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Speech by Síofra O'Leary

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Presidente Lattanzi,

Presidente emerita Cartabia,

Professor Irti,

Illustri componenti della Corte costituzionale, del Consiglio superiore della magistratura e delle Magistrature superiori italiane,

Illustri componenti dell'Accademia dei Lincei

e della Scuola Superiore della Magistratura,

Signore e Signori,

È un privilegio rivolgersi a un pubblico così illustre e condividere questa tribuna con i Presidenti Sciarra e Lenaerts, che, in un passato recente, ci hanno ambedue onorati inaugurando l'anno giudiziario a Strasburgo.

Vorrei ringraziare la Scuola Superiore della Magistratura e l'Accademia dei Lincei per aver organizzato questo importante evento e per avermi invitato a rappresentare la Corte europea dei diritti dell'uomo in questa sede davvero unica. Ho tenuto molti discorsi, in molti luoghi, ma mai sotto l'egida di Raffaello e Baldassarre Peruzzi, il che, devo confessare, intimidisce ed è al contempo stimolante.

Vorrei anche ringraziare il mio collega e amico, il giudice Raffaele Sabato, ponte insostituibile tra la Corte di Strasburgo e la magistratura italiana. E, naturalmente, non posso non salutare stamattina il mio predecessore, Guido Raimondi, al quale faccio i miei auguri più affettuosi, e quelli di tutta la Corte.

Spero mi perdoniate se ho deciso di usare questa bella lingua, che imparai più di trenta anni fa, da studente, a Fiesole, solo nella mia breve introduzione. Ma la vita (e l'amore) hanno voluto che il mio italiano si sia, nel tempo, "spagnolizzato".

Let me start with some introductory words about the role played by the Rule of Law within the case-law of the European Court of Human Rights (ECtHR), before exploring how and why the Court has sought in its case-law to protect judicial independence and the context in Europe in which it is doing so today.

The Rule of Law in the case-law of the ECtHR

According to Article 3 of the Statute of the Council of Europe,[1] every Member State must accept the principles of the rule of law, human rights and democracy.

These three core values are closely interlinked and are the pillars on which the Council of Europe and the European Convention on Human rights - which applies across a legal space hosting 46 States and serves over 700 million inhabitants - are based.

The Rule of law is considered part of the common heritage of Council of Europe States, together with certain "political traditions and ideals" as clearly stated in the Preamble to the European Convention. It is - or should be – a pillar of any national legal order or international organisation and appears in major international legal and political texts, not least now Article 2 TEU, to which no doubt President Lenaerts will refer.[2]

Although, intuitively, these statements about the importance of the Rule of Law are not particularly controversial, it may be more complex to define what the Rule of Law is, and to make a link between that concept and a particular breach of human rights in an international court of law.[3]

In the absence of a clear definition of the Rule of Law in a binding legal text, the work of the European Commission for democracy through law ("the Venice Commission") has been highly relevant in Europe and beyond; used by the Strasbourg court for decades and now increasingly also by the Court of Justice of the European Union (CJEU). In its Rule of Law Checklist, the Venice Commission summarises the concept as follows:

> "*the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.*" [4]

In addition, the Venice Commission has made clear that ensuring sufficient constitutional and legal guarantees of the judiciary's independence requires, *inter alia*, that offences leading to disciplinary sanctions be clearly set out in law and that the disciplinary system "fulfil the requirements of procedural fairness", that the appointment and promotion of judges not be "based upon political or personal considerations", and that the judiciary be sufficiently resourced in order to "perform its duties with integrity and efficiency".[5] As concerns the independence of individual judges, the Venice Commission's benchmarks include, for example, that judicial activities only be subject to the

[1] ETS No. 1.
[2] According to Article 2 TEU, the EU '… is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'
[3] See further, Bingham, *The Rule of Law* (Penguin 2011); R. Spano, "The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary", 27(13) *EULJ* (2021) 211.
[4] Adopted at its 106th Plenary Session (Venice, 11-12 March 2016), § 15.
[5] ibid §§ 78, 79, 83.

supervision of higher courts through the appeal system and that judges not be subject to the supervision of colleague-judges or any executive hierarchical power, and that the allocation of cases be based on objective and transparent criteria.[6] The requirements for the independence of individual judges are seen as particular aspects of the Convention requirement of effective access to justice; which is also where the Court started developing its case-law by making explicit references to the Rule of Law.

In *Golder v. the United Kingdom,* handed down in 1975,[7] the Court based itself on the right to a fair trial guaranteed by Article 6 § 1, from which it inferred the inherent right of individual access to court. With reference to the Rule of Law, which is mentioned in the Preamble of the Convention, it stated that:

> "[…] *it would be a mistake to see in the reference to* [*the Rule of Law*] *a merely 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to 'take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration' was their profound belief in the rule of law*".[8]

We can see that there is a certain symmetry between the approach of the ECtHR in *Golder* to the values underpinning the Convention, including the Rule of Law, and that of the CJEU in its much more recent case-law on conditionality in relation to Article 2 TEU and the values listed therein.[9]

Since *Golder*, the Rule of Law has become a guiding principle for the Court. It "*inspires the whole Convention*",[10] is "*inherent in all the Articles of the Convention*"[11] and is defined as "*one of the fundamental principles of a democratic society*".[12]

The close relationship between the Rule of Law and democratic society has been underlined by the Court through different expressions: "*democratic society subscribing to the rule of law*",[13] "*democratic society based on the rule of law*",[14] and more systematically "*rule of law in a democratic society*".[15] Being linked to the notion of "*democratic society*", the Rule of Law is also related to the broader concept of "*European public order*",[16] the defence of which lies at the heart of the Convention system.[17]

Over the years, the Court has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality or foreseeability,[18] the principle of legal certainty,[19] the principle of equality of individuals before the law,[20] the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake,[21] the principle of

[6] ibid, §§ 87-88.
[7] *Golder v. the United Kingdom, 21 February 1975, Series A no. 18*
[8] Ibid, § 34.
[9] See, for example, Case C-156/21 *Hungary v. Parliament and Council*, EU:C:2022:97 and Case C-157/21 *Poland v. Parliament and Council*, EU:C:2022:98.
[10] *Engel and Others v. the Netherlands, 8 June 1976, § 69 Series A no. 22*
[11] *Amuur v. France, 25 June 1996, § 50 Reports of Judgments and Decisions 1996-III*
[12] *Klass and Others v. Germany, 6 September 1978, § 55 Series A no. 28*
[13] *Winterwerp v. the Netherlands, 24 October 1979, § 39 Series A no. 33*
[14] *Vereniging Weekblad Bluf! v. the Netherlands, 9 February 1995, § 35, Series A no. 306-A,*
[15] *Malone v. the United Kingdom, 2 August 1984, § 79, Series A no. 82*
[16] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, Reports of Judgments and Decisions 1998-I.
[17] See *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016, § 145: "One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle."
[18] *Del Río Prada v. Spain [GC], no. 42750/09, ECHR 2013*
[19] *Panorama Ltd. And Miličić v Bosnia and Herzegovina (no. 69997/10 and 7493/11), 25 July 2017, § 63.*
[20] *Roman Zakharov v Russia* [GC] (no. 47143/06), 4 December 2015, § 230, *Beghal v the United Kingdom* (no. 4755/16), 28 February 2019, § 88.
[21] Reflected in the core of H.F. and Others v. France [GC], nos. 24384/19 and 44234/20, 14 September 2022.

the possibility of a remedy before an independent and impartial court[22] and the right to a fair trial.[23] Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State.[24]

Safeguarding Judicial Independence

An efficient, impartial and independent judiciary is the cornerstone of any functioning system of democratic checks and balances. Courts are the means by which powerful interests, which may impinge upon the human rights of individuals, are restrained. It falls to them to guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law.

This all seems entirely simple and, pronounced before institutions of your stature, I'm somewhat embarrassed by the simplicities of my words. Yet, as previous speakers have said, in Europe over the last decade, the simplicity and legal truth of these words endures in certain places no longer.

In a system of shared responsibility such as that established by the Convention, the integrity of the system itself requires the existence of strong and independent national courts, able to adjudicate free from undue interference and exercise meaningful judicial oversight over national authorities.[25]

It is important to stress that, in the case-law of the Strasbourg Court, the authority of the judiciary is a transversal notion, which is approached through the prism of different Articles of the Convention, such as Articles 6, 8, 10 and 11, and through the complaints of a diverse group of applicants before the Court; sometimes judges themselves, sometimes the parties to the domestic judicial proceedings, and sometimes other persons or bodies with an interest in those proceedings, whether lawyers[26] or the press[27] as I will seek to illustrate.

The Article 6 § 1 toolbox in defense of judicial independence

The protection of the judiciary in the Court's case-law is grounded in the fundamental role of the judiciary as an independent branch of State power, which enjoys special status in accordance with the principles of the separation of powers and the Rule of Law.

As we know, the role of the judiciary in contemporary public life has changed over the centuries. Judges are no longer just the "mouthpiece" of the law as described by Montesquieu. Political issues are increasingly brought before the courts with judges being called to resolve, with reference to the law and subject to legal constraints, sensitive societal issues once left for politics and the legislature. Courts are put under the spotlight and powerful leaders supported by strong majorities

[22] *De Souza Ribeiro v. France* [GC], no. 22689/07, § 83, ECHR 2012.
[23] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 250, 13 September 2016.
[24] See, for example, *Grzęda v. Poland* [GC], no. 43572/18, § 342, 15 March 2022: "the principles of the rule of law and the avoidance of arbitrary power which underlay much of the Convention".
[25] See *Tuleya v. Poland, nos. 21181/19 and 51751/20, § 264, 6 July 2023*: "The Court cannot over-emphasise the fundamental role played by the national courts as guarantors of justice in upholding that principle through their decisions whereby they give direct effect to the Convention rights and freedoms or remedy Convention violations that have already occurred" citing *Grzęda* v. Poland, cited above, § 324. See also A. Seibert-Fohr, "Protecting Judicial Independence: A Shared Endeavour of European Human Rights Protection" Keynote 8 October 2023.
[26] See, for example, *Morice v. France* [GC], no. 29369/10, § 9, ECHR 2015.
[27] See, for example, *Gazeta Ukraina-Tsentr v. Ukraine*, no. 16695/04, § 4, 15 July 2010.

may attempt to dismantle restraints on their own power and erode the separation of powers on which respect for judicial independence also rests. [28]

Serious attacks on judicial independence in recent years, within EU and Council of Europe States, have led to a marked increase in disputes before the Strasbourg court which raise questions regarding the independence and impartiality of judges. Sadly, we now have extensive case-law relating to the recruitment/appointment of judges,[29] career/promotion,[30] transfer,[31] suspension,[32] disciplinary proceedings,[33] reduction in salary following conviction for a serious disciplinary offence[34], and removal from post while formally remaining a judge.[35] Further details of such cases can be found in my paper.

[In recent judgments on Article 6 § 1, the Court has emphasised:

> "the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties".[36]]

As rule of law backsliding has increased across several Council of Europe States – over 450 cases are pending which raise questions regarding judicial independence in Poland for example - the Court has shifted its focus in case-law on the right of access to court, holding that:

> "Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary […], the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy."[37]

Bilgen v. Türkiye, from which this extract is taken, and Article 6 judgments of this nature, point to the fact that the Court is no longer assessing judicial independence solely from the fair trial perspective of the rights of persons involved in court proceedings but also from that of judges as litigants themselves and with an eye to protecting personal and institutional independence.[38]

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[28] This is well-described by Marta Cartabia, speaking then as Vice President of the Constitutional Court, Italy, in "Separation of Powers and Judicial Independence: Current Challenges", Dialogue between Judges, 2018, European Court of Human Rights.
[29] *Juričić v. Croatia*, no. 58222/09, 26 July 2011.
[30] *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, 9 October 2012, and *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, §§ 85-87, 15 September 2015.
[31] *Tosti v. Italy* (dec.), no. 27791/06, 12 May 2009.
[32] *Paluda v. Slovakia*, no. 33392/12, §§ 33-34, 23 May 2017, and *Camelia Bogdan v. Romania*, no. 36889/18, § 70, 20 October 2020.
[33] *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 120, 6 November 2018; *Di Giovanni v. Italy*, no. 51160/06, §§ 36-37, 9 July 2013; and *Eminağaoğlu v. Turkey*, no. 76521/12, § 80, 9 March 2021. As regards dismissal see *Oleksandr Volkov v. Ukraine*, no. 21722/11, §§ 91 and 96, ECHR 2013; *Kulykov and Others v. Ukraine*, nos. 5114/09 and 17 others, §§ 118 and 132, 19 January 2017; *Sturua v. Georgia*, no. 45729/05, § 27, 28 March 2017; *Kamenos v. Cyprus*, no. 147/07, §§ 82-88, 31 October 2017; and *Olujić v. Croatia*, no. 22330/05, §§ 31-43, 5 February 2009.
[34] *Harabin v. Slovakia*, no. 58688/11, §§ 118-23, 20 November 2012.
[35] *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, §§ 34 and 107-11; *Denisov v. Ukraine* [GC], no. 76639/11, § 54, 25 September 2018; and *Broda and Bojara v. Poland* (nos. 26691/18 and 27367/18, §§ 121-23, 29 June 2021), and *Gumenyuk and Others v. Ukraine*, no. 11423/19, §§ 61 and 65-67, 22 July 2021. See, for an overview, K. Šimáčková, "Protection of the rule of law and judicial independence through the protection of the rights of judges before the European Court of Human Rights", "EUnited in diversity, II, The Hague, August 2023, forthcoming.
[36] See *Baka*, cited above, § 165, with further references and, more recently, *Bilgen v. Turkey*, no. 1571/07, § 58, 9 March 2021.
[37] *Bilgen v. Türkiye*, cited above, § 58.
[38] For another example see *Oktay Alkan v. Türkiye*, no. 24492/21, 20 June 2023.

The Convention does not require a particular system of judicial administration but it does demand that national courts be in a position to adjudicate fairly and independently of the executive and legislative branches. As such, the Court has underlined the importance of the separation of powers in the interpretation of the independence requirement, in particular in cases concerning the appointment and dismissal of judges.

In *Guðmundur Andri Ástráðsson v. Iceland*, the Grand Chamber examined the process for the appointment of judges to the newly established Icelandic Court of Appeal. It explained that the guarantee of judicial independence is closely connected to the requirement that courts must be established by law. This "institutional guarantee" of independence in Article 6 § 1 seeks to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from parliament. [This applies not only to the court system in general, but also to the composition of the bench in individual cases. Serious defects in the appointment of judges may give rise to a violation of the right of access to a court established by law.]

According to the three-step test introduced in this Icelandic case, a defect in the appointment procedure of a judge leads to a violation of Article 6 if it is manifestly in breach of domestic law, affects the ability of the judiciary to perform its duties free of undue interference and the competent national courts fail to adequately review the alleged irregularity and its consequences.

The principles developed in *Ástráðsson* have since been picked up by the CJEU and applied by us in cases involving other respondent States.[39] The Grand Chamber judgment reminds us that the establishment of independent and impartial tribunals in accordance with law is something which we must seek to protect in all European States, even in those where democracy and the rule of law does not otherwise appear fragile.

Freedom of expression as a judicial right but also, when necessary, a judicial duty

Thus far I have looked at the requirements of Article 6 § 1 of the Convention. However, as I indicated at the outset, the Convention arsenal for safeguarding of judicial independence is not limited to that article.

In *Baka v. Hungary*, the President of the Supreme Court complained under Article 10 on freedom of expression that his mandate had been terminated as a result of the critical views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice.[40]

As Judges – and this I must really stress - we must readily accept a duty of reserve when it comes to public statements and interviews with the press in relation to societal issues which it may fall to us to judge. The *Baka* case and more recent Polish cases do not call into question this duty of reserve but address the delicate position of judges when faced with reforms capable of, or designed to, sap their independence.[41]

On the freedom of expression of judges, the Court stated in *Baka* that

[39] See, variously, *Reczkowicz v. Poland*, no. 43447/19, §§ 216-279, 22 July 2021; *Besnik Cani v. Albania*, no. 37474/20, §§ 83-114, 4 October 2022; *Gloveli v. Georgia*, no. 18952/18, §§ 49-51, 7 April 2022.

[40] The applicant had expressed critical views on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges.

[41] *Baka v. Hungary* [GC], no. 20261/12, § 168, 23 June 2016.

"*questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter. Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate*."[42]

The tenor of the *Baka* judgment, in which the Court found a violation of Article 10 of the Convention, is now, sadly, oft-repeated in judgments relating to judges and justice system office-holders from Poland, Bulgaria and Romania and beyond who have brought complaints to Strasbourg following their dismissal or the imposition of disciplinary sanctions.[43]

In *Żurek v. Poland*, for example, decided last year, a Chamber of 7 judges, in which Judge Sabato participated, found a violation of Article 10 of the Convention as a result of a series of measures applied to the applicant, who had been a spokesperson and judicial member of the National Council of the Judiciary and critic of Polish judicial reforms. The Court held that:

"*the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat*".[44]

One detects strains of Ecclesiastes 3:7 – "there is a time to keep silent and a time to speak" – in this judgment.

These cases also refer to the "chilling effect" of sanctioning judges for participating in public debate on legislative reforms affecting the judiciary.[45] This "chilling effect" discourages not only directly sanctioned judges but other judges within the relevant system from expressing their views about the functioning of the judiciary or judicial reform.[46] [This has contributed to the Strasbourg Court finding such sanctions as not necessary in a democratic society, as stifling such debate is contrary to the public interest in the judiciary's functioning and contrary to judges' "duty to speak out in defence of the rule of law and judicial independence" when necessary.][47]

Once again, here too we see a shift in the Strasbourg Court's case-law, the result of several years of experience dealing with attacks in various forms on judicial independence.

Rights to private and family life and judicial independence cases

Pursuant to Article 8 of the Convention, the Court usually adopts a consequence-based approach when assessing whether the threshold of severity is met for article 8 to be applicable to employment-related disputes, including in recent years those involving judges and prosecutors.[48]

In *Tuleya v. Poland*, decided last July, the Court had little difficulty concluding that the applicant Judge's complaint was admissible. Central to this finding was the nature and the duration of

[42] *Baka v. Hungary*, cited above, § 165.
[43] *Żurek v. Poland*, no. 39650/18, § 224, 16 June 2022; *Miroslava Todorova v. Bulgaria*, no 40072/13, § 172, 19 October 2021; *Brisc v. Romania*, no. 26238/10, §§ 106-107, 11 December 2018.
[44] *Żurek v. Poland*, no. 39650/18, § 222, 16 June 2022.
[45] *Baka v. Hungary*, cited above, § 173.; *Żurek v. Poland*, cited above, § 227.
[46] ibid.
[47] *Żurek v. Poland*, cited above, § 222.
[48] *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 166, ECHR 2013; *Denisov v. Ukraine* [GC], no. 76639/11, §§ 107-109, 25 September 2018; *Ovcharenko and Kolos v. Ukraine*, cited above, §§ 85-86.

the various negative effects stemming from the initiation of a preliminary inquiry into the applicant's conduct and the lifting of his immunity and ensuing suspension.[49]

With due regard to the central place in EU law of the preliminary reference procedure, the Court held that an interference in the form of an inquiry into the request by the applicant judge for a preliminary ruling to the Luxembourg court was contrary to Article 267 TFEU. Given also the provisions of Polish law, this interference was not "in accordance with the law" within the meaning of Article 8 of the Convention. In addition, the Court found that the decision permitting the applicant to be held criminally liable and suspending him was given by the Disciplinary Chamber of the Polish Supreme Court; a body which could not be considered a "court" for the purposes of the Convention, following several rulings of both the CJEU and the ECtHR.[50]

Tuleya is not the only example of how Article 8 operates to safeguard the judicial independence of individual judges,[51] but it is a judgment which showcases in extensive and fine detail the manner in which the CJEU and the ECtHR go about their complementary judicial missions in defence of the Rule of Law; a point to which I will return later.

Mobilisation of Article 18 in defence of judicial independence

Since threats to judicial independence often stem from systemic or structural difficulties at respondent State level, it is noteworthy that in some recent cases the Court has found violations of the substantive provisions of Articles 8 and 10 of the Convention in conjunction with Article 18.

Article 18 is a peculiar provision in the Convention rights catalogue. It provides that Convention rights and freedoms can only be restricted for the purposes prescribed in the Convention itself. The purpose of this article is to prohibit the misuse of power.[52] It is rarely invoked and, until recently, findings of violations remained rare and, in cases touching on judicial independence, unheard of. This changed in 2022; undoubtedly a sign of the times.

The applicant in *Miroslava Todorova v. Bulgaria*, the President of the judges' association, engaged in criticism of the Supreme Judicial Council (SJC) and the executive. The Court found a violation of Article 10 in this case. The predominant purpose of the disciplinary proceedings and sanctions which had been imposed on her by the SJC had not been to ensure compliance with the time-limits for concluding cases, but rather was to penalise and intimidate the applicant on account of her criticism of the SJC and the executive.

An Article 18 violation, this time in conjunction with Article 8, has also recently been found in a Polish case brought by a Regional Court judge subject to disciplinary proceedings after he sought to verify whether a first instance judge, who had been appointed by the President of the Republic upon the recommendation of the recomposed National Council of the Judiciary, complied with the requirement of independence.[53]

[49] *Tuleya v. Poland*, cited above §§ 252-272.
[50] Given that in *Commission v. Poland* (Disciplinary regime for judges) (C-791/19, EU:C:2021:596 Poland had been found to have failed to fulfil its obligations under Article 19(1) TEU by, in particular, "failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court".
[51] See also *Ovcharenko and Kolos v. Ukraine*, nos. 27276/15 and 33692/15, 12 January 2023; *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021.
[52] *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 303 and 306, 28 November 2017.
[53] See *Juszczyszyn v. Poland,* no. 35599/20, 6 October 2022.

These cases point clearly to the fact that the Court is now prepared to address rule of law violations with reference to this article, something which it had not done in the past, and something which underlines the systemic nature of any violations found.[54]

Judicial reform and judicial independence

Many of the complaints introduced by judges from Convention States stem from the consequences of judicial and legislative reforms for individual judges.

The Court has stressed that the Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary. On each occasion the Court seeks to understand what the complicated background to and context of any impugned judicial reform in the respondent State may be. It is not the Court's role to adjudicate upon the appropriateness of reforms or determine their constitutionality under national law.[55]

It will generally look to the work of expert monitoring bodies, such as the Venice Commission, whose reports may explain in relation to a given State why extraordinary measures may be necessary in a given context in order to remedy corruption or counter incompetence among the judiciary.[56] What the Court concentrates on is whether an applicant's rights under the Convention are affected by the manner in which the reform is actually implemented.

A striking example of this is provided in vetting cases such as *Xhoxhaj v. Albania*,[57]which concerned the dismissal of a judge and lifetime ban from re-entering the justice system as a result of serious findings in the vetting procedure. The latter was conducted pursuant to the Vetting Act, which was part of a national reform effort introduced in response to the widespread perception of corruption and a lack of public trust in the national judicial system of Albania. In this case, the Court found no violation of Article 8 as the Vetting Act and related reforms were found to have responded to the "pressing social need" of combatting alarming levels of corruption, and the applicant's dismissal was deemed proportionate.

Furthermore, no violation was found in *Xhoxha*j with respect to Article 6 § 1 regarding the fairness of proceedings, as the applicant had had adequate information, time and facilities to prepare an adequate defence, and both vetting bodies had provided sufficient assessments and reasons for their decisions.

In contrast, in the case of *Ivanovski v. the former Yugoslav Republic of Macedonia*,[58] a violation was found where the Constitutional Court's president was removed from public office as a result of lustration proceedings. The Lustration Act had made collaboration with the State security services between 1944 and 2008 an impediment to holding public office, and the Lustration Commission determined that the applicant could not hold public office as there was evidence that he had collaborated after being interrogated by the secret police in 1964 in connection with his involvement in a high-school nationalist group. The Court found a violation of Article 6 § 1 regarding the fairness of the proceedings because the Prime Minister had made public statements denouncing the applicant as a collaborator which appeared to put pressure on the independence and impartiality of the proceedings. A violation was also found under Article 8 as the sanctions imposed were deemed disproportionate.

[54] See, for example, *Kövesi v. Romania,* no. 3594/19, 5 May 2020, where only violations of Articles 6 § 1 and 10 of the Convention were found or *Ovcharenko and Kolos v. Ukraine,* cited above, § 136 where the Court rejected the Article 18 complaint as manifestly ill-founded.
[55] See, for example, *Gumenyuk and Others v. Ukraine*, cited above, § 43.
[56] Idem.
[57] *Xhoxhaj v. Albania*, no. 15227/19, 9 February 2021.
[58] *Ivanovski v. the former Yugoslav Republic of Macedonia*, no. 29908/11, 21 January 2016.

Still on the subject of judicial reform, in *Gumenyuk and Others v. Ukraine* the Court accepted that it might be necessary and justified to take extraordinary measures in order to remedy corruption and incompetence among the judiciary. However, its role in the specific case was to examine whether the former judges' rights under Articles 6 and 8 were affected by the manner in which the reform was actually implemented. Under Article 6 the Court found that the right of access to a court was one of the fundamental procedural rights for the protection of members of the judiciary and the applicants should have in principle enjoyed the direct access to court in respect of their allegations of unlawful prevention from exercising their judicial functions. In these circumstances, the absence of access to court was not reasonably proportionate to the legitimate aim sought. Under Article 8 the Court found that the interference with their right to respect for private life had been unlawful for the purposes of the Convention. Bodies may be set up to vet serving judges and prosecutors to combat corruption, however before the Court can consider whether they are independent and impartial they must be considered to constitute a "tribunal established by law" to which the applicant had access for the purposes of the *Vilho Eskelinen* test.

Recurring themes in the ECtHR's case-law on judicial independence and the rule of law

Whichever Convention article has been at the heart of the Court's assessment, our case-law on judicial independence conveys four recurring themes.

Firstly, although the Convention does not require a uniform model for the organisation of national judicial systems, the Court has specified a number of concrete guarantees to protect judicial independence which hare required thereunder. The adoption of laws with clearly defined criteria and procedures for the appointment and removal of judges is needed to prevent unfettered discretion and arbitrariness by the executive.[59] In addition, disciplinary measures can only be based on unequivocal legal criteria, must be sufficiently reasoned and applied following a fair and independent procedure.

Secondly, in the light of the principles of subsidiarity and shared responsibility, the Contracting Parties' obligation to ensure judicial independence is crucially important for the effective functioning of the Convention system itself. The latter cannot function properly without duly appointed independent and impartial national judges.

Thirdly, all Contracting Parties must abide by rule of law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention. Domestic law, including national constitutions, cannot be invoked as justification for failure to respect those obligations.[60]

Finally, the Strasbourg Court refers extensively in these cases to the complementary rule of law jurisprudence of the CJEU, reflecting the synergy between the two European courts in defence of judicial independence and the values which underpin the Convention and EU law.[61]

While the CJEU proceeds on the basis of a combined reading of Articles 2 and 19 § 1 TEU, supplemented on occasion by Article 47 of the EU Charter, the ECtHR has instead recourse to Articles 6 § 1, 8 and 10, sometimes combined with Article 18 and/or explicit references to the Preamble and the general principle of the rule of law.

[59] See, recently, *Pengezov v. Bulgaria*, no. 66292/14, 10 October 2023, not yet final.
[60] See, for the Polish Constitutional Court and government's opposition to the Court's case-law on Article 6 and judicial independence, the summary in *Tuleya v. Poland*, cited above, § 342 and the previous dismissal of their objections in *Juszczyszyn v. Poland*, cited above, §§ 200-209.
[61] See, variously, *Juszczyszyn v. Poland*, cited above, and *Reczkowicz v. Poland,* cited above.

However, regardless of the different system and legal basis, there is a clear symmetry of values, purpose and effect reflected in both Courts' case law. This symmetry is further reflected in the approach of both European courts to the need for effective judicial protection whether under Article 19 § 1 TEU or Articles 6 § 1 and 13 ECHR and to the role of independent and impartial national courts in relation to both systems.[62]

Broader relevance of the Rule of Law under the European Convention

Before concluding, I think it useful to stress that, from the perspective of the Convention and the Strasbourg Court, the importance of the Rule of Law cannot be reduced to questions relating to the independence of the judiciary.

There are other strands to the Rule of Law under the Convention which are less familiar to the general public but which are nevertheless of fundamental importance to the type of societies in which we aspire to live.

Secret rendition cases, for example, provide a window into how the Strasbourg Court uses the Rule of Law as an interpretative tool for the development of substantive guarantees under rights set forth in other articles of the Convention, such as Articles 2, 3 and 5.

The applicant in *El-Masri*, a German national, was detained at the North Macedonian border, held incognito for twenty-three days in a hotel room, interrogated repeatedly, subjected to various forms of torture, forcibly tranquillised and flown on a CIA aircraft to Kabul where he was held captive for months.

Finding multiple violations of the provisions of the Convention, the Court held that it was:

> "*[…] wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework […]*".[63]

This is not an isolated case. Similar stories of abuse can be found in *Al Nashiri v. Poland*,[64] *Al Nashiri v. Romania,*[65] *Abu Zubaydah v. Lithuania,*[66] or *Nasr and Ghali v. Italy*.[67]

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[62] See, for a striking example of dialogue and synergy, the analysis of the CJEU in Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v. Openbaar Ministerie*, EU:C:2022:100, §§ 79-80, regarding execution of an EAW issued by an EU Member State and the two-step assessment required under EU law: "In the context of that assessment, the executing judicial authority may also take account of the case-law of the European Court of Human Rights, in which a breach of the requirement for a tribunal established by law in respect of the procedure for the appointment of judges has been established […]. For the sake of completeness, it should also be added that those relevant factors also include constitutional case-law of the issuing Member State, which challenges the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments of the Court of Justice and of the European Court of Human Rights relating to compliance with EU law and with that convention of rules of that Member State governing the organisation of its judicial system, in particular the appointment of judges." See, for a corresponding defence of the need to respect EU law, *Tuleya v. Poland*, n° 21181/19 and 51751/20, 6 July 2023. See also R. Spano, "The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary", 27(13) *EULJ* (2021).

[63] *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 236, ECHR 2012.

[64] *Al Nashiri v. Poland,* no. 28761/11, § 564, 24 July 2014 on the rule of law and the use of torture evidence: "*No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence irreparably damages that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded in order to protect the integrity of the trial process and, ultimately, the rule of law itself.*"

[65] *Al Nashiri v. Romania*, no.33234/12, 31 May 2018.

[66] *Abu Zubaydah v. Lithuania*, no.46454/11, 31 May 2018.

[67] *Nasr et Ghali v. Italy,* no. 44883/09, § 244, 23 February 2016.

I mention these cases because they remind us of the multiple facets of the rule of law and of the importance of a robust judicial system exhibiting high levels of independence and impartiality in order to defend the latter.

In other Italian cases on Article 3 of the Convention – such as *Cestaro* and *Blair*,[68] which concerned the violence inflicted on G8 demonstrators in police stations in Genova – the difficult but essential role played by national judges shines through. In *Blair*, for example, the Court of Appeal did not mince its words when it said that:

> "*[…] like objects or animals, those arrested in the Diaz-Pertini school had been branded on their faces on their arrival at the police station*".

The Court of Cassation, relying on multiple witnesses, confirmed the violence which had been perpetrated and held that:

> "*[…] the fundamental principles of a State based on the rule of law had been abandoned in the relevant [police] station*".[69]

But for the Statute of Limitations, the cases would not have come to Strasbourg, the national judges having otherwise done the job which falls to them to do under the Convention.

I cite these cases on purpose so that the public understand that dry notions such as the rule of law and judicial independence have real sense and meaning in the European societies, based on common values, in which we both aspire to live and to leave as a legacy for our children.

Conclusion

In 1949, as the post-war framework for the protection of democracy, human rights and the rule of law from which we now all benefit was being constructed, Hersch Lauterpacht, International legal scholar and judge, wrote:

> '[E]ven in countries in which the rule of law is an integral part of the national heritage and in which the Courts have been the faithful guardians of the rights of the individual, there is room for a procedure which will put the imprimatur of international law upon the principle that the State is not the final judge of human rights.'[70]

Then and now, when defending the Rule of Law, in all its different dimensions, the European Convention, and the Strasbourg Court established to interpret and apply it as a matter of last resort, clearly matter. What we see in Strasbourg in recent years is not merely rule of law backsliding but clear signs of democratic degeneration and erosion.

As my predecessors made clear in the *Golder* case, reference to the rule of law is not a matter of mere rhetoric. To function effectively, the Convention system relies primarily on you - national judges, whose independence and impartiality it both requires and seeks to safeguard.

[68] *Cestaro v. Italy*, no. 6884/11, 7 April 2015, and *Blair and Others v. Italy*, nos. 1442/14 and 2 others, § 62, 26 October 2017.

[69] Ibid., § 67.

[70] Lauterpacht and others, 'The Proposed European Court of Human Rights' (1949) 35 *Transactions of the Grotius Society*, 34.