point v., that judges should be involved in all decisions concerning the establishment and development of IT systems within the judiciary. This position is further reinforced the CCJE Opinion No. 26 (2023), Conclusion iv., which states that judges must be involved in the procurement, design, and oversight of assistive technologies in the judiciary, either through judicial councils or by way of other appropriate means. The CCJE, however, sees the role of court presidents as contributing to the work of self-government bodies, but not as a judicial self-governance body (CCJE Opinion No. 19), Conclusions and Recommendations, Point 2. However, the CCJE's position is not as far-reaching as that formulated in the ELI Standards, which explicitly recognise court presidents as judicial self-governance bodies. This interpretation is also in line with the emerging academic understanding of judicial self-governance and the role of court presidents.

The ELI Standards, therefore, articulate a model that clearly states that a comprehensive set of competences relating to the functioning of the judiciary, both in strategic and in day-to-day operations terms, needs to be vested in independent and autonomous bodies, which may or may not take the form of judicial councils.

When compared with the eight-dimension judicial independence concept proposed by Šipulova *et al.*, it becomes evident that the ELI Standards and the Warsaw Recommendations call for judges to have either a decisive role, i.e., veto power, or at least a consultative role in relation to seven of the eight dimensions. This can serve as an important lever in judicial reform efforts, particularly in EU accession countries, where judges seek to assert or reassert their institutional role, as was the case in Serbia, for example, with the recent constitutional and legislative reforms addressing the judiciary, leading to a substantial expansion of the competences of the Serbian Judicial Council, a judicial self-governance body (Knežević Bojović & Ćorić, 2023, pp. 41-62). Nonetheless, some competences remain shared with or fall within the exclusive purview of the line ministry responsible for justice.

4. Findings and Conclusion

The analysis of how judicial governance and judicial self-governance are defined in the two new European soft law instruments supports the initial hypothesis that these two instruments could enhance understanding of the applicable standards in this domain. Notably, both these documents explicitly address the notions of judicial governance and judicial self-governance on a systemic level, rather than limiting their focus

to individual aspects of judicial self-governance, as has been the case with the most law instruments to date. In doing so, they establish a meaningful dialogue between the standard-setting efforts and the academic discourse on judicial governance. Both documents remain relatively neutral when it comes to the optimal structure of judicial governance; in other words, they do not explicitly endorse judicial councils. However, the ELI Standards, in particular, raise the bar by establishing a clear requirement for the independence and autonomy of judicial self-governance bodies. Finally, both these instruments systematise the wide array of judicial governance and self-governance standards found in existing soft law and legal doctrine, transforming them into an operational set of rules and guidelines. Consequently, the efforts invested in their development appear far from futile. On the contrary, a closer examination suggests that the ambition put forward by Turenne (2024, pp. 254-273), a member of the working group for the development of the ELI Standards, that they should "act as soft law (i) to provide specific guidance to measure judicial independence in a national legal system, and (ii) to promote common standards of judicial independence across the European Union in particular" has indeed been fulfilled. Given the broad legitimacy underpinning the adoption process of the two analysed instruments and their contents, their efforts to reconcile diverse national legal traditions (Piana, 2016, p. 761) whilst formulating universal values are particularly commendable. A particular aspect of the added value of the two instruments lies in their potential utility for EU accession countries striving to align and maintain their judiciaries with the foundational values of the rule of law. While Piana's (2016, p. 771) assertion that standards do not function as mechanisms, inasmuch as they do not dictate specific action, but rather open windows of opportunity for action, is valid, it is equally true that soft law has the capacity to catalyse change (Ștefan, 2024, p. 673). There is thus reason to believe that both the ELI Standards and the Warsaw Recommendations will provide impetus for meaningful change.

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