EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

European Democracy through law: the role of the ECHR in building a robust rule of law

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Dear All,
It is always a great pleasure to be in the beautiful eternal city of Rome and to visit distinguished places of learning such as the Università Roma Tre. Since today's topic of discussion is the contribution which the Strasbourg Court has made to advancing the Rule of Law, I thought I would start with a few short reflections on how the ancient Romans viewed the law.

As we know, Rome was for centuries Europe's legal cradle - or *la culla del diritto*, as my Italian colleagues like to say. For the ancient Romans, law was their stock-in-trade. This meant that they could study it and cultivate it over a long span of time. As a result, many of their legal maxims have travelled through the ages and are still with us today, remaining a source of inspiration, even though more than two millennia separate us from ancient Rome.

As historians have shown, the ancient Romans became famous for their inductive analysis of human relationships.[1] They were careful to search for correct solutions to conflicts which frequently arose in their inter-personal affairs. Centuries of debates were then codified and left unto us so that we could refine them and pass them on to those who come after us.

The Twelve Tables, for instance, remain the earliest known codification of Roman Law and its importance lies less in the content of its provisions, and more in the example it provides us, namely, its effort to remove the interpretation of the law from under the monopoly of the powerful ruling classes. By putting its contours on display on Forum Romanum, the Twelve Tables transformed the law into something intelligible, accessible and fair.

Other well-known examples of Roman legal innovation include the *Lex Aquilia* - which laid down rules of compensation for damage unlawfully inflicted by one person upon the property of another - and, naturally, the Code of Justinian. Although compiled in the other capital of the Roman Empire, this latter text, which is nothing less than a legal monument, compiled all the laws and legal interpretations provided by Roman jurists throughout the centuries. Its purpose was i.a. to lay out a number of well-defined principles which could be used to solve any future dispute which arose between persons, including public authorities.

While it would be interesting to talk at length about these examples, my intention is not to lecture you on the ways of the Romans. However, there are four precepts which we can still salvage from the legal vestiges left behind by the Romans and which still resonate in today's world. They are as follows:

[1] A. Bellodi Ansaloni, *Scienza giuridica e retorica forense* (Maggioli 2017).

- First, the ancient Romans believed in the law. It was the law, rather than a particular citizen or group of citizens and their personal preferences, which should govern public affairs and private relations.
- Secondly, the ancient Romans placed a particular emphasis on the study of individual cases, meaning that the facts of each dispute had to be studied in a dispassionate manner before a just conclusion could be arrived at.
- Thirdly, the written law required interpretation, meaning that someone had to mediate between the letter of generally applicable rules and the new realities of life which emerged as a result of social conditions being perpetually in motion.
- Fourthly, the application of general rules to unique cases had to be achieved through an impartial judge who upheld a just balance between the interests involved.

These four elementary precepts, which have laid the foundations of our common European legal tradition, bring me to today's discussion on the protection of human rights *through* law.

In the remaining time I have been given, I will comment on how the Strasbourg Court has understood and protected the Rule of Law within the system established by the European Convention of Human Rights. In doing so, I will draw on the several judgments handed down by the Strasbourg Court and which show that the respect for human rights and the rule of law are inseparably linked.

Throughout the discussion, it will hopefully be clear that the four precepts I have just mentioned are still very much at the core of human rights adjudication today, despite being first put into practice thousands of years ago. And, anecdotally, I may say, perhaps this is not surprising – after all the Convention was signed in the ancient city of Rome on 5 November 1950. The wisdom of history apparently wanted our rule of law precepts of today to originate from the same place where the rule of law was cherished two thousand or more years ago.

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It is without controversy that human rights and the rule of law are entirely interdependent – in other words, they need each other to live and develop.[2] On the 10th December 1948, this inter-dependence was formally recognised at the international level by the Universal Declaration of Human Rights, whose provisions served as the loadstar to the founders of the European system of human rights protection.

The Third Preamble to that Declaration makes an express reference to the rule of law, when stating that:

> "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

Through that statement, the drafters of the Universal Declaration asserted the view that the protection of human rights could not be achieved if governments were left to disregard the law at will. The exercise of power, if left unconstrained by clear and binding rules, is so obviously arbitrary

[2] See Resolution A/HRC/RES/28/14 at https://www.ohchr.org/en/resolutions, accessed on 30 October 2024.

that it cannot satisfy certain essential tenets which run through human rights law, such as legal certainty, equal treatment and proportionality.

In Europe, this same idea is found in the Fifth recital to the Preamble to the European Convention of Human Rights, which states that the Contracting Parties have resolved to enforce certain of the rights enshrined in the Universal Declaration because they hold in common certain ideals, like freedom and the rule of law.

But what does the rule of law really mean?

The contemporary notion of the Rule of Law builds on, but is not necessarily fully synonymous with, the various European approaches to *law* as the ultimate mechanism of control over the discretionary or "arbitrary" exercise of governmental power over individuals. In various European legal systems we find this idea expressed through the notions such as "Rechtsstaat" or "État de droit". While these notions vary to some extent from one jurisdiction to another, depending on the road they have travelled, they share a strong common element. The notion of the Rule of Law is antithesis to the purely formal conception of law which authorises any action of a public official as a "lawful" exercise of the governmental power.[3]

Scholars have offered up varying definitions of the Rule of Law. They often turn on the distinction made between the "thin" and "thick" conceptions of the Rule of Law. The former – the "thin" conception – is concerned with the narrowly defined set of procedures and requirements determining the quality of law that regulates human conduct (non-retroactivity, foreseeability, accessibility of law), while the latter – the "thick" conception – is seen as reflecting the idea of substantive justice incorporating the values of morality and equality of citizens as holders of political rights.[4]

Practitioners have also sought to give meaning to the term Rule of Law. For instance, in his seminal work on the Rule of Law, Lord Bingham – the late Lord Chief Justice of England and Wales and Senior Law Lord – has attempted to devise the principles determining the Rule of Law.[5] He considered human rights (the law must afford adequate protection of human rights) and the rule of law in the international legal order (compliance by the States with their international law obligations) to be intrinsic parts of the concept of Rule of Law.

Similarly, in its Rule of Law Checklist, the experts of the Council of Europe Venice Commission have identified the following elements of the Rule of Law: Legality; Legal certainty; Prevention of abuse/misuse of powers; Equality before the law and non-discrimination; and Access to justice. (They are complemented by several other specific areas in which the Rule of Law is a salient point, namely corruption and conflict of interest, collection of data and surveillance).[6]

The Strasbourg Court's vision of the rule of law has been constructed on an incremental, gradual basis, as the Court is called to determine what the rule of law entails in each specific case it decides, much alike the ancient Roman law was operating.

[3] See further Venice Commission, CDL-AD(2011)003rev, 4 April 2011.
[4] See further, for instance, Møller and Skaaning, Systematizing Thin and Thick Conceptions of the Rule of Law, 33(2) The Justice System Journal (2012), 136-153.
[5] Bingham, The Rule of Law, Penguin 2010.
[6] See further Venice Commission-Rule of law Checklist, Council of Europe, May 2016.

Since my allotted time is limited, I thought I would offer a few illustrations of how this is done, in the hope of shedding light on the contents of the rule of law as understood under the European Convention.

My overview will show that while the Court does not follow – at least not in the strict sense – any specific definition of the term, its case-law obviously features the various elements of the Rule of Law conception discussed earlier.

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Our natural point of departure is the case of *Golder v. the United Kingdom*. The applicant in this case was a prisoner, accused of attacking a prison officer during a riot. The Home Secretary blocked him from sending letters and consulting his lawyer, steps the applicant wished to take to access a court and prove his innocence. In examining the applicant's complaint, the Strasbourg Court underlined importance of access to court by resorting to the notion of the rule of law. The Court held that the reference to the rule of law in the Convention's Preamble was more than just a mere rhetorical device, devoid of any interpretative value.[7]

Ever since this finding, the Strasbourg Court has emphasised the rule of law as an interpretative tool for the development of the substantive guarantees set forth in the Convention.[8] Under this approach, the rule of law, as a principle "inherent in all the Articles of the Convention,"[9] is the fuel which gives human rights their normative drive.

By consistently relying on the rule of law as an interpretative tool, the Court ensures that the effectiveness and utility of each and every Convention right and freedom are not undermined by persuasive sophistry or pure formalism. It does so in two broad manners.

First, when analysing a variety of possible interpretative options relating to Convention rights, the Court will choose that interpretation which "best preserves the core ideal animating the rule of law as a fundamental component of European public order".[10] Of particular relevance here is the fact that the Convention is itself an instrument of law which irrigates the legal orders of the Contracting Parties. The Court is well-aware of the fact that the Convention mandates the establishment of legal safeguards at the domestic level and that the Strasbourg judges intervene only as a matter of last resort. National safeguards must be primarily designed to protect rights which are practical and effective, rather than theoretical and illusory.[11]

Such a vision of the rule of law has led the Court, for instance, to rule that Article 2 of the Convention does not only impose a substantive obligation on States 'to protect life', but also a procedural obligation to investigate deaths, whether they occur at the hands of state agents, private persons, or persons unknown.[12] In *Öneryildiz v. Turkey*, the Grand Chamber held that national authorities, including courts, should not under any circumstances be prepared to allow life-endangering offences to go unpunished, as "this is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts."[13]

[7] *Golder v. the United Kingdom* [Plenary], 21 February 1975, Appl. 4451/70, § 34.
[8] S. O'Leary, 'Europe and the Rule of Law', in M. Bobek & J. Prass (eds.), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020), 37-68.
[9] A vision first expressed in *Amuur v. France,* 25 June 1996, ECR 1996-III, § 50.
[10] R. Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights', European Law Journal 27:1-17, 5.
[11] *Airey v. Ireland*, 9 October 1979, Appl. 6289/73, § 24.
[12] Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (Oxford 2014) 214.
[13] *Öneryildiz v. Turkey* [GC], 30 November 2004, Appl. 48939/99, § 96.

In *Calvelli & Ciglio v. Italy*, a case well known in this jurisdiction, concerning allegations of medical negligence, the Grand Chamber also held that Article 2 requires States to put in place a regulatory framework compelling public and private hospitals to adopt appropriate measures for the protection of their patients' lives. It also required an effective independent judicial system to be set up so that the cause of death of patients under medical care can be determined and those responsible made accountable.[14]

Similarly, Strasbourg judges view Article 8 as imposing certain obligations on States which are not immediately visible upon a first reading of that provision's text. Those obligations are only identifiable if one reads Article 8 within the wider 'rule of law logic' present in the Convention. One example I can cite is *X and Y v. the Netherlands*, a seminal case on the positive obligations in the context of sexual abuse of a mentally disabled minor. The Dutch law in force at the time did not provide for a possibility for a legal guardian to lodge a criminal complaint in the name of a child who had already reached the age of 16. The Court ruled that in order to prevent serious violations of persons' sexual lives, it will be necessary for States to enact criminal laws which effectively enable to punish grave acts like rape.[15] Echoing that view in *Volodina v. Russia (no. 2)* in relation to protection from acts of cyberviolence, stalking and impersonation, the Court drew a clear connection between 'effective rights' and the rule of law, when stating that:

> "the effectiveness principle means that the domestic authorities must on no account be prepared to let…physical or psychological suffering inflicted [by private persons to] go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in acts of violence." [16]

(In cases involving procedural obligations under Article 8, the Court's reliance on the notion of the rule of law is less explicit, but nonetheless present. It has, for instance, held that Article 8 requires governments to not only refrain from action that would unjustifiably interfere with an individual's right to privacy, but also to set up a "system for its effective protection and implementation".[17] That system "could require the adoption of measures designed to secure respect for private life, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures".[18]

Although the reasoning in this example I just gave is more subtle it still dispels any doubt that, in many cases, what the Court is most interested in seeing is the enactment of binding rules upon which private persons can rely to protect themselves against the excesses of public power. This is, after all, what the rule of law is about.)

In the interests of brevity, I will refrain from providing further examples of how the rule of law determines the interpretation to be given to Convention rights. Suffice it to say that the cases I just mentioned are testament to the Court's willingness to avoid situations in which respect for fundamental rights would depend exclusively on the will and proclivities of the governments of the day. Indeed, allowing States an unhindered choice on whether, when and how to observe their Convention obligations, would open the door to arbitrary practices which are fundamentally at variance with the rule of law.

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[14] *Calvelli & Ciglio v. Italy* [GC], 17 January 2002, Appl. 32967/96, § 49.
[15] *X and Y v. the Netherlands*, 26 March 1985, Appl. 8978/80.
[16] *Volodina v. Russia (n°. 2)*, 14 September 2021, Appl. 40419/19, § 67.
[17] *Taliadorou & Stylianous v. Cyprus*, 16 October 2008, Appl. 39627/05 and 39631/05, § 55.
[18] Ibid.

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This brings me to the other ways in which the rule of law features in the Court's case law. As many present will know, the Convention makes the application of exceptions to human rights within the domestic orders of the Contracting Parties conditional upon three basic criteria which all must be fulfilled in order not to find a violation of one's rights. Among them is the criteria of 'lawfulness', namely that any interference to human rights be 'prescribed by law'. This is a common theme running through the Convention and is to be found wherever one looks. For example, no one's private life, freedom of conscience, freedom of expression and freedom of assembly and association shall be restricted unless such restrictions are prescribed by law. Nor shall anyone be deprived of their property except in the public interest and according to conditions contained in law.

The requirement of lawfulness is strictly emphasised in respect of some other core rights, which can be traced back to *Magna Carta Libertatum* from the 13th century. No one shall be punished if their conduct did not constitute a criminal offence laid down by law at the time it was committed. Nor shall they be deprived of their liberty except in accordance with a procedure prescribed by law and in pursuance of a limited number of purposes which must themselves be set out by law.

In light of this emphasis on law, the Court is frequently called to examine whether domestic law restricting fundamental rights possesses certain qualities which make it consonant with the rule of law, as understood by the Convention. Cases in which this issue arises are colloquially known as 'quality of law' cases and they sometimes raise heated debates on the degree to which States can legitimately restrict fundamental rights. The positive side to this is that many of those debates are only allowed to take place because the Court has rightfully departed from a formalistic understanding of the 'lawfulness' requirement. For the Court, mere existence of law will not do.

By requiring something more than words on paper, the Court looks to whether national law, in the practical outcomes it engenders, is free of arbitrariness and treats persons in similar positions equally. This latter 'quality' is particularly important since it implies that one of the essential characteristics of law, as viewed by the Court, is its grounding in objective criteria, rather than the capricious worldview of those in power.

With this in mind, the Court has held that laws restricting fundamental rights must conform to the principle of legal certainty, which remains one of the cornerstones of any system based on the rule of law.[19] Such laws must be accessible, in the sense that the citizen must be able to have an adequate indication, in light of any special circumstances, of the legal rules applicable to their case. Such laws must also be certain and formulated with sufficient precision to enable persons to regulate their conduct. So, for instance, in the case of *Molla Sali,* where Greek courts have inconsistently applied Sharia law and Greek civil law when deciding inheritance disputes involving Greek Muslims living in Western Thrace, the Grand Chamber held that such a judicial practice created legal uncertainty incompatible with the level of predictability to which the rule of law aspires.[20]

We must not forget either that the Court's conception of the rule of law is intimately tied to the Contracting Parties' democratic systems of government. Therefore, it has sometimes been necessary to assess the 'lawfulness' requirement together with its sister requirement of 'necessity in a democratic society'. This occurs particularly in secret surveillance cases, where the Court assessed the domestic law allowing for such measures.

[19] *Baranowski v. Poland*, 28 March 2000, Appl. 28358/95, § 56.
[20] *Molla Sali v. Greece* [GC], 19 December 2018, Appl. 20452/14, § 153.

Thus, the Grand Chamber has held that legislation permitting secret interception of a person's correspondence must be accessible and foreseeable in its application; it must also ensure that secret surveillance measures are applied only if they provide for adequate and effective safeguards against abuse of power.[21]

In our democratic societies, it is essential to have clear, detailed rules governing interception, especially as the technology available for use is continually becoming more sophisticated.[22] In the absence of such binding rules, an existential threat to the democratic process can arise, as persons bringing to light matters of public interest would have no protection against some of the most severe interferences into their private lives.

One final example of the Court assessing the compatibility of domestic law with the rule of law is to be found in the case law relating to deprivation of liberty cases. Since *Engel and Others v. the Netherlands*, we know that the deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[23]

This will occur if national provisions allowing for the detention of persons can be so widely construed that they will entitle authorities to detain persons on the sole pretext that the detention is required in the interests of complying with any legal obligation under the sun. The Court does not accept that. Instead, it is emphasising in its case-law that domestic law permitting detention will be arbitrary if devoid of qualities such as the existence of clear legal provisions for ordering detention, for extending detention, for setting time-limits for detention[24] and for contesting the lawfulness and length of continuing detention.[25]

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In mentioning all these cases, I have, up to now, attempted to show that the judges in Strasbourg view the law as one of the best safeguards against human rights violations. Through its work, the Strasbourg Court looks at the particular facts of a dispute before reaching a conclusion on what the Convention requires in that instance. That conclusion is often driven by an autonomous conception of the rule of law which is in turn guided by democratic ideals to which the Contracting Parties subscribe.

All that may be well and good, but the most vital question which – I would say – remains, is the following: what is it that is keeping all this – the entire system of human rights protection – together?

I believe that the answer is to be found in what some call the right which guarantees all other rights, namely, the procedural right to a fair trial enshrined in Article 6 of the Convention.[26] The fair trial is also one of Lord Bingham's foundational principles of the conception of the rule of law.

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[21] *Roman Zakharov v. Russia* [GC], 4 December 2015, Appl. 47143/06, § 236 ; *Big Brother Watch & others v. the United Kingdom* [GC], 25 May 2021, Appl. 58170/13, 62322/14 and 24960/15, § 334.

[22] *Kruslin v. France*, 24 April 1990, Appl. 11801/85, § 33.

[23] *Engel v Netherlands (n°. 1)* [Plenary], 8 June 1976, Appl. 5100/71, 5101/71, 5102/71, 5354/72 & 5370/72, § 69: The Government have derived argument from sub-paragraph (b) (art. 5-1-b) insofar as the latter permits "lawful arrest or detention" intended to "secure the fulfilment of any obligation prescribed by law". The Court considers that the words "secure the fulfilment of any obligation prescribed by law" concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration (Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34). It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.

[24] *Garayev v. Azerbaijan*, 10 June 2010, Appl. 53688/08, § 99.

[25] *Louled Massoud v. Malta*, 27 July 2010, Appl. 24340/08, § 71.

[26] F. Sudre, *Droit européen et international des droits de l'homme*, (2023 PUF) 562.

Allow me here one more historical digression. Namely, such conception is obviously parallel to the one of Roman law. There, it was considered that legal protection of an individual could best be achieved by the system of actions and exceptions, enforceable before a judge.

Article 6 of the Convention requires the Contracting Parties to establish independent and impartial tribunals by law. Those tribunals must be capable of determining the civil rights and obligations of persons, or any criminal charges brought against them, in a fair manner and within a reasonable time.

Going back to the *Golder* case, by declaring that one can scarcely conceive of the rule of law without the existence of courts,[27] the Strasbourg Court made it known that the right to a fair trial constitutes the skeletal frame upon which all other rights rest. This is because the fundamental purpose of Article 6 is to ensure that the question of whether an applicant enjoys rights under the Convention can only truly be answered through an independent and impartial process.
Naturally, there is nothing in the Convention which requires a uniform model for the organisation of national judicial systems. But the Convention nevertheless obliges Contracting Parties to provide a number of judicial guarantees to applicants in their domestic legal systems. Over time, the Court has identified a number of these guarantees, often by putting forward the principle that the general right to a fair trial would be rendered meaningless if certain essential elements flowing from it were disregarded.

So, for instance, there can be no fair trial and no rule of law without any possibility of accessing courts,[28] or if an applicant, once getting through the court's doors, finds that the court cannot properly assess the legal and factual merits of their claim.[29] On this latter point, the Court has held that if the assessment carried out by judges is too restricted, then it risks emptying the right to a court of its substance.[30] A prime example of such restriction is to be found in the Italian case of *Scordino (no. 1)*, regarding inadequate amount of compensation for expropriation on account of retrospective application of a law.[31] There, the Court ruled that legislative amendments adopted while proceedings were pending against the government, and which had the effect of forcing judges to retroactively ignore acquired rights and decide in the government's favour, must be analysed with an acute degree of circumspection.[32]

Yet among all the procedural guarantees which the Court has identified there is one which, perhaps, stands above all the rest. I am referring here to the requirement of judicial independence and impartiality, without which there can be no rule of law. Consequently, all other guarantees will lose all the value which the Convention seeks to ascribe to them.

Unfortunately, judicial independence and impartiality have, in recent years, come under attack. They have been relativised in ways which are so novel and unexpected that the Court in Strasbourg has had to deploy added efforts to address the issue. The many cases concerning judicial independence

[27] *Golder* [n. 3], § 34.
[28] Ibid.
[29] *Albert & Le Compte v. Belgium* [Plenary], 10 February 1983, Appl. 7299/75 & 7496/76, § 29.
[30] *Obermeier v. Austria*, 28 June 1990, Appl. 11761/85, § 70.
[31] *Scordino v. Italy (n°. 1)* [GC], 29 March 2006, Appl. 36813/97.
[32] Ibid. §§ 131-133: "in the present case section 5 *bis* of Law no. 359/1992 simply extinguished, with retrospective effect, an essential part of claims for compensation, in very high sums, that owners of expropriated land, such as the applicants, could have claimed from the expropriating authorities…In the Court's view, the Government have not demonstrated that the considerations to which they referred, namely, budgetary considerations and the legislature's intention to implement a political programme, amounted to an "obvious and compelling general interest" required to justify the retrospective effect that it has acknowledged in certain cases…There has therefore been a violation of Article 6 § 1 of the Convention [on account of the unfairness of the proceedings]."

pending before the Court are a stark reminder that this essential aspect of the rule of law does not always attract widespread support in several Contracting Parties.

We must never forget that one of the driving forces underlying human rights treaties like the Convention is their vocation to transform human rights into binding norms that are enforceable within the domestic order of the Contracting Parties. Viewed from this angle, attacks on the judiciary are particularly worrying since the Convention system largely depends on shared responsibility between the domestic and Strasbourg judges for its proper functioning.

Faced with attempts to undermine the judiciary, the Strasbourg Court has had to reply by reminding governments, in simple terms, of their most basic obligations under the Convention. It has placed emphasis on the special role in society which the judiciary, as guarantor of justice, plays. Guaranteeing justice for individuals through an independent judiciary is a fundamental value in any State governed by the rule of law, and public confidence in the judiciary must not be undermined if it is to carry out its duties peaceably.[33]

Contracting Parties must be aware that judicial independence is to be protected from the moment of appointment. Judicial appointments must not depend on the unfettered discretion or undue influence of the executive, but must be regulated by law. Therefore, there will be a breach of Article 6 if the appointment procedure of a judge is in manifest breach of domestic law, if it affects the ability of the judiciary to perform its duties free of undue interference, or if the competent national courts fail to adequately review the alleged irregularity in light of the Convention's principles as well as its consequences.[34]

After appointment, judges must be protected throughout the period in which they hold office. In a democratic society founded on the doctrine of the separation of powers, the Court has been "particularly attentive to the protection of members of the judiciary against measures affecting their status or career", as these can threaten their independence, autonomy and judgment.[35]

The Court's approach to the protection of independence and autonomy of the judiciary can best be demonstrated on the example of the Polish rule of law cases.

These cases, as you may know, dealt with comprehensive judicial reforms in Poland dating back to 2015 which sought to exert influence, by the executive, on the appointments and status of judges in Poland. In a series of cases, the Court found that the procedure for appointing judges to the different chambers of the Supreme Court had been unduly influenced by legislative and executive powers, which compromised the legitimacy of the courts, most notably from the perspective of the requirement of "independent and impartial tribunals established by law" within the meaning of Article 6 of the Convention.[36] The Court reached the same finding as regards the appointment of a Constitutional Court judge in Poland.[37]

Judicial independence should also be protected through security of tenure. For instance, in *Tuleya v. Poland*,[38] several preliminary inquiries had been opened against a Polish judge for having criticised Polish judicial reforms and for having referred a question to the CJEU under Article 267 TFEU. After his immunity was lifted by the Disciplinary Chamber of the Polish Supreme Court, the Strasbourg

[33] *Baka v. Hungary* [GC], 23 June 2016, Appl. 20261/12, §§ 98, 164.
[34] *Guðmundur Andri Ástráðsson* [GC], 1 December 2020, 26374/18, §§ 243, 244, 246, 248-250, where allegations were made about judicial appointments done manifestly in breach of domestic law and where the Court found a violation of Article 6 § 1 of the Convention.
[35] *Bilgen v. Turkey*, 9 March 2021, Appl. 1571/07, § 58.
[36] See, for instance, *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022 and *Żurek v. Poland*, no. 39650/18, 16 June 2022.
[37] *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.
[38] *Tuleya v. Poland*, 6 July 2023, Appl. 21181/19 & 51751/20.

Court held that the applicant's Article 6 rights were violated since that Disciplinary Chamber was not a tribunal established by law within the meaning of its case-law. Equally, a judge may not be prosecuted, or rather persecuted, for exercise of judicial function in good faith.

In *Grzęda*, the Grand Chamber found a violation of Article 6 in relation to a lack of judicial review of premature termination *ex lege*, after legislative reform, of serving Supreme Administrative Court judge's term of office as member of National Council of the Judiciary (NCJ). The Court clarified that judicial independence is to be understood in inclusive manner and applied not only to judges' adjudicating role but also to other official judicial functions, such as membership of a judicial council. It, again, insisted on the necessity to protect independence of a judicial council from executive and legislative powers so as to safeguard integrity of judicial appointment process. For the Court, successive Polish reforms resulted in weakening of judicial independence and adherence to rule of law standards.

Moreover, in another case – *Żurek v. Poland* – where a judge was removed from the National Council of the Judiciary where he served as a member and spokesperson for having criticised Polish judicial reforms, the Court demonstrated how Article 10 (freedom of expression) formed part of a rule of law toolbox in the protection of the judiciary. The Court found that the applicant's removal was a strategy aimed at intimidating (or even silencing) him which created a chilling effect on the judges' participation in public debate on legislative reforms affecting the judiciary and on its independence. In this context, the Court clarified 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.

The Court's insistence on the necessity to address the structural rule of law deficiencies in Poland finally led to a positive change. The Court adopted a pilot judgment in the *Wałęsa* case,[39] which concerned the complaint brought by the well-known former Polish Nobel Prize winner and statesman Mr Lech Wałęsa, who had suffered a subsequent reversal of a final defamation judgment in his favour, following an appeal by the Prosecutor General. The Court regarded this as "an abuse of the legal procedure by the State authority in pursuance of its own political opinions and motives".

When adopting the pilot judgment the Court referred to the related structural and repeated breaches of the fundamental principles of the rule of law, separation of powers and the independence of the judiciary in Poland.

Shortly after the delivery of the judgment, the newly elected Polish Government has publicly, and in a letter sent to the Court, declared its intention to execute this and other judgments on the rule of law. This process is still pending but the unequivocal commitment by the Government shows that the rule of law can ultimately prevail.

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I started today's speech by outlining four precepts which still lie at the heart of the rule of law as we understand it today. Although ancient, they are still valuable in so far as they can serve as a useful source of inspiration when interpreting and protecting the rights and freedoms enshrined in the Convention.

[39] *Wałęsa v. Poland*, no. 50849/21, 23 November 2023.

For all those who are called to decide cases alleging the violation of human rights, we must not forget that our decisions must be taken in accordance with the law, and our judgment must remain impervious to external influences.

If anything is clear it is this: there can no rule of law without courts; anything else would, as the ancient Romans would say, be nothing more than private vengeance parading as justice.

We should also understand the rule of law as a conception encompassing morality, justice and fairness and, as such, as a value intrinsically linked with the ideals of democracy and human rights. *Ius est ars boni et aequi,* as again the ancient Romans would say. A respect for these values should be the guiding principle of any governmental action and policy.

Without justice, fairness and respect for fundamental human rights our civilisation risks backsliding rather than developing from the foundations established by the ancient Romans. I can only hope that these thoughts resonate in the minds of European leaders and nations and that the generations of the Europeans to come will continue living in peaceful, prosperous and orderly societies grounded on the ideals of human rights, democracy, and the rule of law.

I am sure that my presentation today has demonstrated that the European Court of Human Rights is capable of and ready to shoulder its part of responsibility in building and safeguarding a robust rule of law order. It will be for you, the young generation of Europeans, to carry the torch further.

I thank you for your attention.