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The constraints on the domestic separation of powers by supranational courts

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Abstract

This article discusses the way in which supranational courts constrain and affect the separation of powers within their respective Contracting Parties. It is argued that that is an important development in separation-of-powers theory that can be seen all around the world, but which has so far remained largely under the radar of legal and political science literature. The article demonstrates this development on the basis of a novel study of the case law of four supranational courts: the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights. It shows how the case law of those courts significantly constrains the freedom of the Contracting States in shaping their system of separation of powers in each of its components, the separation of functions, institutions and personnel, as well as the checks and balances. It further indicates how, when taken together, the supranational jurisprudence can be understood as imposing a blueprint on how those states can (and cannot) design the functional, institutional and personal relationships between their branches of powers. Yet, that conclusion entails several important consequences and forces us to consider the principle of separation of powers in light of that multilevel reality. The article discusses how we could take on board this consequential position of the supranational courts in understanding how the separation of powers functions in a given jurisdiction. Finally, it takes a normative stance on what role the supranational courts should play in policing the domestic separation of powers.

Keywords

separation of powers - supranational courts - multilevel constitutionalism - fundamental rights - constitutional law

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The constraints on the domestic separation of powers by supranational courts*

Mathieu Leloup♣

1 Introduction

The separation of powers is somewhat of an evergreen for constitutional scholars around the globe. As a basic tenet of constitutionalism, it has received perhaps not constant, but certainly sustained attention for almost four centuries now. One of the reasons for that is that so many issues of constitutional law can be brought back, at least in part, to concerns relating to the theory of separation of powers. In the same vein, many of the most salient and contentious issues in contemporary constitutional law can equally be traced back to the foundational underpinnings of the principle of the separation of powers. Think, for example, of the role that domestic or international courts can or should play in the fight against climate change,[1] about the validity of executive measures to combat the COVID-19 pandemic and the intensity of their judicial scrutiny, or about the recent attention to the topic of court packing, brought about by the developments surrounding the Supreme Court of the United States or the Polish courts.[2]

The separation of powers has thus been a popular topic for legal and political science scholars, and even seems to be going through something of an academic renaissance lately, with renewed interest in the evolutions and

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[1] Among many others: Laura Burgers, Should judges make climate change law?, 9 Transnational Environmental Law 55 (2020).

[2] Among others: Benjamin Garcia Holgado & Raúl Sánchez Urribarri, Court-packing and democratic decay: A necessary relationship?, 12 Global Constitutionalism 350 (2023).

challenges that the principle faces.[3] This article aims to contribute to this literature and to shine light on a development that has thus far remained more on the background in existing scholarship: the internationalization of the separation of powers. One of the main claims of this article is a simple one, namely that the choices of institutional and functional design within and between the branches of power are no longer the exclusive domain of domestic actors. Given the relentless constitutionalisation of international law,[4] the international legal sphere has gained significant reach over the domestic separation of powers. This means, in essence, that countries are constrained in how they can organize the relationships between the branches of powers within their state apparatus and in the design of their institutional architecture. While the intensity of those supranational constraints may differ between regions, depending on how well-developed the various supranational or international legal orders are, the evolution in itself can be seen worldwide.

One particularly noticeable and prevalent facet of such international constraints on the domestic separation of powers – and the one that will be the main focus of this article – are those exerted by supranational courts via their case law. Indeed, when one analyzes the supranational case law, it becomes apparent that those courts impose significant requirements on how the system of separation of powers within their respective Contracting Parties is expected to be organized. Even though these courts do not have an explicit mandate to police issues of separation of powers on the domestic level, their judgements can be seen to – at least indirectly – bring about such effects. As will be pointed out further in this article, the supranational case law affects every component of the principle of separation of powers and may even be understood to impose a kind of blueprint on how a domestic system of separation of powers should look like.

Despite the mountains of scholarship regarding the separation of powers and the case law of supranational courts, the constraints that the latter may impose on the former has so far remained a rather underexplored topic. In

[3] Recent examples: New Challenges to the Separation of Powers (Antonia Baraggia, Cristina Fasona & Luca Pietro Vanoni eds., 2020); The Evolution of the Separation of Powers Between the Global North and the Global South (David Bilchitz & David Landau eds., 2018); Christoph Möllers, The Three Branches: A Comparative Model of Separation of Powers (2013); Eoin Carolan, The New Separation of Powers: A Theory for the Modern State (2009).
[4] Jan Klabbers, Anne Peters & Geir Ulfstein, The Constitutionalization of International Law (2009).

some literature, such effects were touched upon tangentially,[5] but fundamental engagement with the issue has long remained lacking. Over the course of the last decade, things have somewhat picked up, with several authors discussing this topic more fundamentally in journal articles and three doctoral dissertations. Yet, the scope of this scholarship limited itself mostly to a study of the case law by the European Court of Human Rights,[6] and to cases relating exclusively to the judiciary.[7] As this article will show, that earlier scholarship does not show the full picture. While building on the valuable insights those earlier works offer, this article will expand on them in two important ways. On the one hand, this article is the first to look into the case law of four major supranational courts – the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights – and will, as such, show that the supranational judicial constraints on the domestic separation of powers are not only a European, but indeed a worldwide phenomenon. Second, the cases that will be discussed below have been chosen to showcase how extensively the supranational case law has developed and how it has evolved well beyond cases only concerning the judiciary.

The main aim of this article is then to draw attention to the extent to which supranational courts are willing to review the domestic system of separation of powers within their Contracting States, and in doing so, the extent to which they constrain the freedom of those states in shaping their internal institutional, functional and personal architecture. At the same time, the article wants to provide a first step in grappling with the theoretical consequences of that development and lay a basis for future scholarship.

[5] For example: Xavier Souvignet, La Prééminence du Droit dans la Droit de la Convention Européenne des Droits de l'Homme 349-353 (2012); Elke Cloots, De Fratelli Costanzo rechtspraak van het Hof van Justitie en de scheiding der machten in de E.U.-lidstaten, in Leuvense Staatsrechtelijke standpunten 45 (André Alen & Stefan Sottiaux eds., 2010).

[6] David Kosař, *Policing separation of powers: A New Role for the European Court of Human Rights?*, 8 EUCONST 33 (2012); Nina Le Bonniec, *L'appréhension du principe de la séparation des pouvoirs par la Cour européenne des droits de l'homme*, REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 335 (2016); Laure Milano, *La séparation des pouvoirs et la jurisprudence de la Cour européenne des droits de l'homme*, TITRE VII 60 (2019); AIKATERINI TSAMPI, LE PRINCIPE DE SÉPARATION DES POUVOIRS DANS LA JURISPRUDENCE DE LA COUR EUROPÉENNE DE DROITS DE L'HOMME (2019); MATHIEU LELOUP, THE IMPACT OF THE FUNDAMENTAL RIGHTS CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE ON THE DOMESTIC SEPARATION OF POWERS (2021); CHRISTINA KAMM, EMRK UND GEWALTENTEILUNG (2023).

[7] David Kosař and Lucas Lixinski, *Domestic judicial design by international human rights courts*, 109 *AJIL* 713 (2015).

To do that, this article is structured as follows. The second section will briefly discuss how the separation of powers has thus far been examined from a primarily – virtually exclusively – national point of view. Section 3 then broadens the scope to show how supranational courts affect and constrain the domestic system of separation of powers, on the basis of a novel study of the case law of the four supranational courts. To do this, the section will highlight some significant strands of case law and explain how those judgments, taken together, may be understood as imposing a blueprint of what the separation of powers is expected to look like. Section 4 takes a step back and discusses the consequences for the theory of separation of powers in such a multi-layered reality. It shows how the separation of powers has become – much more than before – something that can be challenged and litigated. Further, it discusses how the supranational courts must be understood to take a rather peculiar position in the model of separation of powers, since they can affect and constrain the way in which the domestic system of separation of powers functions and is given shape, yet they themselves stay outside this system. Section 5 then turns to the more normative question of what role the supranational courts (should) play in policing the domestic separation of powers. While it argues that the supranational courts undoubtedly have a role of significance to play, the considerations of section 4 urge the courts – precisely on the basis of separation-of-powers arguments – to be cognizant of the effects of their case law and to take a restrained and well-reasoned position. Finally, section 6 concludes.

Before turning to the second section, an introductory remark is in order. The aim of this article is not to show in empirical fashion exactly what the impact of the supranational case law on the domestic systems of separation of powers has been. While the article at times mentions the effects that the supranational case law has had on the ground, and describes the changes that have been made to the system of separation of powers in a specific country to comply with the judgment in question, this is not done systematically.[8] It is acknowledged from the outset that non-execution of the supranational jurisprudence can be a pervasive problem – in some jurisdictions more than others – and that important separation-of-powers judgments may in fact be

[8] Given the amount of case law cited throughout the article, this would hardly have been feasible.

left ignored. To some degree, this article thus starts from the assumption that the Contracting Parties do ultimately comply with the supranational judgments. However, even the absence of full and good-faith execution does not diminish the legal obligations and constraints regarding the domestic separation of powers which flow from the supranational case law, which are the dynamics that form the crux of this article.

2 The separation of powers as a primarily national principle

It is commonly accepted that every constitutional democracy in the world rests on some form of separation between the legislature, the executive and the judiciary.[9] As a doctrine for the constitutional design of a state, the separation of powers enjoys a virtually ubiquitous position,[10] and rests firmly in the firmament of contemporary, liberal constitutionalism, together with ideas such as democracy, rule of law, and respect for human rights. Nevertheless, as a concept it is also severely criticized and debated, not in the least because of how indeterminate and ambiguous it is. Scholars may mean very different things when talking about the separation of powers. Because of that, this section will begin with a short account of how the principle is understood throughout the article.

First of all, the separation of powers is understood to be a normative doctrine, one which describes how a state should be designed.[11] It aims to lay down how constitutions and their institutions should be arranged, and offers a framework of assessment.[12] As a logical corollary, a body – like a (supranational) court – that can rule on separation-of-powers related

[9] Aileen Kavanagh, *The Constitutional Separation of Powers*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221, 221 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

[10] David Landau and David Bilchitz, *The evolution of the separation of powers in the global south and global north*, *in* THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH 2 (David Bilchitz & David Landau eds., 2018).

[11] Among others: Peter Strauss, *Separation of Powers in Comparative Perspective: How Much Protection for the Rule of Law?*, *in* OXFORD HANDBOOK ON COMPARATIVE ADMINISTRATIVE LAW 396, 398 (Peter Cane, Herwig Hofmann, Eric Ip & Peter Lindseth eds., 2020); Kavanagh, *supra* note 9, at 221.

[12] This is not accepted by everyone. See: Christoph Möllers, *Separation of Powers*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 230, 231 (Roger Masterman & Robert Schütze eds., 2019). He claims that there is "nothing distinctively normative" about the notion. See also: GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 124 (1971).

questions can also inherently decide on the normative question of how a state should be designed.

Secondly, this article will employ a traditional understanding of the separation of powers, one which dictates a division between three branches of power,[13] a legislative branch, an executive branch and a judicial branch. Each of these branches has a particular function – the legislative branch prescribes general rules, the executive branch executes these rules, and the judicial branch adjudicates any arising conflicts – and corresponds to a particular institution – the legislature, the executive and the judiciary.[14] In the past some scholars have defended a pure view of the separation of powers, in which there was an exclusive one-to-one relationship between the three branches and their respective functions, and were manned with distinct and separate personnel.[15] In this view, the different branches thus operated as sealed chambers, marked by absolute separation.[16] Recent scholarship, however, generally accepts the unworkability of this pure view and defends a partial doctrine, in which the three branches are characterized by mutual checks and balances.[17] The idea behind them is to specifically design government functions to overlap, in order to give each of the government institutions some power over the others.[18] This way, power restrains power and a mutual exchange between the government institutions is created.[19]

Understood this way, the separation of powers, as used in this article, consists of four basic components: a separation of institutions, a separation of functions, and a separation of personnel, all of which is underpinned by a system of mutual political and legal checks and balances.[20] Part of what makes

[13] While this article acknowledges the limitations to this tripartite understanding, especially in light of the complexity of current governance systems, the supranational courts apply this traditional view, which makes it the most apt framework for the article.

[14] TUSHNET, ADVANCED INTRODUCTION TO CONSTITUTIONAL LAW 66 (2nd ed. 2018).

[15] VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (1967).

[16] Paul Bator, *Constitutions as Architecture: Legislative and Administrative Courts under Article III*, 233, at 265.

[17] With further references: KAVANAGH, THE COLLABORATIVE CONSTITUTION 88 (2024).

[18] Nick Barber, *Prelude to the separation of powers*, 60 CAMBRIDGE LAW JOURNAL 59, at 60 (2001).

[19] MÖLLERS, *supra* note 3, at 43.

[20] See for the same four components, among others: Jiří Baroš, Pavel Dufek and David Kosař, *Unpacking the separation of powers*, *in* NEW CHALLENGES *supra* note 3, at 124; Francois Venter, *The separation of powers in new constitutions*, *in* NEW CHALLENGES *supra* note 3, at 108; ANDRÁS SAJÓ & RENÁTA UITZ, THE CONSTITUTION OF FREEDOM. AN INTRODUCTION TO LEGAL CONSTITUTIONALISM 132 (2017); Kavanagh, *supra* note 9. This view is, however, not undisputed. Waldron, for example, argues that the separation of powers should be distinguished from checks and balances,

the separation of powers so difficult to define is that it embodies two different – and to a certain extent even opposing – ideas.[21] On the one hand, there is a strong focus on the separation between state actors, understood in an institutional, functional and personal sense. This idea of separation implies that the branches of government should make sure not to encroach upon the domain of the other two. On the other hand, there is the idea of mutual control, present in the system of checks and balances. Here, the focus lies not on the separation between the different branches of government, but on their ability to keep each other in check. The principle of separation of powers thus combines the ideas of both autonomy and control.

Importantly, those underlying ideas of autonomy and control may be applied not only to the relationship between actors that belong to two different branches of power, also known as inter-branch, but equally to actors that belong to one and the same branch, also known as intra-branch separation of powers. While separation-of-powers theory often limits itself to the dynamics between the three branches (inter-branch), the basic ideas of autonomy and control can be transposed without many difficulties to a setting within a single branch (intra-branch).[22] In such an intra-branch context it is equally important that the various actors can exercise their function without undue interference by others, while simultaneously preventing concentration of power, by dispersing it between several actors and putting in place mutual checks and balances.[23] Seen in that light, the principle of separation of powers must be understood as aspiring to create a fragile equilibrium between state actors – whether they be from two different branches of power or from one and the same branch – based on mutual control and autonomy; an efficient and coherent government architecture that is marked by both claims for independence as well as meaningful oversight.

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which is an important principle that is commonly associated, if not identified with it. Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 BOSTON COLLEGE LAW REVIEW 433 (2013).

[21] For a similar argument: PAOLO SANDRO, THE MAKING OF CONSTITUTIONAL DEMOCRACY 268 (2022); Paul Gewirtz, *Realism in Separation of Powers Thinking,* WILLIAM AND MARY LAW REVIEW 343 (1989).

[22] The concept of intra-branch separation of powers, or internal separation of powers, still remains underexplored and scholarship has so far focused mostly on the (American) executive branch. For example: Jon Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers* 91 NEW YORK UNIVERSITY LAW REVIEW 227 (2016).

[23] In the European context, for example, it has recently become apparent how judicial independence can just as well be put under strain by other – perhaps captured – actors within the judicial branch.

Traditionally, the separation of powers has always been articulated as a fundamentally national principle. Whether the specific institutional and functional design of a particular state functioned properly and managed to create the abovementioned equilibrium, preventing any actor from obtaining too much power, without thereby sabotaging the efficient functioning of the state,[24] was understood to be of concern solely to the state and its citizens. In contemporary literature as well, it is still described as such,[25] and connections to the supranational level are made only rarely.[26]

Such a focus on the national level is certainly not illogical. Generally, it is incumbent on every state to design its institutional architecture and to decide how to model the relationships between its branches of power.[27] In fact, those decisions belong to the very core of a country's constitutional prerogatives and are one of the most basic functions that a constitution must perform.[28] This institutional architecture and the balance between its actors then reflect the social,[29] historical,[30] and geographical[31] background of the country in question. Generally, every country thus ends up with its own unique system of separation of powers.[32] Elements that are deemed absolutely essential to the system of separation of powers in one country, may be completely ignored in others.[33] In other words, while every state can be understood to adhere to the separation of powers as a principle, the way in which it is given concrete expression differs profoundly from country to country.

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[24] Recent doctrine also focuses on the fact that a system of separation of powers should allow for rational and efficient government, rather than just dispersal of power. See, among others, KAVANAGH, *supra* note 17, at 97.

[25] Just by way of example, one can point to: NICK BARBER, THE PRINCIPLES OF CONSTITUTIONALISM (2018). Chapter 3 discusses the separation of powers. In it, no mention is made of the international legal orders.

[26] See, for example: ROGER MASTERMAN, THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION (2010). He did address two areas in which the ECtHR had affected the separation of powers in the UK.

[27] Cheryl Saunders, *Theoretical underpinnings of the separation of powers*, *in* COMPARATIVE CONSTITUTIONAL THEORY 66, 70 (Gary Jacobsohn & Miguel Schor eds., 2018).

[28] Jonathan Gould & David Pozen, *Structural Biases in Structural Constitutional Law*, 97 NYU L. REV. 59, 60 (2022); Paul Craig, *Constitutions, Constitutionalism and the European Union*, 7 ELJ 125, 126 (2001).

[29] See, for example: Asifa Quraishi, *The Separation of Powers in the Tradition of Muslim Governments*, *in* CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY 63 (Rainer Grote & Tilmann Röder eds., 2012). She explains how Muslim legal scholars provide a check on government power in Muslim countries.

[30] See, for example, on the strong executives that have developed in Latin-American countries: Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEXAS INTERNATIONAL LAW JOURNAL 1 (2006).

[31] For example: Ran Hirschl, *The Nordic counternarrative: Democracy, human development, and judicial review*, 9 ICON 449 (2011).

[32] AALT WILLEM HERINGA, CONSTITUTIONS COMPARED 32 (5th ed. 2019).

[33] Jenny Martinez, *Horizontal Structuring*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 574, 574 (Michel Rosenfeld & András Sajó eds., 2012).

That balance between the branches is, moreover, anything but fixed, and changes constantly. Actors belonging to any of the three branches may affect the balance that exists between two, or even all three branches. Such changes differ in scope and may range from truly fundamental to rather minute. The clearest example of a fundamental change is probably a revision of the constitution, in which the constitutional legislator changes the form of government within a country.[34] Yet, even a legislature without constituent power can have a fundamental impact on a country's system of separation of powers. It can, for example, establish or abolish institutions, amend their powers and functions, or redraw their composition. Smaller changes are also possible, for example by passing legislation with retroactive effects, and in doing so potentially intervening in pending judicial proceedings,[35] or by validating an administrative act, thereby immunizing it from judicial review.[36] Similarly, the executive may also take action that affects the balance of powers. One does not have to look far back for examples. The Covid-19 pandemic required urgent governmental action in order to save the lives of the population. However, the sweeping measures that were taken often posed serious constitutional difficulties and offered the executive a way to expand its powers.[37] Similarly, a recent article explained how members of the executive branch in federal states may informally amend the constitution via intergovernmental agreements.[38] Finally, the judiciary can also alter the domestic system of separation of powers. At times, national courts are confronted with cases that are in essence about the delineation of power between the branches. In such cases, the courts can empower one branch at the expense of the other. While such powers may be explicitly given to constitutional courts, the judgments of supreme courts or lower courts may have just the same effects.[39] Furthermore, one can think of famous examples

[34] Think of the big constitutional reform in Turkey in 2017, changing the country from a semi-presidential to a presidential system.

[35] PETER GERANGELOS, THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS (2009).

[36] DAVID RENDERS, LA CONSOLIDATION LÉGISLATIVE DE L'ACTE ADMINISTRATIVE UNILATÉRAL (2003).

[37] See, for example: Joelle Grogan, *COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis*, 14 HAGUE JOURNAL ON THE RULE OF LAW 349 (2022). She argues that: the demands of emergency provide a convenient guise and means of justification for the use of power which only serves to consolidate power within the executive to the detriment of the separation of powers and weakening of the institutions of liberal democracy.

[38] Johanne Poirier and Jesse Hartery, *Para-constitutional engineering and federalism: Informal constitutional change through intergovernmental agreements*, 20 ICON 758 (2022).

[39] See: Druscilla Scribner, *The Judicialization of (Separation of Powers) Politics: Lessons from Chile*, 3 JOURNAL OF POLITICS IN AMERICA 71 (2010) (focusing on the Chilean Constitutional Tribunal); Aziz Huq and Jon Michaels, *The Cycles of*

in which courts strongly extended their power of review and fundamentally increased their powers over the other branches, like *Marbury v Madison*[40] in the United States, the *Bank Hamizrahi* judgment in Israel,[41] or the decision of several constitutional courts to review constitutional amendments.[42]

The previous paragraph merely describes some pertinent examples and countless others could have been offered just as well. The key point to take away here, is that in any given country the system of separation of powers is perpetually in flux. While the core of the three branches and their most fundamental interactions may be relatively stable, the borders between them are much less so. Those areas of friction may offer an avenue for each branch to try and expand its relative power over the others.[43]

3 The internationalization of the separation of powers: the constraints by supranational courts

It is crucial to point out, however, that such fluctuations within a domestic system of separation of powers are not driven exclusively by interactions on the national level. Rather, the key point of this article is that they are now dictated to an important extent by international actors as well. In general, in an era of ever-deepening constitutionalization of international law, one can also see an increasing internationalization of the principle of separation of powers.[44] With that, I do not mean to refer to the strand of scholarship that aims to find whether something akin to the separation of powers can be found on the international level.[45] Rather, I mean that at this point in time, in any given state, a full and accurate account of the system of separation of powers

Separation-of-Powers Jurisprudence, 126 THE YALE LAW JOURNAL 346 (2016) (focusing on the US Supreme Court); Joshua Strayhorn, *Lower Courts in Interbranch Conflict*, 11 JOURNAL OF LAW AND COURTS 67 (2023) (focusing on lower US courts).

[40] US Supreme Court Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[41] C.A. 6821/93, United Bank Mizrachi v. Migdal, 49(4) P.D. 22.

[42] Recently, for example, the Slovak Constitutional Court in its judgment PL. ÚS 21/2014 of 30 January 2019.

[43] Compare to: Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 THE AMERICAN JOURNAL OF COMPARATIVE LAW 103, 130 (2009).

[44] Cedric Jenart & Mathieu Leloup, *Separation of Powers and Alternative Dispute Resolution before the European Court of Human Rights*, 15 EUCONST 247, 255 (2019).

[45] This has happened most often regarding the EU: Deirdre Curtin & Eoin Carolan, *In Search of a New Model of Checks and Balances for the EU: Beyond Separation of Powers*, *in* ALLOCATING AUTHORITY: WHO SHOULD DO WHAT IN EUROPEAN AND INTERNATIONAL LAW? 54 (Joana Mendes & Ingo Venzke eds., 2018). See also regarding the Council of Europe: Paul Mahoney, *Separation of Powers in the Council of Europe: The Status of the European Court of Human Rights Vis-à-Vis the Authorities of the Council of Europe*, HUMAN RIGHTS LAW JOURNAL 152 (2003).

and a complete understanding of its functioning and evolution can no longer be achieved without giving due account to the effects by international actors.[46]

While that is a broad statement, which can be looked at from a lot of different perspectives – all of which may merit further analysis –[47] one of the clearest and most pronounced iterations of that development can be found in the interference – whether direct or indirect – by supranational courts via their case law. It is this aspect that will be the focus of the remainder of this article. As will be shown throughout the rest of this section, the various supranational courts are found willing to scrutinize a wide array of separation-of-powers issues, and they have established a persistent stream of case law that has an immediate effect on how states can (and importantly cannot) organize their system of separation of power. In other words, the decisions on institutional and functional architecture of the Contracting States, which, as was mentioned, belong to the very core a country's constitutional prerogatives, are to an important extent confined by the supranational courts; while the latter may not always dictate a conclusive design choice, they do limit the options that are left open to the states.

At this point in time, those constraining effects are most clearly visible in the European countries, which are subject to the highly developed legal systems of both the EU and the European Convention on Human Rights. The ECtHR and, to a lesser extent, the ECJ have by now developed a rich and quite detailed separation-of-powers jurisprudence, not in the least as a consequence of the attacks on judicial independence that have recently taken place in certain countries.[48] Nevertheless, such constraining effects can be noted just as well within the context of the case law by the Inter-American and African Courts.

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[46] See for a similar point, focusing on administrative bodies: Antonia Baraggia, *The rise of conditionality within the global administrative space: a challenge for the separation of powers*, *in* NEW CHALLENGES *supra* note 3, at 80.

[47] One can think, for example, of the influence that advisory bodies, such as the Venice Commission, or the Consultative Council of European Judges may have. See on the former: SERGIO BARTOLE, THE INTERNATIONALISATION OF CONSTITUTIONAL LAW: A VIEW FROM THE VENICE COMMISSION (2020). Furthermore, one could look at the effects that the EU has on domestic institutional design, for example via the Copenhagen-criteria (Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN LJ 1257 (2014)) or via its being a driving force of agencification on the domestic level (STÉPHANIE DE SOMER, AUTONOMOUS PUBLIC BODIES AND THE LAW - A EUROPEAN PERSPECTIVE (2017)). See also for claims about how the African Union has contributed to the Africanization of constitutional law, among other things by setting standards on core issues of constitutionalism, such as separation of powers and judicial independence: Micha Wiebusch, *Africanization of constitutional law*, *in* COMPARATIVE CONSTITUTIONAL LAW IN AFRICA 361 (Rosalind Dixon, Tom Ginsburg & Adem Abebe eds., 2022).

[48] In particular the Polish case has led to an extensive list of cases before both Courts.

Despite the prevalence of this development and its overall importance for constitutional law, it has so far stayed under the radar of legal scholarship,[49] especially in the general literature on the separation of powers.

The rest of this section aims to substantiate that development on the basis of a study of the case law of the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights. A distinction will be made on the basis of the four abovementioned components of the principle of separation of powers (separation of functions, institutions and personnel, as well as checks and balances), in order to show that the courts engage with and assess elements relating to all four of those components and ultimately dictate requirements on each of them. The aim of this section is certainly not to provide an exhaustive overview of the case law, but rather to lay bare the extent to which supranational courts have been found willing to review (elements of) the domestic system of separation of powers of their Contracting States, and to show how they constrain the design options that are left open to the states in doing so.

Before delving into the case law, I want to give a brief explanation of the methodology that was used to find the relevant jurisprudence. The cases were found on the basis of a combination of two search methods. The first method was textual in nature and used the search engines of the Courts[50] to look for judgments and decisions that mention relevant key phrases, such as "separation of powers" or "checks and balances", in English, French, and Spanish, depending on the languages used by the Court in question.[51] Since the African Court does not have its own searchable database, the African Human Rights Case Law Analyzer was used.

This textual method of finding cases led to around 600 judgments or decisions from the European Court of Human Rights, 200 judgments or Advocate General opinions for the ECJ, 50 judgments or decisions for the Inter-American

[49] See *supra* note 6 and accompanying text.

[50] HUDOC (https://hudoc.echr.coe.int/) for the ECtHR; Curia (https://curia.europa.eu/juris/recherche.jsf?language=en) for the ECJ; Jurisprudencia (https://jurisprudencia.corteidh.or.cr/) for the IACtHR.

[51] For the ECtHR the language is English or French, depending on the case in question; for the Inter-American Court Spanish or English; for the African Court French; for the ECJ, which translates its judgments and decisions in all official languages of the EU, the English versions were used.

Court and 12 judgments or decisions for the African Court. However, not all of those results turned out to be relevant, as there were false positives, for example where the concept of separation of powers was used only in passing in the arguments of the parties. At the same time, there were false negatives, since there were judgments that are relevant for the topic of this paper, without necessarily mentioning any of the abovementioned key phrases.

Because of that, the primary textual search method has been supplemented by a second, more content-based search method. That search method, rather than looking for specific words or phrases, looked into case law that addressed substantive topics which can be seen as a concrete manifestation of the principle of separation of powers, as it was defined earlier in this article, namely interactions between two actors – whether from the same or different branches – in terms of claims for autonomy or mutual control.[52] Those topics and the relevant judgments were identified via secondary sources: a thorough literature analysis, and a study of the annual reports by the Courts and the press releases of new judgments and decisions. Every time a relevant topic was found, I also examined whether the other Courts had case law on that same topic.

The combination of those two search methods led to a list of several hundred pertinent judgments and decisions. A large majority of those have ultimately not been included in the following case law analysis. At the same time, it must be stressed again that the abovementioned methodology does not – nor could it ever – pretend to lead to an exhaustive list of cases. Rather, the cases that are discussed below are illustrative for the broader argument made in this article and have been selected to point out the rich body of supranational separation-of-powers case law that exists by now for all four courts. With those methodological clarifications out of the way, let us now turn to the case law analysis in question, starting with those cases that concern the separation of functions.

3.1 The separation of functions

The first judgment in which the European Court of Human Rights explicitly stated that the separation of powers "had assumed growing importance"[53] in

[52] See *supra* section 2.

[53] Stafford v. United Kingdom, App. No. 46295/99, para. 78 (May 28, 2002), https://hudoc.echr.coe.int/eng?i=001-60486.

its case law concerned an issue of separation of functions, namely the question whether members of the executive could be involved in sentencing decisions. The Strasbourg case law on this topic has evolved rapidly via a series of rulings against the United Kingdom. In its earlier case law, the Court was rather deferential and accepted that it fell entirely within the discretion of the Secretary of State to decide on the prison sentence of a prisoner.[54] A few years later, however, the Court held that the fact that a member of the executive performed such a judicial function became increasingly difficult to reconcile with the separation of powers.[55] Later that same year, the Court went one step further and held that there was a violation of the Convention even if the Secretary of State was not able to lawfully depart from a recommendation on the sanction by a judicial authority. According to the Court, it was imperative that the sanctioning decision was taken by a judicial authority.[56] This was "not just a matter of form, but impinged on the fundamental principle of separation of powers and detracted from a necessary guarantee against the possibility of abuse".[57] In less than ten years, considerations related to the separation of powers have thus compelled the Court to completely change its view on this issue, and to prohibit the executive from performing that judicial function.

In similar sense, the supranational courts have equally made clear that the legislative branch cannot improperly intervene in the adjudicatory process. The European Court of Human Right has long held that, whereas the legislature is in principle not prohibited from regulating via new provisions with retroactive effect,[58] the principle of the rule of law and the notion of fair trial enshrined in Article 6(1) ECHR preclude any interference by the legislature in the administration of justice, designed to influence the judicial determination of a dispute, except on compelling grounds of public interest.[59] The Court has established a rich and extensive jurisprudence in which it protects the judiciary from encroachment on its judicial function by the

[54] Wynne v. United Kingdom, App. No. 15484/89 (July 18, 1994), https://hudoc.echr.coe.int/eng?i=001-57886.
[55] *Stafford*, at para 78.
[56] Compare to: Crospery Gabrial and Ernest Mutakyawa v. United Republic of Tanzania, App. No. 050/2016, Afr. Ct. H.R., para. 94 (Feb. 13, 2024), in which the African Court held that by imposing a mandatory death sentence in the law, the legislature took away the independent discretionary power of the judicial officer. See also: Makungu Misalaba v. United Republic of Tanzania, App. No. 033/2016, Afr. Ct. H.R., para. 152 (Nov. 7, 2023).
[57] Benjamin and Wilson v. the United Kingdom, App. No. 28212/95, para 36 (Sep. 26, 2002), https://hudoc.echr.coe.int/eng?i=001-60649.
[58] At least in civil law matters.
[59] Vegotex v. Belgium, App. No. 49812/09, para 92 (Nov. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-220415.

legislature. It has consistently held that any reasons adduced to justify legislative intervention with the administration of justice must be treated with the greatest possible degree of circumspection.[60] The ECJ has recently followed this line of case law and held that the right to a fair trial, enshrined in Article 47 of the Charter, precludes measures by the executive or legislative power with retroactive effect that effectively decide a judicial dispute.[61] In the same vein, both the Inter-American and the African Court have made clear that amnesty legislation violates the right to judicial protection and to have their case heard by a judicial body.[62]

A third example can be found in the Inter-American Court's case law concerning the impeachment of judges, a topic that has led to several high-profile judgments of the Court. The starting point in the Court's reasoning here is that, although the jurisdictional function belongs, in particular, to the judiciary, other public organs or authorities may exercise functions of the same type. Nevertheless, any state organ that exercises such a function, must do so in a way that respects the guarantees of due legal process established in Article 8 of the American Convention, including the requirements of independence and impartiality.[63] Thus, while the Court does not on principle rule out that the legislative branch performs that judicial function, it polices the manner in which it does. The Court's assessment has proven stringent in this regard, verifying whether the parliament was competent to take the decision,[64] whether the necessary procedural safeguards have been respected, and whether the impeachment decision was acceptable in light of the principles of judicial independence and the separation of powers.[65] In

[60] Among others: D'Amico v. Italy, App. No. 46586/14, para 35 (Feb. 27, 2022), https://hudoc.echr.coe.int/eng?i=001-215595.
[61] Case C-504/19, Banco Portugal (Apr. 29, 2021).
[62] Among others: Case of Gomes Lund v. Brazil, Inter-Am. Ct. H.R. (Nov. 24, 2010); Sébastien Germain Marie Aïkoue Ajavon v. Republic Of Benin, App. No. 062/2019, Afr. Ct. H.R., paras. 309-325 (Dec. 4, 2020).
[63] Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Inter-Am. Ct. H.R., para. 166 (Aug. 28, 2013); Case of the Constitutional Court v. Peru, Inter-Am. Ct. H.R., para 71 (Jan. 31, 2001).
[64] See for a recent judgment in which the Court found an additional violation of the principle of legality under Article 9 of the Inter-American Convention on that basis: Case of Gutiérrez Navas a.o. v. Honduras, Inter-Am. Ct. H.R. (Nov. 29, 2023).
[65] Camba Campos, *supra* note 63; Case of the Supreme Court of Justice (Quintana Coello et al) v. Ecuador, Inter-Am. Ct. H.R. (Aug. 23, 2013); Case of Ríos Avalos et al. v. Paraguay, Inter-Am. Ct. H.R. (Aug. 19, 2021); Case of Aguinaga Aillón v. Ecuador, Inter-Am. Ct. H.R. (Jan. 30, 2023).

doing so, the Inter-American Court strongly circumscribes the leeway for the legislative branch to perform this judicial function.[66]

Importantly, the supranational case law does not solely protect the judicial function from encroachments by the legislative and executive branches. The courts equally safeguard the legislative function against encroachments by the executive and judicial branches. Whereas the European Courts accept that domestic legislation progressively develops via executive application and judicial interpretation, they do not shy away from penalizing those domestic authorities if their understanding of the law could not reasonably be foreseen and drifts too far from the clear wording of the law.[67] Especially when criminal law provisions are at stake the Strasbourg Court verifies whether the domestic courts did not infringe the reasonable limits of acceptable judicial clarification.[68] In other words, the Courts thus seem to indicate that the core of the law and policy making power should lie with the legislature.[69] In a few specific areas, such as the organization of the judiciary,[70] the European Courts, as well as the Inter-American Court, even explicitly require the legal framework to be laid down in formal legislation,[71] expressly reserving the legislative function for the legislature in those fields, shielding it from the executive and judicial branches.

3.2 The separation of institutions

When looking at the separation of institutions, the majority of the case law – rather unsurprisingly – concerns the independence of the judiciary. All four supranational courts have established a wealth of case law on the institutional independence of the judiciary, assessing, among other things, the appointment, discipline, removal, promotion and tenure of judges. This case law has developed rapidly over the course of the last decade and is

[66] See for two authors who argue that the IACtHR has de facto ruled out impeachment: Kosař & Lixinski, *supra* note 7, at 738.
[67] Lia v. Malta, App. No. 8709/20, para. 167 (May 5, 2022), https://hudoc.echr.coe.int/eng?i=001-217115.
[68] Parmak and Bakir v. Turkey, App. No. 22429/07, para. 76 (Dec. 3, 2019), https://hudoc.echr.coe.int/eng?i=001-199075; Yüksel Yalçınkaya v. Türkiye, App. No. 15669/20, para. 271 (Sep. 26, 2023), https://hudoc.echr.coe.int/eng?i=001-227636.
[69] See recently in the context of the fight against climate change: Verein Klimaseniorinnen Schweiz a.o. v. Switzerland, App. No. 53600/20, para. 413 (Apr. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-233206.
[70] Guðmundur Andri Ástráðsson v. Iceland, App. No. 26374/18, para. 214 (Dec. 1, 2020), https://hudoc.echr.coe.int/eng?i=001-206582; Case C-542/18/ RX-II, Review Simpson v. Council (26 March 2020); Case of Cajahuanca Vásquez v. Peru, Inter-Am. Ct. H.R., para. 108 (Nov. 27, 2023)
[71] See for example Case C-528/15, Al Chodor, paras. 42-45 (Mar. 15, 2017).

increasingly constraining the institutional design options for the respective Contracting Parties. The Strasbourg Court has, for example, indicated in *Oleksandr Volkov* and *Denisov* that a judicial council with disciplinary powers can only be considered independent if it is composed for a majority of judicial members that were appointed by their peers.[72] In the recent judgment of *Cataña*, the Court seemed to indicate further that the Minister of Justice and the Prosecutor General may not be *ex officio* members of the council, even if it is composed for a majority of judges.[73]

In the same vein, in two recent cases against Benin, the African Court has found a violation of Article 26 of the African Charter, which requires the State Parties to guarantee the independence of the courts, on the basis of the composition of its judicial council. In both judgments, the Court relied on the principle of separation of powers to argue that the judicial council, as a body that is meant to protect the independence of the judiciary, should itself be independent from the legislative and executive branches. The Court found, however, that the Benin council's composition was skewed in favor of the executive, since the President of the Republic and the Minister of Justice were *ex officio* members, with the President acting as president of the council and having the decisive vote. Consequently, the Court found that the conditions for the independence of the high council were not met and found a violation of Article 26 of the Charter.[74] In an older judgment against Cameroon, the fact that the President of the Republic and the Minister of Justice were the Chairperson and Vice Chairperson of the judicial council respectively, sufficed for the African Commission to decide that there was 'manifest proof' that the judiciary was not independent.[75] Finally, in two other judgments against Benin and Malawi, the African Court has ruled that the Constitutional Court was not sufficiently independent, since the term of office of its judges, only lasted for

[72] Denisov v. Ukraine, App. No. 76639/11, paras. 68-72 (Sep. 25, 2018) https://hudoc.echr.coe.int/eng?i=001-186216; Oleksandr Volkov v. Ukraine, App. No. 21722/11, paras. 109-117 (Jan. 9, 2013), https://hudoc.echr.coe.int/eng?i=001-115871.

[73] Cataña v. Moldova, App. No. 10473/05 (Jan. 29, 2023), https://hudoc.echr.coe.int/eng?i=001-116132.

[74] Houngue Éric Noudehouenou v. Republic Of Benin, App. No. 028/2020, Afr. Ct. H.R., paras. 68-83 (Dec. 1, 2022); Sébastien Germain Marie Aïkoue Ajavon v. Republic Of Benin, App. No. 062/2019, Afr. Ct. H.R., paras. 309-325 (Dec. 4, 2020).

[75] Kevin Mgwanga Gunme et al v. Cameroon, App. No. 266/03, Afr. Com. H.R., para. 211 (May 27, 2009).

five and seven years respectively, and the law did not lay down clear criteria to decide on the renewal of appointment.[76]

Notably, one can also find examples of the separation of institutions that go beyond the independence of the judiciary. In *Karácsony*, a group of opposition members from the Hungarian parliament challenged a disciplinary sanction that had been suggested by the speaker of the house and adopted by the plenary session. The applicants contended, among other things, that they had not had an effective remedy to challenge this sanction outside of parliament. The Court, nevertheless, clearly stated that in light of the generally recognized principles of parliamentary autonomy and the separation of powers, members of parliament cannot be considered entitled to a remedy to contest a disciplinary sanction outside of parliament, but imposed procedural safeguards onto the parliament to protect the opposition members.[77] Thus, the Court was willing to scrutinize this element of Hungarian constitutional law and highlighted the established importance of parliamentary autonomy and allowed for a clear separation between the legislature and judiciary in this field.

3.3 The separation of personnel

Beyond the separation of functions and institutions, the supranational courts have also addressed cases concerning the separation of personnel. The majority of these cases is examined from the perspective of judicial independence when members of a court still have ties to the legislative or executive branch. In general, the supranational case law does not impose a strict separation in this regard. In this vein, the Strasbourg Court has held that the principle of separation of powers is not decisive in the abstract.[78] As such, the mere presence of a member of the legislature or executive in a tribunal does not suffice to violate the right to an independent and impartial court.[79] Nevertheless, the Courts do verify whether these members enjoy sufficient guarantees against outside pressure and whether the presence of political

[76] Oumar Mariko v. Republic of Mali, App. No. 029/2018, Afr. Ct. H.R., para 85 (Mar. 24, 2022); XYZ v. Republic of Benin, App. No. 010/2020, Afr. Ct. H.R., paras. 60-72 (Nov. 27, 2020).
[77] Karácsony v. Hungary, App. No. 42461/13 (May 17, 2016), https://hudoc.echr.coe.int/eng?i=001-162831.
[78] Thevenon v. France, App. No. 46061/21, para. 63 (Sep. 13, 2022), https://hudoc.echr.coe.int/eng?i=001-220004.
[79] Pabla Ky v. Finland, App. No. 47221/99 (Jun. 22, 2004), https://hudoc.echr.coe.int/eng?i=001-61829; Sramek v. Austria, App. No. 8790/79 (Oct. 22, 1984), https://hudoc.echr.coe.int/eng?i=001-57581. Case C-203/14, Consorci Sanitari del Maresne (Oct. 6, 2015).

members interferes with the independence and impartiality of the court in the specific circumstances of the case, not shying away from finding a violation when they do.[80] In other words, the supranational courts have been found willing to police the compatibility of a judge wearing two hats in light of the requirement of independence and impartiality.

The supranational case law is, however, not limited to cases concerning members of a judicial body who are connected to the legislative or executive branches. The Strasbourg Court also has a surprisingly rich case law, grounded on the right to stand for elections enshrined in Article 3 of the First Additional Protocol, on separation-of-powers inspired incompatibilities for members of parliament.[81] In this vein, it has assessed complaints by individuals who could not hold a seat in parliament because they already exercised a function in both the executive or judicial branch.[82] The Court has generally been very lenient towards the states' choices in imposing incompatibilities, pointing to the broad latitude to establish constitutional rules on the status of members of parliament, including criteria for declaring them ineligible.[83] Nevertheless, such cases make clear that it is willing to assess those choices.

One particular topic concerning the separation of personnel in which the supranational Courts impose stricter standards is military tribunals. Both the San José and Strasbourg Court have developed jurisprudence on this topic and have stressed the need to fully maintain the independence of the military members of those tribunals, stipulating that there may no longer be any hierarchical relationship between the military judges and the military, and that they can no longer be subject to military discipline.[84] These independence criteria essentially demand to sever all connections between the military

[80] McGonnell v. United Kingdom, App. No. 28488/95 (Feb. 8, 2000), https://hudoc.echr.coe.int/eng?i=001-58461. Here, the Strasbourg Court found that the Royal Court in Guernsey was not sufficiently independent and impartial. The reason for that was that the Bailiff, who sat in the court, also chaired the legislative body in Guernsey and had in that capacity been actively involved in the preparatory stages of the regulation that was at the heart of the dispute on the domestic level.

[81] Lykourezos v. Greece, App. No. 33554/03 (Jun. 15, 2006), https://hudoc.echr.coe.int/eng?i=001-75858.

[82] Barski and Święczkowski v. Poland, App. No. 13523/12 (Feb. 2, 2016); Ahmed a.o. v. United Kingdom, App. No. 22954/93 (Sep. 2, 1998); Gitonas v. Greece, App. No. 18747/91 (Jul. 1, 1997), https://hudoc.echr.coe.int/eng?i=001-58038; Brike v. Latvia, App. No. 47135/99 (Jun. 29, 2000), https://hudoc.echr.coe.int/eng?i=001-31257.

[83] Kokëdhima v. Albania, App. No. 55159/16, para 49. (Jun. 11, 2024), https://hudoc.echr.coe.int/eng?i=001-234125.

[84] For two recent examples: Case of Grijalva Bueno v. Ecuador, Inter-Am. Ct. H.R., para 97 (Jun. 3, 2021); Mustafa v. Bulgaria, App. No. 1230/17, paras. 38-50 (Nov. 28, 2019), https://hudoc.echr.coe.int/eng?i=001-198691.

judges and the executive branch, requiring military courts to resemble ordinary courts on almost all key points.[85] These standards have led to wide-scale reforms of the military court system in, among others, Ukraine, Chile and Turkey. The African Commission, in turn, has also indicated that specialized criminal courts cannot be considered independent and impartial when they are composed for a majority by members that belong to the executive branch.[86]

3.4 Checks and balances

Finally, as regards the fourth component of the principle of separation of powers, the checks and balances, one can also find a large amount of consequential supranational judgments. There are plenty of judgments to be found in which the supranational courts indicate that the system of checks and balances within the contracting parties is insufficient and should include further mutual checks between two state actors. One famous example of such a judgment is the European Court of Justice's *Simmental* ruling, in which it held that any domestic court should interpret national laws to the greatest extent possible in conformity with EU law, and, in case that proves impossible, to disapply the provision.[87] The ECJ later clarified that to do that, the domestic court did not have to request or await the prior setting aside of such provision by legislative or constitutional means.[88] In doing so, the Court has empowered every domestic court within the European Union to conduct a strong judicial review of national legislation against Union law.[89] Thereby, it fundamentally strengthened the position of the domestic judiciary vis-à-vis the legislature. Later, the Court imposed a similar requirement for members of the executive. In the *Costanzo* judgment, the Court obliged members of the executive to disapply national legislation when they believe it to be contrary to EU law.[90] The Inter-American Court similarly requires domestic courts and all other domestic actors to conduct an *ex officio* "conventionality control" of domestic legislation. This control requires members of the judicial and executive

[85] Prompting two authors to argue that this case law undercuts the reason for having such courts in the first place. Kosař & Lixinski, *supra* note 7, 727.
[86] Constitutional Rights Project v. Nigeria, App. No. 60/91, Afr. Com. H.R.
[87] Case 106/77, Simmenthal (Mar. 9, 1978).
[88] Case C-573/17, Popławski, para. 58 (Jun. 24, 2019).
[89] Patricia Popelier, *The Agony of Political Constitutionalism within the European Legal Space*, *in* THE POWERS THAT BE. A LEIDEN RESPONSE TO MÖLLERS 65, 70 (Hans-Martien ten Napel and Wim Voermans eds., 2015).
[90] Case C-103/88, Costanzo (Jun. 22, 1989).

branches to check whether national laws are in compliance with the American Convention, as interpreted by the Court, and, if that is not the case, to disapply them.[91] In doing so the San José Court has established something akin to a Convention-inspired *Simmenthal* and *Costanzo* doctrine.[92]

This case law clearly alters the traditional balance of powers that existed within the respective Contracting States. Via those judgments, the supranational courts require the domestic judicial and executive branches to act as a check on the legislative branch. Especially with regards to the executive, those judgments extended the powers far beyond the limits that are traditionally imposed on them by domestic constitutional law.[93]

A different strand of case law that engages with an issue of checks and balances relates to the right of access to a court and the question of judicial review of executive action. The supranational courts generally require that decisions by administrative actors can be challenged before a court or tribunal. They moreover require the domestic courts to be endowed with full jurisdiction and thus to provide a sufficient review in the proceedings before them.[94] There are plenty of examples in which the courts criticized the fact that a measure by the executive could not be brought before the courts or indicated that the review in question was not sufficiently thorough.[95] The general effect of this strand of case law is therefore to push the domestic courts to intensify their checking function on the executive, either by expanding the scope of their review to include actions that escaped judicial scrutiny in the past, or by intensifying their review in order to provide a full review. Nevertheless, the Strasbourg Court has equally indicated that is not blind to the theory of "*actes de gouvernement*" and the separation-of-powers

[91] For the first explicit mention of this duty, see: Case of Almonacid-Arellano et al v. Chile, Inter-Am. Ct. H.R., para. 124 (Sep. 26, 2006). It has since been confirmed and refined. See: GONZALO AGUILAR CAVALLO A.O., EL CONTROL DE CONVENCIONALIDAD: IUS CONSTITUTIONALE COMMUNE Y DIÁLOGO JUDICIAL MULTINIVEL LATINOAMERICANO (2021).

[92] Raffaela Kunz, *Judging International Judgments Anew? The Human Rights Courts before Domestic Courts*, 30 EJIL 1129, at 1135 (2019). Interestingly, in some exceptional cases the Strasbourg Court has mentioned a similar requirement, though this has never become part of its mainstream case law. See: Dumitru Popescu v. Romania (no. 2), App. No. 71525/01, para. 103 (Apr. 26, 2007), https://hudoc.echr.coe.int/eng?i=001-80352.

[93] For a critical analysis of the doctrine of conventionality control in light of the domestic separation of powers: Eduardo Meza Flores, *Control de convencionalidad en sede nacional: impacto en la separación de poderes*, 2 REVISTA DE INVESTIGACIÓN DE LA ACADEMIA DE LA MAGISTRATURA 67 (2020).

[94] Sigma Radio Television LTD v. Cyprus, App. No. 32181/04, para. 154 (Jul. 21, 2011), https://hudoc.echr.coe.int/eng?i=001-105766.

[95] For example: Case C-245/19, État luxembourgeouis (Oct. 6, 2020); Steininger v. Austria, App. No. 21539/07 (Apr. 17, 2012), https://hudoc.echr.coe.int/eng?i=001-110483.

considerations that underpin it, and allows an absence of judicial review in highly political cases or in areas such as foreign policy.[96]

3.5 The supranational case law: a blueprint for the separation of powers?

The above overview did not necessarily concern the most legally invasive or politically sensitive examples. They were chosen in the first place to lay bare the variety of separation-of-powers issues that the supranational courts have been willing to assess and to show that their jurisprudence affects all four components of the separation of powers and constrains the contracting states in their domestic design choices. Yet, it is important to stress once again that the various strands of case law that were addressed above are only the tip of the iceberg and that many further examples can be found. Besides the cases discussed above, the supranational courts also have case law on other separation-of-powers issues, such as parliamentary immunity and access to a court,[97] lowering of the retirement age of judges by the legislature,[98] judicial functions by parliamentary commissions of enquiry,[99] the independence of prosecutors,[100] judicial review of individual, non-legislative acts by parliament,[101] the independence of electoral bodies,[102] undue political interference with the appointment of judges,[103] the duty of the executive to abide by and execute judicial decisions,[104] the prohibition of indefinite

[96] Levrault v. Monaco, App. No. 47070/20 (Jul. 9, 2024), https://hudoc.echr.coe.int/eng?i=001-235424; Tamazount v. France, App. No. 17131/19 (Apr. 4, 2024), https://hudoc.echr.coe.int/eng?i=001-231874; H.F. v. France, App. No. 24384/19 (Sep. 14 2022), https://hudoc.echr.coe.int/eng?i=001-219333.

[97] Case of Barbosa de Souza et al v. Brazil, Inter-Am. Ct. H.R. (Sep. 7, 2021); Kart v. Turkey, App. No. 8917/05 (Dec. 3, 2009), https://hudoc.echr.coe.int/eng?i=001-96007.

[98] Case C-619/18, Commission v Poland (Independence of the Supreme Court) (Jun. 24, 2019); Pajak v. Poland, App. No. 25226/18 (Oct. 24, 2023), https://hudoc.echr.coe.int/eng?i=001-228355.

[99] Rywin v. Poland, App. No. 6091/06 (Feb. 18, 2006), https://hudoc.echr.coe.int/eng?i=001-161037.

[100] Case of Nissen Pessolani v. Paraguay, Inter-Am. Ct. H.R. (Nov. 21, 2022); Kolevi v. Bulgaria, App. No. 1108/02 (Nov. 5, 2009), https://hudoc.echr.coe.int/eng?i=001-95607.

[101] Assemblée chrétienne des Témoins de Jéhovah d'Anderlecht v. Belgium, App. No. 20165/20 (May 4, 2022), https://hudoc.echr.coe.int/eng?i=001-216625; Mándli v. Hungary, App. No. 63164/16 (May 26, 2020), https://hudoc.echr.coe.int/eng?i=001-202540.

[102] Bob Chacha Wangwe and Legal and Human Rights Centre v. United Republic of Tanzania, App. No. 011/2020, Afr. Ct. H.R. (Jun. 13, 2023); Gahramanli a.o. v. Azerbaijan, Appl. No. 36503/11 (Oct. 8, 2015), https://hudoc.echr.coe.int/eng?i=001-157535.

[103] Case C-487/19, W.Z. (Oct. 6, 2021); Advance Pharma Sp. Z O.O v. Poland, App. No. 1469/20 (Feb. 3, 2022), https://hudoc.echr.coe.int/eng?i=001-215388; Kouassi Kouame Patrica and Baba Sylla v. Republic of Côte d'Ivoire, Afr. Ct. H.R. (Sep. 22, 2022).

[104] Harold Mbalanda Munthali v. Republic of Malawi, App. No. 022/2017, Afr. Ct. H.R. (Jun. 23, 2022); Case of Meza v. Ecuador, Inter.-Am. Ct. H.R. (June 14, 2023).

presidential re-election,[105] the combination of advisory and judicial functions within councils of state,[106] and others. Beyond those more traditional issues of tripartite separation, recent jurisprudence also addresses questions of fourth branch institutions[107] and intra-branch separation of powers.[108]

The point that is being made here is not that the supranational courts lay down exactly how the domestic system of separation of powers should be given shape on every single one of those topics. In fact, the courts themselves at times take great pains to stress that they do not impose a particular constitutional model governing the relationship or interactions between the branches of government.[109] However, their case law does determine what is and what is not allowed in terms of such relationships or interactions. In other words, the supranational courts circumscribe the way in which their respective signatory parties can shape the functional and institutional relationships between the domestic branches of power, ranging from rather minute (think of the question of executive sentencing powers) to more fundamental (such as the composition of judicial councils) issues. In this sense, when you take all of the individual strands of case law together, the courts must be understood to lay down a kind of blueprint of what the system of separation of powers within their respective Contracting Parties is allowed and expected to look like.[110]

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[105] Advisory opinion OC-28/21 requested by the Republic of Colombia on the presidential reelection without term limits, Inter-Am. Ct. H.R., (Jun. 7, 2021).

[106] Kleyn v. the Netherlands, App. No. 39343/98 (May 6, 2003), https://hudoc.echr.coe.int/eng?i=001-61077; Procola v. Luxembourg, App. No. 14570/89 (Sep. 28, 1998), https://hudoc.echr.coe.int/eng?i=001-57944.

[107] On the issue of fourth branch institutions: TUSHNET, THE NEW FOURTH BRANCH (2021). The ECJ has an extensive jurisprudence on the independence of regulatory bodies, for example: Case C-718/18, Commission v. Germany (Sep. 2, 2021). See also by the ECtHR on the independence of the Moldovan media regulator: NIT S.R.L. v. Republic of Moldova, App. No. 28470/12 (Apr. 5, 2022), https://hudoc.echr.coe.int/eng?i=001-216872.

[108] The clearest example of this is the developing case law on internal judicial independence, stressing that judges must equally be independent from actors within the judiciary. Among others: Parlov-Tkalčić v. Croatia, App. No. 24810/06, para. 86 (Dec. 22, 2009), https://hudoc.echr.coe.int/eng?i=001-96426; Case C-554/21, HANN-INVEST, para. 54 (Jul. 11, 2024). For a completely different example of the ECJ: Case C-474/10, Seaport (NI) (Oct. 20, 2011). Requiring that within an executive authority a functional separation should be organized so that an administrative entity internal to it has real autonomy, that is provided with administrative and human resources of its own and that is in a position to fulfil the tasks entrusted to the authorities in an objective fashion.

[109] Case C-585/18, A.K. (Independence of the Disciplinary Chamber of the Supreme Court), para. 130 (Nov. 19, 2019); Case of Martínez Esquivia v. Colombia, Inter-Am. Ct. H.R., para. 97 (Oct. 6, 2020); Haarde v. Iceland, App. No. 66847/12, para 84 (Nov. 23, 2017), https://hudoc.echr.coe.int/eng?i=001-178700.

[110] See in this sense also: Kamm, *supra* note 6, at 758.

To be clear, that blueprint may very well remain relatively open-ended for some topics – thereby leaving room for a range of options in terms of institutional and functional relationships – and is not equally detailed on every issue.[111] At the same time, this blueprint is not necessarily identical between the various courts, depending on their body of case law. Differences between the courts may be inspired by fundamental reasons, such as the texts of the treaties they interpret, the powers and jurisdiction of the court in question, or the opinions of the judges who hear a certain case. In this sense, the case law of each court is also likely to reflect particular institutional or functional set-ups that are common to the region.[112] At the same time, such differences may equally be steered by more practical reasons, such as the amount of cases a court decides, or which separation-of-powers aspects happen to be brought before them. In this sense, the fact that the Strasbourg Court has the richest jurisprudence, can hardly be separated from the fact that it is the oldest of the four courts and has by far the largest case load.

Nevertheless, for the contracting states, the fact remains that the power to make such choices on the institutional and functional relationships between their government bodies, which as was said belong to the very core of a country's constitutional prerogatives, is limited by what the supranational courts say on the matter.[113] That blueprint must, moreover, be understood to apply to all signatory parties equally. Depending on the requirements imposed by the strand of case law in question, the courts may therefore be understood to slowly nudge the various national separation-of-powers systems closer towards each other, imposing a sort of supra-national, regional model of separation of powers.[114]

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[111] One area on which there is, for example, little to no case law, is the separation of institutions between the executive and legislative branches. One important reason for that is that that relationship is more difficult to capture in terms of fundamental rights, which means that cases on that issue cannot be brought before the supranational courts.

[112] Think for example of the fact that the San José Courts has quite some jurisprudence on the impeachment of judges, whereas the Strasbourg Court does not, simply because that instrument is much more common in South American countries than in Europe.

[113] Compare to: SOUVIGNET, *supra* note 4, at 353. He states that the Court "clearly ventures into the field of institutional and constitutional architecture"

[114] In such sense also: Sègnonna Horace Adjolohoun, *Judges Guarding Judges: Investigating Regional Harbours for Judicial Independence in Africa*, 67 JOURNAL OF AFRICAN LAW 169, at 172 (2023); David Kosař, *Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights shapes domestic judicial design*, 13 UTRECHT LAW REVIEW 112, at 121 (2017).

Importantly, those supranational judgments do not only operate *ex post*, weeding out the noncompliant aspects of the various State Parties on a case-by-case basis. Its effects are much more general and must be understood to also have forward looking effects.[115] Take the ECtHR's Grand Chamber judgment in *Mugemangango* as an example. In that case, the Court unanimously held that the Belgian system of purely parliamentary post-election dispute resolution violated the rights to free and fair elections and to an effective remedy, mostly because it did not offer sufficient safeguards of impartiality.[116] To execute the judgment, the Belgian state has announced that it will amend its parliamentary system of post-election dispute resolution – a system which has been firmly enshrined in its Constitution since 1831 and was designed exactly to protect the independence and autonomy of parliament – and indicated that a judicial review by the Constitutional Court will be installed.[117] Importantly, commentators have argued that the judgment equally sent a clear message to all other European countries that still have such a parliamentary system,[118] and that they too are now required to amend it and allow for some form of impartial (quasi)judicial review.[119] In the same sense, any European or African country that wants to establish or redesign a judicial council cannot do so without giving due account to the stringent requirements imposed by the European Court of Human Rights, the European Court of Justice or the African Court if it does not want to run the risk of a future violation.[120]

Finally, there is, all things considered, not that much that the countries in question can do to halt such interferences by the supranational case law. All courts argue that the instrument(s) they interpret, and as such their interpretation of those instruments, have precedence over domestic law, even the constitution. The Contracting Parties are thus in principle bound to respect the judgments, no matter what aspect of the state organization they call into question and have very little legal instruments at their disposal – other than

[115] Similarly: Mathieu Leloup and David Kosař, *Sometimes Even Easy Rule of Law Cases Make Bad Law: Grzęda v Poland*, 18 EuConst, 753, at 755 (2022).
[116] Mugemangango v. Belgium, App. No. 310/15, para. 137 (Jul. 10, 2020), https://hudoc.echr.coe.int/eng?i=001-203885.
[117] The action plans can be accessed via: https://hudoc.exec.coe.int/?i=004-55686.
[118] For example: the Netherlands, Iceland and Italy.
[119] Eirik Holmøyvik, *The right to an effective (and judicial) examination of election complaints*, *in* European Yearbook of Human Rights 541, at 564 (Philip Czech, Lisa Heschl, Karin Lukas, Manfred Nowak, Gerd Oberleitner eds., 2021).
[120] In the same sense: Adjolohoun, *supra* note 114, at 177.

simple outright refusal to comply – to push back in any sort of meaningful way.[121]

4 The separation of powers in a multi-layered reality

The previous title set out to show that the case law of supranational courts limits the institutional, functional and personal design choices of the contracting parties regarding every component of the separation of powers. For some, that might not seem like a very innovative conclusion. Legal and political science literature has long been aware that international law, and fundamental rights catalogues in particular, have an effect on the balance of powers within the state, mainly strengthening the judiciary vis-à-vis the legislative and executive branches.[122] Due to their inherently counter-majoritarian nature and open-ended formulation, they generally cause a shift of ultimate decision-making power from the political branches to the judiciary.[123] In other words, the flourishing of fundamental rights that we have seen all over the world over the last couple of decades, has had a clear empowering effect on the judiciary.[124]

Yet, what the previous section has shown goes much further than that prevailing understanding in the literature. It showed that supranational courts have been willing to actively assess a broad range of elements of the system of separation of powers within their respective State Parties and interfere directly in the balance of powers between the various branches with their judgments, dictating what is and what is not allowed in terms of institutional,

[121] In Europe, some governments and domestic apex courts have tried to rely on the doctrine of constitutional identity. See for example: Romanian Constitutional Court, decision 390/2021 (Jun. 8, 2021), https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf; Polish Constitutional Court decision K3/21 (Oct. 7, 2021); Mugemangango, *supra* note 116, at paras. 58 and 65. However, so far that kind of arguments have not convinced the ECJ and ECtHR. See very tellingly in this respect, Case C-204/21, Commission v. Poland, para. 72 (Jun. 5, 2023). "there is no ground for maintaining that the requirements arising [...] from respect for values and principles such as the rule of law, effective judicial protection and judicial independence [...] are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU."

[122] For example: ALEC STONE SWEET & CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 95 (2018).

[123] Among many others: Luca Pietro Vanoni, *New challenges to the separation of powers: the role of constitutional courts*, *in supra* note 3 NEW CHALLENGES, at 70-74; Alec Stone Sweet, *A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, at 68 (2012); Hellen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on national legal systems*, *in* A EUROPE OF RIGHTS. THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 677, at 688 (Hellen Keller & Alec Stone Sweet eds., 2008) Critical in this regard: Richard Ekins, *Human Rights and the Separation Of Powers*, 34 UNIVERSITY OF QUEENSLAND LAW JOURNAL 217 (2015).

[124] Marta Cartabia, *The rule of law and the role of courts*, 10 ITALIAN JOURNAL OF PUBLIC LAW 1, at 3 (2018).

functional or personal relationships between them. Put differently, beyond the indirect, horizontal effect that takes place via domestic courts relying on supranational norms, there is also a distinct, direct and vertical effect via the judgments of supranational courts.

At this point, some might wish to interject that all of this is not really a novel evolution. To a certain extent that is indeed correct. In fact, supranational courts can be understood to have interfered in issues of domestic separation of powers as long as they have been around. Since these courts have the power to rule on the right to a fair trial by an independent court, they have long been deciding cases on that central element of the separation of powers. Yet, the point that this article intends to prove is just how far the supranational case law on domestic issues of separation of powers has developed. For one, the case law on judicial independence has evolved to an extent that it now dictates very detailed standards on how a body of judicial discipline should be composed, on how much discretionary power political actors may have during the appointment procedure of (even constitutional court) judges, or on how a procedure of impeachment is allowed to take place, much further than one might expect at first glance. Second, and more fundamentally, the supranational separation-of-powers case law by now goes way beyond only questions of judicial independence. Even though the right to an independent tribunal is the only clear hook in terms of separation of powers that one can find in the various treaties, the courts have created a rich and sprawling case law that concerns a multitude of other separation-of-powers related topics as well, spanning all dimensions of the concept. Throughout the years the courts have decided that a wide variety of issues of institutional and functional architecture fall within their purview – sometimes via rather flexible interpretations – and have been found willing to police those issues and impose substantive standards.

The key point to take away then is that when talking about the separation of powers, the supranational courts have by now become crucial actors that significantly determine the design choices of the contracting states. That is a noteworthy development in constitutional law that can be seen in different parts of the world and one which I argue will not reverse any time soon, but rather further intensify. I see at least four separate yet interconnected reasons for this.

First, consider the way in which the institutional landscape of supranational adjudication has evolved. The African Court, for example, issued its first judgment only in 2013, but has since developed an impressive jurisprudence, especially on issues of judicial independence. One can expect that the jurisprudence of this court will only continue to grow and develop, especially if more countries accept its jurisdiction.

Second, generally speaking, the reach of international law – and human rights law in particular – over domestic constitutional law, and issues of an institutional or political nature, tends to expand over time.[125] The same can be seen with regard to the supranational courts' separation-of-powers case law. A prime example of that is the well-known Portuguese judges case by the ECJ,[126] in which it all of a sudden brought questions of domestic judicial independence and judicial governance of all EU Member States within its own purview, via a groundbreaking new interpretation of Article 19(1)(2) TEU.[127] Other than such big revolutions, the development can also take a more gradual path. Some have, for example, pointed to the "irresistible extension"[128] of the scope of Article 6(1) ECHR, requiring that an ever-increasing number of types of disputes is amenable to domestic judicial review.[129] Even beyond such a right – which clearly has a close link to the idea of checks and balances – the expanding material scope of other fundamental rights, coupled with the growing tendency to read procedural obligations into such rights, equally leads to a further influence on issues of domestic balance of powers. This then means that over time, the body of supranational separation-of-powers case law has been expanding and is likely to expand further.

Third, we can see that this expanding body of case law is subsequently relied on to challenge substantively closely related or identical separation-of-powers

[125] Laurence Burgorgue-Larsen, *Les Occupants Du "Territoire Constitutionnel". État Des Lieux Des Contraintes Jurisprudentielles Administrative et Européenne Pesant Sur Le Conseil Constitutionnel Français*, REVUE BELGE DE DROIT CONSTITUTIONNEL 68 (2003).

[126] Case C-64/16, Associação Sindical dos Juízes Portugueses (Feb. 26, 2018).

[127] Matteo Bonelli and Monica Claes, *Judicial Serendipity: how Portuguese judges came to the rescue of the Polish judiciary* 14 EUCONST 622 (2018).

[128] David Renders and Dominique Caccamisi, *L'irrésistible extension du champ d'application de l'article 6, § 1 er , de la Convention européenne des droits de l'homme*, JOURNAL DES TRIBUNAUX 640 (2007).

[129] Think, for example, about the Strasbourg Court's *Vilho Eskelinen* judgment, in which it changed its previous case law and held that disputes between the state and civil servants in principle fall within the scope of Article 6(1) ECHR. This judgment laid the basis for all disputes before the Strasbourg Court about career-related questions for judges, such as appointment, dismissal and discipline.

issues, which requires the courts to further develop their case law. For example, the ECJ's Portuguese judges judgment has led to a slew of preliminary references and infringement procedures, pertaining to various Member States, which relied on the novel basis provided by Article 19(1)(2) TEU to challenge some element of the domestic judicial organization. As another example, two individuals who lost an election for member of parliament in Iceland relied on the then recent *Mugemangango* judgment as an argument to challenge the Icelandic parliamentary system of post-election dispute resolution before the Strasbourg Court. In its judgment, the Court applied and further finetuned the principles it had set out in *Mugemangango* to the Icelandic system and equally found a violation.[130] In other words, what we see is a sort of snowball effect, in which the expanding supranational separation-of-powers case law is used as a legal basis to challenge identical or similar issues in the various contracting states, thereby pushing the courts to keep developing their jurisprudence further.

Fourth, and finally, supranational courts have recently been asked rather explicitly to assess domestic questions of constitutional backsliding and legal changes that run counter to the separation of powers. Domestic actors – especially judges – have found a strong ally, external to the domestic legal order, in the supranational courts to look for legal protection, with overall success. This puts the courts in the spotlight when it comes to the protection of the separation of powers, and has simultaneously given a strong impetus to their case law on the matter.[131] For example, it is commonly accepted that the ECJ's novel interpretation of Article 19(1)(2) TEU or the European Courts' expansive reading of the right to a tribunal established by law was decided with the situation in Poland in mind.[132] At the same time, cases about the Polish rule-of-law crisis that were brought before the ECtHR and the ECJ have

[130] Guðmundur Gunnarsson and Magnús Davíð Norðdahl v. Iceland, App. No. 24159/22 (Apr. 16, 2024), https://hudoc.echr.coe.int/eng?i=001-233111.

[131] For a good overview concerning the ECJ: Sara Iglesias Sánchez, *The Role of the Court of Justice of the EU in Transition 2.0*, *in* TRANSITION 2.0 471 (Michal Bobek, Adam Bodnar, Armin von Bogdandy and Pal Sonnevend eds., 2023).

[132] In *Guðmundur* and *Review Simpson* (see *supra* note 70) the ECtHR and ECJ respectively expanded the scope of the right to a tribunal established by law to include respect by the political branches of the rules of appointment for judges.

resulted in an expansion of their substantive standards, for example on topics such as judicial councils, or judicial discipline.[133]

Given that, it would seem that the importance of the supranational jurisprudence for the domestic separation of powers is not likely to slow down any time soon. Yet, if we accept that conclusion, we should grapple with its consequences. First, on a theoretical level, the fact that supranational judgments concerning individual rights can affect the system of separation of powers within Contracting Parties, and with it the very design of the state, urges us to move beyond the classical distinction in constitutional theory between rights provisions on the one hand and structural provisions on the other.[134] The conclusion that (fundamental) rights may, when enforced, entail such clear structural consequences, evidences the blurring lines between the two categories.[135]

Second, and closely related, this means that the separation of powers is something that now, much more than before, can be challenged and litigated. A "correct" version of what the domestic separation of powers ought to look like may be tried to be enforced via supranational courts.[136] Often, this will be somewhat indirectly, by individuals for whom a certain aspect of the domestic system of separation of powers is detrimental to their case. Yet, crucially, we can also see such challenges coming from government actors themselves, who are directly affected by those aspects. This is first and foremost the case with domestic judges who have for a while now been using supranational courts as a shield against encroachments upon their internal or external independence. Yet, judges have also started to move beyond this mere protective function. In this sense, six Spanish judges have recently applied to the ECtHR, not to have

[133] See: Grzęda v. Poland, App. No. 43572/18 (Mar. 15, 2022), https://hudoc.echr.coe.int/eng?i=001-216400; Case C-791/19, Commission v. Poland (Régime disciplinaire des juges) (Jul. 15, 2021).
[134] Among others: Daryl Levinson, *Rights and votes*, 121 YALE LAW JOURNAL 1286, at 1293 (2011); Jessica Hayden, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, at 240 (2007).
[135] For a first attempt at conceptualization: Ozan Varol, *Structural Rights*, 105 GEORGETOWN LAW JOURNAL 1001 (2016); Mathieu Leloup, *The Concept of Structural Human Rights in the European Convention on Human Rights*, 20 HUMAN RIGHTS LAW REVIEW 480 (2020). Recently confirming this point of view: Kamm, *supra* note 6, at 798.
[136] The *Mugemangango* judgment again provides an interesting case in point. For decades, there had been strong criticism in Belgium on the purely parliamentary system of election dispute resolution. See as early as 1843: ALPHONSE DELEBECQUE, COMMENTAIRE LÉGISLATIF DES TROIS LOIS ÉLECTORALES DE BELGIQUE 227 (1843). Nevertheless, the government has never been willing to amend this system. Due to the clear wording of the Belgian constitution, all Belgian courts declared themselves incompetent to hear disputes on the matter. It was only after the ECtHR judgment that the Belgian government saw it necessary to take action.

their independence protected, but to use the Strasbourg Court as a crowbar to force the political gridlock in the Spanish Parliament which halted the appointment of judges to the *Consejo General del Poder Judicial*.[137] In the same vein, domestic judges have used the preliminary reference procedure before the ECJ to challenge those elements of institutional set-up that they are not happy with, in hopes of forcing the government's hand to amend them.[138] Importantly, we can see the same strategies coming from members of the political branches. Both *Mugemangango* and *Karácsony* are cases in which a Member of Parliament challenged a central aspect to the autonomy and independence of parliament, because they argued it breached their fundamental rights. To put it sharply, choices concerning the very design of a state are then no longer the prerogative of political discretion via democratic decision-making, but are increasingly becoming the subject of individual enforceable rights on the supranational level.[139] At the same time, the supranational courts run the risk of becoming an instrument in the national power struggle between the branches of power.

Thirdly, that conclusion urges us to reconsider our understanding of the principle of separation of powers in light of this supranational reality. When supranational courts can constrain and affect the design and functioning of the domestic separation of powers to the extent described above, it is clearly no longer tenable to keep looking at it as a purely national principle. Rather, the supranational courts should be given a place in our understanding of the separation of powers. Indeed, when courts – whether they be national or international – are in a position to rule on cases that draw the boundaries between the three branches, they are active participants in the separation of powers,[140] and not just passive onlookers. The supranational courts should

[137] Lorenzo Bragado v. Spain, App. No. 53193/21 (Jun. 22, 2023), https://hudoc.echr.coe.int/eng?i=001-225331.
[138] Case C-216/21, Asociaţia "Forumul Judecătorilor din România" (Sep. 7, 2023).
[139] See in this sense also very tellingly the dissenting opinion by judge Wojtyczek in: Szanyi v. Hungary, App. No. 35493/13, para. 9 (Aug. 20, 2024), https://hudoc.echr.coe.int/eng?i=001-168372. He argues that the majority's approach in that case results in the "*droit-de-l'hommisation* of legal relations within the State apparatus" and "artificially transforms issues of checks and balances within the organisation of the State into alleged human-rights issues.
[140] Payvand Ahdout, *Separation of Powers Avoidance*, 132 YALE LAW JOURNAL 2360, at 2366 (2023).

thus be taken on board in our understanding of how the separation of powers functions in a given jurisdiction.[141]

With this, I do not mean to address the question of which duties should be allocated to the domestic actors and which to the supranational courts,[142] which is closer to the question of who does what in international law.[143] Rather, the aim of this section is to help indicate what place should be given to the supranational courts in our understanding of how the principle of separation of powers operates.

By including the supranational courts in our model of separation of powers, it would move beyond a horizontal separation between the various branches of government within one and the same level – the state – and would also develop a vertical dimension.[144] Some scholars have indeed pointed to such an understanding. One author mentioned, for example, that the traditional horizontal separation of powers is bypassed, and the focus is shifted to an alternative basis for the divestment of constituted power, with one such alternative being a vertical separation of powers, in which governance occurs at different points, not merely at the national level, but also at the supranational level.[145] In similar vein, another author has argued that the ECtHR has gained important constitutional functions, which has also added a new, transnational dimension to the separation of powers.[146] More generally, other authors have pointed out how European and international law may act as a check on the domestic constitutional system.[147]

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[141] This basic point can essentially be extrapolated to any international body that affects the domestic separation of powers, as highlighted above. See on administrative bodies, Baraggia, *supra* note 46. Yet, given the focus of this article, it is made exclusively concerning supranational courts.

[142] See on this, recently: Hinako Takata, *Separation of powers in a globalized democratic society: Theorizing the human rights treaty organs' interactions with various state organs*, GLOBAL CONSTITUTIONALISM (2023), firstview.

[143] ALLOCATING AUTHORITY: WHO SHOULD DO WHAT IN EUROPEAN AND INTERNATIONAL LAW? (Joana Mendes & Ingo Venzke eds., 2018).

[144] Compara, Baraggia, *supra* note 46, at 81. It should be pointed out that such a more vertical understanding is not entirely new, but mostly used sub-nationally. Most clearly it underlies the scholarship that looks at federalism as a way to separate government powers. See: CHRISTIAN BEHRENDT & FRÉDÉRIC BOUHON, INTRODUCTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT 164 (2020); Jessica Bulman-Pozen, *Federalism as a safeguard of the separation of powers*, 112 COLUMBIA LAW REVIEW 459 (2012).

[145] Aoife O'Donoghue, *International constitutionalism and the state*, 11 ICON 1021, at 1034-1035 (2013).

[146] Geir Ulfstein, *Transnational constitutional aspects of the European Court of Human Rights*, 10 GLOBAL CONSTITUTIONALISM 151, at 157 (2021).

[147] For example: Shai Dothan, *International Adjudication as Governance* in Helene R. Fabri (ed.), MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (2019); PATRICIA POPELIER AND KOEN LEMMENS, THE CONSTITUTION OF

Yet, while it may be appealing to try to adopt a unifying view on this issue, by including the various supranational courts into the system of separation of powers of the respective Contracting Parties and construing it as a coherent, multi-layered system of checks and balances, it is conceptually unsatisfactory. In fact, the very logic inherent in the theory of separation of powers opposes such an understanding. As was mentioned in the beginning of this article, the theory of separation of powers aspires to create an equilibrium between state actors – whether they be from two different branches of power or from one and the same branch – based on mutual control and autonomy. Its goal is an efficient and coherent government architecture that is marked by both claims for independence as well as meaningful oversight.

Yet, such an understanding cannot be easily transposed to include a supranational context, since there are no clear legislative checks to moderate or undo any of the judgments of the supranational courts, an option which does exist for (constitutional) legislatures on the domestic level.[148] In this respect, the idea of the equilibrium of the whole constitutional construction that underpins the theory of separation of powers, does not translate well to the relationship between the supranational courts and the Contracting States.[149] While the supranational Courts can pronounce binding rulings and act as a check on essentially any part of the state apparatus, virtually no checks and balances exist the other way around. Of course, the states do retain some forms of legal and political pressure on the courts. They do, for example, appoint the judges and are in charge of the budget. Domestic apex courts may also try to create some pushback via well-reasoned judgments. Furthermore there is the looming threat of leaving the Treaty or more indirect pressure via political declarations, such as happened with the Strasbourg Court. Yet, such

BELGIUM. A CONTEXTUAL ANALYSIS 59-60 (2015); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis* 15 EJIL 907, at 919 (2004).

[148] Compare also to a judgment by the Irish High Court (X.X. v. Minister of Justice and Equality, [2016] IEHR 377.) in which it held: "By contrast with other major national or regional courts, such as the U.S. Supreme Court or the Court of Justice of the EU, there are no legislative checks and balances to moderate the effect of any particular Strasbourg decision. To that extent, the European Court of Human Rights must have one of the highest ratios of power to accountability of any major judicial organ. [...] Theoretically, the member states could amend the Convention to recalibrate and limit substantive rights, but this has never been done."

[149] See for this point, focusing particularly on the ECtHR, the dissenting opinion of Judge Wojtyczek in Fedotova v. Russia, App. No. 40792/10, para 2.1 (Jan. 17 2023), https://hudoc.echr.coe.int/eng?i=001-222750.

measures can hardly be considered strong politico-legal checks on the Courts.[150]

As mentioned, that imbalanced reality is difficult to square with the underlying theory of a properly-functioning system of checks and balances. Because of this, it would seem more correct to understand the national and supranational level as remaining separate. Instead of trying to bring the domestic actors and the supranational Courts within one, unified system of separation of powers, the two spheres stay, to an extent, decoupled. In this understanding, the domestic level retains the primary freedom to decide on the organization of its horizontal system of separation of powers between the three branches of power, but must do so within the boundaries imposed by the supranational case law.[151] The supranational courts must then be understood to take a rather peculiar position in the model of separation of powers. They can affect and constrain the way in which the domestic system of separation of powers functions and is given shape, yet they themselves stay outside this system. Seen in this light, the role that the supranational courts play has in any case added a more vertical dimension to the model of separation of powers all throughout the world and has further deepened and complicated how the separation of powers operates in a given country. Yet, such a decoupled view poses less conceptual problems since the supranational courts are understood to remain external to the system of separation of powers on the domestic level.

5 The role of supranational courts in policing the domestic separation of powers

The two previous sections first showed the extent to which the supranational courts are willing to police questions of the domestic separation of powers and how they have a rich case law that constrains and affects the way in which Contracting Parties can organize their domestic system of separation of

[150] For the sake of the argument, the point in this paragraph has been framed rather sharply. Of course this issue is much more complex than it has been presented here and one must also take into account doctrines such as subsidiarity, margin of appreciation or national procedural autonomy. Moreover, this balance varies between the supranational Courts, depending on the powers afforded by them in their respective Treaties.

[151] For an argument in that sense regarding the ECJ's case law on judicial independence: Koen Lenaerts, *The two dimensions of Judicial Independence in the EU Legal Order*, *in* FAIR TRIAL: REGIONAL AND INTERNATIONAL PERSPECTIVES: LIBER AMICORUM LINOS-ALEXANDRE SICILIANOS 333 at 347 (Iulia Motoc, Lubarda Branko, Maria Tsirli, Paulo Pinto de Albuquerque, Robert Spano eds., 2020)

powers. Second, they discussed the consequences that that state of affairs implies for our understanding of the separation of powers. This final substantive section builds on the above and turns to the normative question what role the supranational courts ought to play in policing the domestic separation of powers.

The starting point of this analysis is the conclusion from everything that precedes that, given the current state of human-rights law, it has become inevitable that the supranational courts are confronted with cases that ask them to verify certain aspects of the domestic system of separation of powers. The contentious question is then not so much whether these courts should at all intervene in questions of domestic separation of powers, but rather in what way they do so and to what effects. While the exact impact of the supranational case law on the domestic separation of powers should be the subject of further research, particularly as regards the Inter-American and African systems,[152] the courts have shown that they have a role of significance to play in this respect. This is especially the case for the protection of the independence of domestic judges,[153] not in the least given the declining rule-of-law standards throughout the world.[154] All four Courts act as a lifeline for the domestic judges, a shield to protect them against encroachments upon their internal or external independence. In Europe, both the ECtHR and the ECJ have made fundamental developments in their recent case law so they could act as a bulwark against the assault that is being waged on the separation of powers in certain countries. Furthermore, the case of *Mugemangango* shows how the supranational courts may force the government's hand to change some elements of the domestic system of separation of powers that have long been criticized, but for which there may not be a lot of political willingness to actually amend it, thereby countering democratic blind spots.[155] Finally, by protecting and enforcing a certain core of separation of powers on the domestic level, the supranational Courts can contribute to the creation of a

[152] As mentioned, the European systems have been studied more extensively. See the references *supra* note 6.
[153] The existing literature is also unanimous that the separation-of-powers case law by the supranational courts has that effect: Kosař & Lixinski, *supra* note 7; Leloup, *supra* note 6; Tsampi, *supra* note 6; Adjolohoun, *supra* note 113.
[154] See also tellingly: Case of Aguinaga Aillón v. Ecuador, Inter-Am. Ct. H.R., para. 71 (Jan. 30, 2023). Here, the San José Court states "The protection of judicial independence in this sphere is particularly critical today, given current trends in the world and the region toward the erosion of democracy, where formal powers are being used to promote anti-democratic values, hollowing out institutions and leaving only their outward image intact.
[155] Rosalind Dixon, Responsive Judicial Review (2022).

domestic institutional and functional framework in which individual (fundamental) rights are more faithfully protected.[156] The Courts may even contribute to a sort of upwards convergence in constitutionalism, strengthening institutions in regions that have historic problems with abuse of powers, or contributing to a transition process towards a constitutional democracy governed by the rule of law.[157]

Yet, the considerations from the previous section simultaneously urge the supranational courts – precisely on the basis of separation-of-powers considerations–[158] to be cognizant of the effects of their case law and to take a restrained and well-reasoned position.[159] This implies, first of all, that the Courts base their judgments on a sufficiently theoretically grounded and nuanced understanding of the principle of separation of powers. As of yet there is very little to be found in the case law in terms of theoretical framework surrounding the principle of separation of powers.[160] To an extent, this is of course understandable. We can hardly require supranational courts to delve into detailed, almost scholarly debates on the intricacies of separation-of-powers theory. However, it does not seem like a stretch to expect that actors that affect and constrain separation-of-powers issues to the extent described above, and may even unify questions of separation of powers in an entire region, thereby removing certain institutional set-ups as viable options, do so on the basis of an informed and balanced understanding of what the principle entails.[161] One particular risk in this regard is that the courts focus too strongly

[156] In such sense: Frédéric Krenc and Françoise Tulkens, *L'indépendance du juge. Retour aux fondements d'une garantie essentielle d'une société démocratique*, *in* INTERSECTING VIEWS ON NATIONAL AND INTERNATIONAL HUMAN RIGHTS PROTECTION: LIBER AMICORUM GUIDO RAIMONDI 377 at 397 (Linos-Alexandre Sicilianos, Iulia Motoc, Robert Spano & Roberto Chena eds., 2019).

[157] In similar sense: BINDER*, The Inter- American Human Rights System's/ ICCAL's Impact on Transitions to Democracy from the Perspective of Transitional Justice*, *in* THE IMPACT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 408, at423 (Armin von Bogdandy, Flávia Piovesan, Eduardo Ferrer Mac-Gregor & Mariela Morales Antoniazzi eds., 2024).

[158] See comparably: JOHANNES HENDRIK FAHNER, JUDICIAL DEFERENCE IN INTERNATIONAL ADJUDICATION 207 (2020); MÖLLERS *supra* note 3, at 213.

[159] In this respect, one can refer again to the above quote of judge Wojtyczek, para. 2.1.

[160] See already in 2012: Kosař, *supra* note 6, at 39. More recently: Leloup, *supra* note 6, at 271. The Inter-American Court has gone a bit further than other courts in setting out some general theory. See in particular: Advisory opinion OC-28/21 requested by the Republic of Colombia on the presidential reelection without term limits, Inter-Am. Ct. H.R., paras. 80-82 (Jun. 7, 2021).

[161] For a criticism, by way of example, of a "rather sweeping quest on the part of the ECtHR in imposing and policing a strict and formalised vision of separation of powers" within the Contracting States on the issue of advocates general in domestic courts: Michal Bobek, *A Fourth In The Court: Why Are There Advocates-General In The Court Of Justice?*, 14 CYELS 529, at 533 (2011).

on the independence of the judiciary, thereby becoming critical of any form of accountability towards the other branches of power.[162] Such a focus is certainly not illogical, since the right to a fair trial by an independent judge is a core part of any international human rights instrument. Moreover, domestic judges are the natural, often faithful national interlocutors with the supranational courts and strengthening national judges indirectly also bolsters their own position. However, a view that is focused too much on the separation side of the coin and not on the checks-and-balances side may ultimately skew the balance in favor of the judiciary and can – inadvertently – lead to entirely different problems within the domestic institutional framework.[163]

A second, closely related consideration is that the supranational courts should not be overly demanding in the material requirements they impose in terms of separation of powers. As already indicated earlier, the effects of the judgments carry over beyond the confines of the case at hand and the requirements that underly the reasoning become a general standard that, in principle, applies to each Contracting State equally.[164] This means that when the supranational courts denounce a certain institutional set-up or relationship between the branches in a given Contracting Party, that judgment immediately also calls into question any similar set-up or relationship within the same state, as well as in all other states that fall within that court's jurisdiction.[165] However, as already indicated earlier, any system of separation of powers is a complex array of inter-related institutions and each of its aspects can hardly be assessed in isolation, outside of the broader framework.

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[162] As an example of a rather one-sided view, one could point to a judgment of the African Commission (*supra* n 73) in which it held that the fact that the President and Minister of Justice were chair and vice-chair of the Cameroon judicial council was "manifest proof" that the judiciary was not independent. One can also think of: Cataña, *supra* note 73.

[163] See, as an example: Samuel Spáč, Katerína Šipulová, and Marína Urbániková, *Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia*, 19 GERMAN LJ 1741 (2018).

[164] In the literature this is known as the *res interpretata* effect of the case law. On the African Court: Jonas Obonye, *Res interpretata principle: Giving domestic effect to the judgments of the African Court on Human and Peoples' Rights*, 20 AFRICAN HUMAN RIGHTS LAW JOURNAL 736 (2020). On the ECtHR: Oddný Mjöll Arnardóttir, *Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights*, 28 EJIL 819 (2017).

[165] See for example: Bruno Garcia de Silva & Sébastien Van Drooghenbroeck, *La reconnaissance des cultes : une copie constitutionnelle (de plus) à revoir*, Journal des Tribunaux 681 (2022). The authors relied on a judgment by the ECtHR that denounced the discretionary decision-making power of the Belgian Parliament in recognizing religions (see *supra* n 100), and therefore also questioned other, similar powers of parliament, such as naturalization.

In other words, a far-reaching and sweeping reasoning by the courts could call into question aspects of separation of powers in some states that may work perfectly well in others, which have established different, countervailing factors.[166]

The above urges the supranational courts to ponder before imposing sweeping institutional standards, and to sufficiently contextualize their findings on the basis of the formal and informal dimensions within the system of separation of powers of the country in question.[167] Clearly, that is not an easy feat and some have questioned whether the courts in fact have sufficient expertise to decide on separation-of-powers issues.[168] Generally speaking, there is much more diversity in issues of separation of powers than there is in human-rights matters,[169] and one can hardly expect the judges to have an intimate understanding of the institutional architecture of every Contracting Party. In that light, it becomes absolutely crucial that the governments give extensive and detailed information on why a particular aspect of its system of separation of powers is important, and on how it fits within the broader network of formal as well as informal power relationships. In the same vein, it could only be welcomed if other states intervene in cases to highlight the possible effects that the legal issue at stake could have on an element of their system of separation of powers. That input can help the Courts to be more acutely aware of the potential effects of their judgments and to issue more nuanced and well-reasoned judgments that strike a balance between protection of (fundamental) rights on the one hand and respect for institutional diversity and autonomy on the other.[170]

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[166] This effect may even be strengthened further because other actors may rely, in turn, on the standards imposed by the Courts. See, for a recent example: Venice Commission, Opinion CDL-AD(2023)015, para. 16. In its opinion, the Venice Commission relied on the ECtHR's *Cataña* judgment to recommend France to remove from the law the possibility for the Minister of Justice to participate in the sittings of the *Conseil Supérieur de Magistrature*, even though in practice the Minister never attended.

[167] See similarly: Adjolohoun, *supra* note 114, at 184. See, as an example: Camba Campos, *supra* note 63, at para. 210. See for a good example concerning presidential pardon powers: Saakashvili v. Georgia, App. No. 632/20 (May 23, 2024).

[168] More specifically, the ECtHR: Kosař, *supra* note 6, at 36.

[169] This diversity also underlay the IACtHR's refusal to give an advisory opinion concerning the impeachment of sitting presidents. See: Order of the Inter-Am. Ct H.R. on the request for an advisory opinion presented by the Inter-American Commission of Human Rights (May 29, 2018).

[170] In this respect it would seem difficult to disconnect the nuance that can at times be found in judgments and opinions of the Inter-American Court from the wealth of input they receive from governments, NGO's, domestic

6 Conclusion

The separation of powers has been a veritable staple of constitutionalism for centuries now. Every constitutional democracy rests on some kind of separation between legislative, executive and judicial branches. Originally, the separation of powers was an exclusively internal, national affair. Whether the specific institutional and functional design of a particular state functioned properly, and managed to prevent any actor from obtaining too much power, without sabotaging the efficient functioning of the state, was of concern solely to the state and its citizens.

However, the rules of the game have changed for those states that have acceded to a supranational legal order that claims primacy.[171] For them, national design choices are increasingly dictated by supranational actors. Nowhere does that become more clear than with the case law of the supranational courts. This article has shown how those courts significantly constrain and affect the way in which the contracting parties can shape the functional, institutional and personal relationships between their three branches of government. It furthermore discussed how the various strands of case law, taken together, can be understood as imposing something akin to a supranational blueprint of what the system of separation of powers is allowed and expected to look like. In this regard, this article has shown that the principle of separation of powers can no longer be seen as something exclusively national, but is increasingly gaining an important international dimension.

The development discussed in this article nevertheless entails several important theoretical consequences and requires us to take due account of the principle of separation of powers in its present, multilevel reality. For one, the separation of powers is now, much more than before, something that can be challenged and litigated. Importantly, we see that that not only happens indirectly by individuals, but also more directly by government actors, like judges and members of the political branches. In this way, the supranational courts may become an important actor – perhaps even an instrument – in the national power struggle between the branches of power.

judicial bodies and experts on some cases. Of course, in that respect one can also not be blind to the difference in workload between the Court in San José from that of, for example, the Strasbourg Court.

[171] Leonard Besselink, *Separation of Powers versus EC Law?*, 41 CML Rev 1429 at 1452 (2004).

On a more general level, this development also forces us to consider what role supranational courts have to play in policing the domestic separation of powers and to reconsider our model of how the separation of powers operates. This article has sought to provide an answer to those questions in the underpinnings of the theory of separation of powers itself. It argued that the courts must be understood to take up a rather peculiar position in the model of separation of powers, since they can affect and constrain the way in which the domestic system of separation of powers functions and is given shape, yet they themselves stay outside this system. That peculiar, imbalanced position in turn urges the courts to be cognizant of the effects of their case law and to take a restrained and well-reasoned position.

This topic raises many other fundamental questions, much more than could be discussed in the scope of this article. Nevertheless, it is important that these questions are discussed in future literature, in order to get a clear, grounded understanding of an important development in constitutional law, one that is taking place in different parts of the world, and one that seems unlikely to slow down anytime soon.