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

The Role of Courts in Tackling Democratic Backsliding

Speech by Marko Bošnjak

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Ladies and gentlemen, esteemed colleagues, it is a distinct honour to address you here at the Harvard Law School on the topic of "The Role of Courts in Tackling Democratic Backsliding."

1. Introduction

A great deal has been written about democratic backsliding. Given the limited time available today, I will focus on the role of courts – particularly the European Court of Human Rights – in addressing one specific aspect of this phenomenon: rule of law backsliding.

Additionally, I will discuss the Court's role in protecting domestic judiciaries from attacks that frequently arise in this context.

The term democratic backsliding lacks a precise definition but may simply be described as the process by which a State gradually becomes less democratic. This process does not occur spontaneously or by accident: it is always driven by the actions of democratically elected leaders. The process unfolds incrementally, with successive reforms reinforcing one another. It is therefore difficult to detect until it has significantly advanced. Democratic backsliding has emerged as the primary method of democratic reversion in the 21st century, replacing the coups and violent revolutions that characterized democratic reversals in the 20th century.

Democratic backsliding can take many forms but is invariably characterised by dispensing with institutional checks and balances reducing constraints on executive power and the resultant "executive aggrandizement". Most democratic constitutions are based on separation of powers and seek to constrain the executive by checks and balances provided by the other two branches of Government, the legislature and the judiciary. The executive is also constrained by various other factors, including an impartial civil service, independent media, and respect for the rule of law. Executive aggrandizement can flourish when all these constraints are weakened or reduced leading to increasingly arbitrary exercise of the powers of the executive.

Democratic backsliding, therefore, threatens three core values that Europe and the United States have shared for more than two centuries: human rights, democracy, and the rule of law. In this regard it is sufficient to recall that the Founding Fathers of the United States were deeply influenced by Enlightenment political philosophy and the English 1688 Bill of Rights when drafting the American Declaration of Independence in 1776 and the U.S. Constitution in 1789.

Likewise, the French Declaration of the Rights of Man and Citizen drew inspiration from the American Declaration of Independence. Additionally, Alexis de Tocqueville's admiration for American democracy served as a reminder of the deep historical connections between our shared democratic traditions.[1]

Here I would also recall something that is particularly important for today's topic, namely the fact that US Supreme Court judgment penned by Chief Justice Marshall in *Marbury v. Madison*, established the principle of judicial review, enabling the US courts to review compliance of a law with the Constitution. This served as an inspiration to famous Austrian (and later also American) jurist Hans Kelsen to establish the world's first constitutional court in his home country in 1918. Afterwards, the power of constitutional review spread worldwide. Today, roughly 80% of constitutions provide for some form of constitutional review[2].

Those powers and the fact that when faced with each aspect of democratic backsliding (silencing the press, stifling political pluralism, dispensing with institutional checks and balances, eliminating political competition etc.) those affected often turn to the courts, makes the courts crucial in protecting democracies against that phenomenon. However, it also makes them targets for those seeking to govern without constraints[3].

Human rights, democracy and the rule of law are the three pillars of the Council of Europe, an international organisation based in Strasbourg, to which the European Court of Human Rights belongs. Founded in 1949, the Council of Europe is Europe's oldest intergovernmental organisation, including 46 Member States with a population of approximately 675 million. 27 of those States are also Member States of the European Union (EU), a supranational organisation distinct from the Council of Europe.

Non-European States which accept democracy, rule of law, and human rights, and wish to participate in the Council's initiatives may be accorded observer status. The United States became an observer State in 1995. Mexico, Canada, the Holy See and Japan are also observers.

Among those three values, the rule of law has long been the least visible, as democracy and human rights typically attract more attention. However, in the 21st century, the significance of the rule of law has become increasingly apparent[4]. This is partly due to democratic backsliding, where one of the modalities is to erode the rule of law and the institutions that protect it by consolidating power in the executive.[5] Because the rule of law, by definition, places constraints on leaders, it poses a threat to those who wish to consolidate power.[6] Therefore, one of the early signs of democratic backsliding is a government's growing unwillingness to respect constitutional and international norms.

For this reason, one can speak of rule of law backsliding as an aspect of democratic backsliding. While democratic backsliding encompasses a broader decline in democratic principles and institutions, rule of law backsliding focuses more narrowly on the undermining, weakening, or dismantling of the legal and institutional mechanisms that ensure accountability, fairness, and justice. Examples include efforts to control or influence the judiciary, changing laws to entrench the power of the ruling party, selective enforcement of laws, arbitrary legal decisions favouring those in

[1] Alexis de Tocqueville: *De la démocratie en Amérique*, 1835 and 1840
[2] T. Ginsburg: "*Democratic Backsliding and the Rule of Law*", Ohio Northern University Law Review, Volume 44, Issue 3, p. 352
[3] Ibid.
[4] Rule of Law by the Venice Commission at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN#:~:text=Of%20the%20three%20pillars%20of,its%20importance%20have%20become%20evident accessed on 22 January 2025
[5] T. Ginsburg: "*Democratic Backsliding and the Rule of Law*", Ohio Northern University Law Review, Volume 44, Issue 3, p. 352
[6] Ibid.

power, and the weakening of constitutional oversight mechanisms.[7] This aspect of democratic backsliding is deeply troubling because democracy cannot survive without the rule of law.

Before turning to the role of the European Court of Human Rights in addressing rule of law backsliding, let me briefly discuss the European system of human rights protection and the concept of the rule of law.

2. The Convention System of Human Rights Protection

Unlike the European Union, the Council of Europe cannot make binding regulations. However, it has produced a number of international treaties, some of which are open to non-European states. For instance, the United States is a signatory to the Council of Europe's most recent treaty – the Framework Convention on Artificial Intelligence.

The most significant of the Council's treaties – and a cornerstone of its human rights protection – is the European Convention for the Protection of Human Rights and Fundamental Freedoms. Often regarded as the Council's "crown jewel," the Convention is frequently described as Europe's bill of rights. This year marks its 75th anniversary.

Both the Council of Europe and the Convention are, at their core, peace projects founded on the principle that democracies which respect human rights and the rule of law do not wage war against one another. In the aftermath of the Second World War, European leaders recognized that by safeguarding those three values Europe could strengthen its prospects for lasting peace.

The Convention is openly linked to a single political model. The Court stressed that democracy is "the only political model contemplated by the Convention and, accordingly, the only one compatible with it"[8], and that "the Convention was designed to maintain and promote the ideals and values of a democratic society"[9], which supposes "pluralism, tolerance and broadmindedness"[10].

The adoption of the Convention on 4 November 1950 in Rome was also Europe's way of securing key rights enshrined in the Universal Declaration of Human Rights, adopted two years earlier. However, the Convention went beyond the Universal Declaration, which was largely aspirational, by establishing legally binding obligations and an enforcement mechanism to uphold these rights.

Under the Convention, the Contracting States bear the primary responsibility for safeguarding the rights and freedoms it defines. However, to ensure that these obligations were not merely symbolic but concrete and enforceable, the Convention established, for the first time, an international oversight mechanism based on the right of individual application. This mechanism allows individuals who believe their rights under the Convention have been violated to seek justice beyond their national legal systems. After pursuing their cases through their national courts, they can bring their complaints before the European Court of Human Rights, whose judgments are binding.

This was a groundbreaking concept at the time and a major milestone in the protection of human rights in Europe and beyond. It contributed to recognition of individuals as subjects of international

[7] See, for example, L. Pech and K. L. Scheppele: *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies, Volume 19, December 2017, pp. 3 – 47; and F. Tan: *The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?*, Göttingen Journal of International Law, Volume 9, Issue 1, 23 December 2018, pp. 109 – 141.
[8] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, *Reports of Judgments and Decisions* 1998-I
[9] Ibid.
[10] See, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 175, 15 November 2018

law, marking a significant shift from the traditional principle that placed a State's treatment of its own citizens beyond international scrutiny or liability.

Equally remarkable was the fact that, by creating this mechanism, the Contracting States implicitly recognized the need for institutional recourse outside their borders. They did so because they had seen that the atrocities of the Second World War had demonstrated that unchecked power – even when democratically attributed – could fail to protect democracy, human rights, and the rule of law. Having witnessed firsthand the devastating consequences of this failure, the European States understood that some form of external review was required. This element is of a crucial importance for our discussion today.

Over the years, the Convention system has evolved into the most advanced and effective international mechanism for protecting human rights.

The Contracting States have incorporated the Convention into their national legal systems. And as it reflects European legal traditions, for many States the rights in the Convention, such as the right to a fair trial, or not to be subject to torture, were not new but in fact already included in the constitutions or basic laws. This process of "embedding" of the Convention, along with its unique character that goes beyond mere reciprocal engagements between the Contracting States and directly creates rights for private individuals[11], led the European Court of Human Rights to conclude that the Convention became "a constitutional instrument of European public order". As one of the Court's former Presidents stated, the Convention became "the single most important legal and political common denominator" of the European States and "a constitutional law for all Europe in the field of human rights protection".[12]

This enables me to draw some loose and imperfect parallels between the U.S. Constitution and the Convention. It could be argued that just as state and federal courts in the United States interpret and apply the Constitution, national courts in the Contracting States interpret and apply the Convention. Similarly, while the U.S. Supreme Court serves as the ultimate authority on constitutional interpretation, the European Court of Human Rights fulfils the same role for the Convention.

One may draw further comparisons. To borrow the words of Chief Justice Marshall from *McCulloch v. Maryland*, like the U.S. the Constitution, the Convention should also be read as a document "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Both the U.S. Constitution and the Convention have stood the test of time: through their judicial interpretation they have been made applicable to situations that were unforeseeable and unimaginable at the time of their adoption. While methods of constitutional interpretation remain a subject of enduring debate in the United States, there is no question that the Constitution has remained applicable to modern challenges. By contrast, the European Court of Human Rights has firmly stood at the position that for the Convention this has been achieved through its dynamic and evolutive interpretation as a "living instrument" that reflects present-day conditions.[13] This approach is essential to ensuring its effective application, namely that the rights safeguarded by the Convention are not merely "theoretical or illusory" but "practical and effective." [14]

[11] See, for example, *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25.
[12] R. Ryssdal: "*The coming of Age of the ECHR*", 1 (1996) EHRLR 18 at 18.
[13] *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.
[14] See, for example, *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37.

In fact, although it happens rarely, the U.S. Supreme Court and the European Court of Human Rights occasionally refer to each other's case-law.[15]

Coming back to the development of the Convention system, the 1990s and early 2000s saw a major expansion of that system due to the fall of communism and the resultant influx of new democracies for which joining the Convention signaled a departure from the past and dedication to a democratic future. From 1989 to 2010 the number of Contracting Parties to the Convention rose from 22 to 47. Russia became a significant new signatory in 1998.

This "golden era" in the late nineties was marked by great optimism and the belief that each country's accession was accompanied by a sincere commitment to the three core values of the Council of Europe. Post-accession violations of the Convention in new democracies were regarded as nothing more than isolated incidents rather than signs of bad faith, systemic issues, or lack of commitment to the Convention system and its values by the Contracting States.

With hindsight, this appears to have been too optimistic. Today, we are witnessing opposite tendencies, with some questioning not only certain jurisprudence of the Court or specific rights but also the adherence to the Convention system itself.

3. The Rule of Law

Turning now to the rule of law, the term has its roots in the common law legal tradition. In the 1610 Case of Proclamations the Chief Justice of England ruled that 'the King had no prerogative but that which the law of the land allows him'. The case was referred to as recently as 2017 by the UK Supreme Court[16] when it ruled that the government could not by its own prerogative withdraw from the EU, but only Parliament had that legal authority.

The UK Supreme Court observed drily that: "[this] statement may have been controversial at the time." It went on to say that, however – "it had become firmly established by the end of that century". In England and Wales, the Bill of Rights 1688 confirmed that "the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal".[17]

The term rule of law was later popularized in the 19th century by British jurist A. V. Dicey, who viewed it as comprising three principles: that the government must follow the law it makes, that no one is exempt from the operation of the law and that it applies equally to all, and that general rights emerge from particular cases decided by the courts.

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[15] The European Court of Human Rights more often refers to cases from other jurisdictions to provide a comparative perspective, and has made periodic references to the U.S. Supreme Court's case-law with a view to informing its decisions, for example, in *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 87, ECHR 2011; *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 112, ECHR 2009; *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, § 115, 14 December 2017; *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 65, 21 July 2015; *Vona v. Hungary*, no. 35943/10, § 31, ECHR 2013; *Fáber v. Hungary*, no. 40721/08, § 18, 24 July 2012; *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, §§ 59-61, 17 January 2012; *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07 and 4 others, §§ 134-136, 10 April 2012; *Ponomaryovi v. Bulgaria*, no. 5335/05, § 39, ECHR 2011; *McVicar v. the United Kingdom*, no. 46311/99, § 27, ECHR 2002-III; *Fayed v. the United Kingdom*, 21 September 1994, § 61, Series A no. 294-B; and *James and Others v. the United Kingdom*, 21 February 1986, § 40, Series A no. 98. Furthermore, the Court's judgment in *Ismayilov v. Russia*, no. 30352/03, 6 November 2008, was evidently inspired by the U.S. Supreme Court's case-law on excessive fines clause, in particular by its judgment in *United States v. Bajakajian*, 524 U.S. 321 (1998). Judges of the European Court of Human Rights often refer to the case-law of the U.S. Supreme Court in their separate opinions. While the practice of citing foreign judgments in U.S. constitutional interpretation is less common, it should be noted that the U.S. Supreme Court has referenced the case-law of the European Court of Human Rights in, for example, *Atkins v. Virginia* (2002), *Lawrence v. Texas* (2003), *Roper v. Simmons* (2005), *Boumediene v. Bush* (2008), and *Graham v. Florida* (2010).

[16] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review*

[17] Ibid. §44.

The rule of law has been a fundamental value in the American legal and historical order since the founding. In 1776, John Adams wrote in his *Thoughts on Government* that "there is no good government but that which is republic" and that "the very definition of a republic is an empire of laws and not of men." The framers of the American Constitution divided power among three branches of government in order to ensure that no single person was able to gain absolute power and stand above the law.

Article VI of the U.S. Constitution asserts that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof… shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby." Building on this claim of legal supremacy, other provisions of the Constitution specifically prohibit violations of the rule of law. Article I, Section 9 forbids the suspension of the writ of *habeas corpus* except in cases of rebellion or invasion and prohibits bills of attainder and *ex post facto* laws. The Fifth Amendment promises that no person shall "be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment adds that "[n]o State shall deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." The U.S. Constitution thereby forms the basis of a robust framework for the protection of the rule of law in the United States.

In its early jurisprudence, the U.S. Supreme Court affirmed the centrality of the principle of the rule of law, as well as the role of the judiciary in upholding it. In *Marbury v. Madison*, Chief Justice John Marshall stated that "[t]he Government of the United States has been emphatically termed a government of laws, and not of men" and that it is "the province and duty of the Judicial Department to say what the law is."

It later used its authority to uphold the separation of powers and the rule of law by curbing the power of the executive.[18]

The modern concept of the rule of law is similar, but not entirely identical to, the various European concepts such *Rechtsstaat* in German or *État de droit* in French that view law as the ultimate safeguard against the discretionary or arbitrary use of governmental power over individuals. However, they all reject a purely formal understanding of law, which would legitimise any action by a public official as a "lawful" exercise of governmental authority.

Scholars and practitioners have sought to give meaning to the term the rule of law by offering varying definitions, but the concept has remained elusive. A body of the Council of Europe, namely the European Commission for Democracy through Law, known as the Venice Commission, in a report adopted in 2011 concluded that the term was indefinable. Instead, it took an operational approach and focused on identifying the core elements of the rule of law, namely: (i) legality, (ii) legal certainty, (iii) prevention of abuse/misuse of powers, (iv) equality before the law and non-discrimination, and (v) access to justice.

[18] See, for example, *Youngstown Sheet & Tube Co. v. Sawyer* (1952) where the Supreme Court held that President Truman did not have constitutional authority to seize and operate steel mills; *U.S. v. Nixon* (1974) where, in the context of the Watergate affair, it held that the President could not safeguard certain information using his "executive privilege." While a limited executive privilege exists in areas of military or diplomatic affairs, the Supreme Court in this case gave preference to the "fundamental demands of due process of law in the fair administration of justice." Therefore, the President was required to produce the requested tapes and documents. In *Clinton v. Jones* (1997), the Supreme Court held that the serving President is not entitled to absolute immunity from civil litigation arising out of events which transpired prior to his taking office. The decision was made in the context of sexual harassment allegations against President Clinton, which were said to have occurred while he was Governor of Arkansas.

The principle of the rule of law figures prominently also in the Preamble to the Convention, 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.

In its case-law the European Court of Human Rights has held that the rule of law is inherent in all the Articles of the Convention and that the Convention is therefore, essentially, a rule-of-law instrument.[19]

It has also clarified that modern democracy involves subjecting the democratic will to the rule of law, emphasizing that "democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law."[20]

This echoes the words of James Madison who in Federalist 48 stated: "An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."

It is precisely this vision of the relationship between the rule of law and democracy that is being challenged in the process of democratic and rule of law backsliding:[21] Populist governments assert their direct legitimacy and portray the law as subordinate to popular will.

The European Court of Human Rights, like the Venice Commission, does not adhere strictly to any specific definition of the rule of law, but its case law clearly reflects its constituent elements.

For example, Article 6 of the Convention guarantees the right to a fair trial and outlines specific procedural and institutional safeguards. However, it does not explicitly mention the right of access to a court. Yet, in the landmark 1975 case *Golder v. the United Kingdom*[22], the Court, drawing on the principle of the rule of law referenced in the Convention's Preamble and the need to prevent arbitrary power, ruled that access to a court is an inherent aspect of the safeguards enshrined in Article 6. The Court notably stated that "one can scarcely conceive of the rule of law without there being a possibility of having access to the courts".[23]

As regards the rule-of-law element of legality, the Convention requires, regarding most of the rights it guarantees, that measures interfering with those rights must be lawful, meaning that such measures must have a basis in domestic law. However, laws which are directed against specific persons are contrary to the rule of law.[24]

Moreover, the concept of lawfulness under the Convention also entails the rule-of-law element of legal certainty. In particular, the measures interfering with the Convention rights must not only have a basis in domestic law, but the relevant legislation must also satisfy the "quality of law" requirement, meaning that that such legislation must be accessible and foreseeable.[25]

The cases of *Stran Greek Refineries and Stratis Andreadis v. Greece*[26], and *Horsnby v. Greece*[27] concerned another aspect of the rule-of-law element of legal certainty. In *Stran Greek Refineries*,

[19] *Grzęda v. Poland* [GC], no. 43572/18, § 339, 15 March 2022
[20] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, § 412, 9 April 2024.
[21] T. Ginsburg, op.cit., p. 363
[22] *Golder v. the United Kingdom*, 21 February 1975, Series A no. 18
[23] Ibid., § 34.
[24] See, for example, *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 269, 22 December 2020.
[25] See, for example, *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 49, Series A no. 30.
[26] *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, Series A no. 301-B.

which concerned legislative intervention in the ongoing judicial proceedings against the State with a view to securing a favourable outcome, the Court held that the principle of the rule of law (and the notion of fair trial enshrined in Article 6) precluded any such interference by the legislature with the administration of justice.[28] In *Hornsby*, which dealt with the administrative authorities' refusal to comply with domestic administrative court judgments, the Court held that interpreting Article 6 of the Convention without ensuring the enforcement of judicial decisions would be incompatible with the principle of the rule of law.[29] In a number of other cases the Court held that legal certainty was as one of the fundamental aspects of the rule of law and required, among other things, that where the courts have finally determined an issue, their ruling should not be called into question.[30]

More recently, the Court has examined situations of a different nature, where States have used the law as an instrument of abuse of power.

The case of *Navalnyy v. Russia*[31] concerned the rule-of-law element of preventing the abuse of power. The applicant, a political activist and one of Russia's most prominent opposition figures, was arrested, provisionally detained, and convicted of administrative offenses on seven occasions between March 2012 and February 2014 on account of his alleged participation in unauthorised but peaceful public gatherings. Notably, on the fifth occasion, he was penalised when he left a stationary demonstration in a group of people, and on the sixth, he found himself in a group of activists in front of a courthouse because they had been denied entry to the court hearing. The Court found that his right to peaceful assembly, as guaranteed under Article 11 of the Convention, had been violated.

For the first time, however, the Court also found a violation of Article 18 in conjunction with Article 11. Article 18 stipulates that restrictions on human rights permitted under the Convention must not be used for purposes other than those for which they were prescribed. The Court found a violation of this Article because it had established that the restrictions imposed on the applicant during the fifth and sixth incidents pursued an ulterior purpose, namely, to suppress political pluralism, a hallmark of effective political democracy governed by the rule of law.

4. The Role of the European Court of Human Rights in Tackling the Rule of Law Backsliding through Protection of Domestic Judiciary

As I already noted, democracy cannot survive without the rule of law. And the rule of law is in the hands of the courts.

Given this prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, the Court has been particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy. The Court held that judges could uphold the rule of law and give effect to the Convention only if domestic law does not deprive them of the guarantees of independence and impartiality.[32]

In other words, the rule of law cannot exist without independent courts as without them that principle would be nothing more than "an empty vessel."[33].

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[27] *Hornsby v. Greece*, 19 March 1997, *Reports of Judgments and Decisions* 1997-II
[28] *Stran Greek Refineries and Stratis Andreadis*, § 49.
[29] *Hornsby*, § 40.
[30] See, for example, *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII, and *Lenskaya v. Russia*, no. 28730/03, § 30, 29 January 2009.
[31] *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, §§ 163-176, 15 November 2018
[32] *Grzęda v. Poland* [GC], no. 43572/18, § 302, 15 March 2022
[33] 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," *European Law Journal* 2021, pp.1-17.

Unfortunately, independence of the judiciary has come under attack in recent years in some of our member States.

In some countries governments started to question a fundamental principle of the rule of law: the judiciary's supremacy in resolving disputes. These governments have accused the courts of trying to encroach upon the exercise of the legitimate power of the government. They then started interfering with the judiciary by appointing judges conforming to their political and social views and sanctioning those who did not comply.

Those attacks often happen under the guise of judicial reforms. Judicial reform is a normal part of the good functioning of a State. However, no reform should result in undermining the independence of the judiciary and its governing bodies.[34]

Such attempts to undermine the judiciary are a cause for great concern both for people living in countries who can no longer turn to their judiciary to safeguard their rights, and because the effective functioning of the Convention system which rests on the shared responsibility between domestic judges and those in Strasbourg.[35] I will illustrate the Court's response to such attacks with some examples.

In *Baka v. Hungary*[36] the applicant, a former judge of the European Court of Human Rights, was elected President of the Supreme Court of Hungary for a six-year term ending in 2015. In that capacity he expressed his views on various legislative reforms affecting the judiciary. The transitional provisions of the new Hungarian Constitution of 2011 provided that the legal successor to the Supreme Court would be the *Kúria* and that the mandate of the President of the Supreme Court would end following the new Constitution's entry into force on 1 January 2012. According to the new election criteria for the President of the *Kúria*, candidates were required to have at least five years' experience as a judge in Hungary. Time served as a judge in an international court was not counted. This led to the applicant's ineligibility for the post of President of the new *Kúria*.

Since only a legislation of general application is compatible with the principle of the rule of law, the Court questioned whether the legislation at issue, given its individualized (*ad hominem*) nature, complied with that principle. However, it did not base its decision on this legality element of the rule of law but on its access-to-justice element by holding that the premature termination of the applicant's mandate had neither been reviewed, nor open to review, by any bodies exercising judicial powers. Noting the growing importance attached at the international level to procedural fairness in cases involving the removal or dismissal of judges, the Court considered that the respondent State had impaired the very essence of the applicant's right of access to a court.

The Court also found a breach of the applicant's freedom of expression. It held that there was prima facie evidence suggesting that the premature termination of his mandate was prompted by the views and criticisms he had publicly expressed in his professional capacity. The Court emphasized that it was not only his right but also his duty to express his opinion on legislative reforms likely to impact the judiciary and its independence. The premature termination of his mandate undoubtedly had a chilling effect, discouraging not only him but also other judges and court presidents from participating in public debate on issues concerning judicial independence.[37] The Court also gave particular consideration to the principle of the irremovability of judges, which was a key element for maintaining judicial independence.

[34] *Grzęda*, cited above, § 323.
[35] See also *Grzęda*, cited above, § 324.
[36] *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016.
[37] As another example in which the Court used freedom of expression as an instrument to protect the judiciary, see *Żurek v. Poland*.

The Court's approach and commitment to protecting judicial independence and autonomy is best illustrated by what are referred to as the Polish rule of law cases. These cases addressed extensive judicial reforms in Poland since 2015 which resulted in the weakening of judicial independence and adherence to rule-of-law standards. Those reforms, which aimed at exerting the executive's influence over judiciary, started with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, the remodelling of the National Council of the Judiciary (NCJ) – the body responsible for judicial appointments – and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. As a result, the judiciary – an autonomous branch of State power – was exposed to interference by the executive and legislative powers and thus substantially weakened.[38]

In *Grzęda v. Poland*[39] the Court found a breach of the right of access to a court due to the absence of judicial review following the premature termination, after legislative reform, of a judge's mandate as member of the NCJ.

The new legislation provided that judicial members of the NCJ were no longer to be elected by other judges but by the Polish Parliament (*Sejm*), and that the terms of office of the NCJ's judicial members elected pursuant to previous legislation would continue until the election of its new members. Thus, when the *Sejm* elected 15 judges as new members of the NCJ in March 2018, the applicant's term of office was terminated *ex lege* thus excluding access to a court.

The Court clarified that judicial independence had to be understood in an inclusive manner and applied not only to judges' adjudicating roles but also to other official functions they might be called upon to perform that were closely connected with the judicial system, such as membership in judicial councils. It also reiterated the need to protect independence of judicial councils as bulwarks against political influence over the judiciary from executive and legislative influence to ensure the integrity of judicial appointments.

The Court found that the legislation in question was directed at a specific group of fifteen clearly identifiable members of the NCJ, including the applicant, and that its primary purpose was to replace them. Since the said legislation was directed at those persons, and was not therefore of general application, it was incompatible with the rule of law.

The Court further held that the members of the judiciary should enjoy – as do other citizens – protection from arbitrariness on the part of the legislative and executive powers, and only oversight by an independent judicial body of the legality of a measure such as removal from office was able to render such protection effective. Consequently, the lack of judicial review of the legality of the applicant's premature termination of his membership of the NCJ was not justified.

In both cases mentioned, access to justice as the element of the rule of law played a crucial role in safeguarding the judiciary from attacks on its independence arising from measures aimed at removing judges from office.

However, judicial independence needs safeguarding from the moment of appointment. Judicial appointments should not be subject to the unrestricted discretion or undue influence of the executive but must be governed by law. The Court addressed this somewhat indirectly, through another fundamental element of the rule of law: the principle of legality. More specifically, it relied

[38] *Grzęda*, cited above, §§ 346 and 348.
[39] *Grzęda*, cited above.

on one of the institutional safeguards enshrined in Article 6 of the Convention, which guarantees that everyone is entitled to a fair hearing by a tribunal "established by law."

In the case of *Guðmundur Andri Ástráðsson v. Iceland*[40] the Court devised a test to determine when this institutional safeguard would be breached.

The case revolved around the legality of a judge's appointment to Iceland's newly established Court of Appeal. The applicant was convicted of driving without a valid licence and while under the influence of drugs. He complained that the Court of Appeal, which had dismissed his appeal, was not "a tribunal established by law" because one of the judges who heard his case had been appointed through a process that did not comply with domestic law.

Specifically, the Minister of Justice had replaced four of the top fifteen candidates recommended by an Evaluation Committee with four others, including the judge in question, without conducting an independent evaluation or providing adequate reasons. Additionally, the Parliament had approved the Minister's list *en bloc*, rather than voting on each candidate individually as required.

The Court formulated a three-step test to determine whether the alleged irregularity was of such gravity as to undermine the fundamental principles of the rule of law and the separation of powers, and to compromise the independence of the court in question. Specifically, the Court considered that it had to examine (i) whether there was a manifest breach of domestic law, (ii) whether the breach concerned a fundamental rule of the appointment procedure, and (iii) whether the domestic courts effectively reviewed and redressed the alleged breach in a Convention-compliant manner.

Applying those criteria, the Court found that the applicant's case had been heard by a judge whose appointment procedure had been vitiated by grave irregularities, resulting in a breach of the right to a "tribunal established by law".

The Court applied the *Ástráðsson* test in several cases against Poland, finding that the appointment procedures for various chambers of the Polish Supreme Court were unduly influenced by legislative and executive powers, compromising the courts' legitimacy.[41] The same conclusion was reached in a case regarding the appointment of a Constitutional Court judge in Poland.[42]

The case of *Juszczyszyn v. Poland*[43] involved a judge who was suspended from his judicial duties by the Disciplinary Chamber of the Supreme Court. This suspension occurred after he issued a court order to obtain information necessary for assessing the independence of another judge, who had been appointed based on the recommendation of the reconstituted NCJ.

Applying the criteria established in *Guðmundur Andri Ástráðsson*, the Court concluded that the irregularities in the appointment procedures for members of the Disciplinary Chamber were of such gravity that the chamber could not be considered a "tribunal established by law." These irregularities also compromised the court's independence and impartiality. Consequently, the Court found a violation of Article 6 of the Convention on both grounds.

Additionally, the Court found a violation of the applicant's right to respect for his private life under Article 8 of the Convention. It held that the imposition of the disciplinary sanction was unlawful because, under the Polish Constitution, the suspension of a judge required a court judgment. However, since the Disciplinary Chamber was not "established by law," it was not a "court."

[40] *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 243, 244, 246, 248-250, 1 December 2020.
[41] *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, and *Żurek v. Poland*, no. 39650/18, 16 June 2022.
[42] *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021
[43] *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022

Furthermore, the domestic provision that served as the legal basis for the applicant's suspension lacked the qualitative requirement of foreseeability, as he could not have foreseen that issuing his court order would lead to his suspension.

Lastly, the case also concerned the rule-of-law element of preventing the abuse of power. Similar to the *Navalnyy* case, the Court found a separate violation of Article 18 of the Convention. It held that the predominant purpose of the applicant's suspension had been to sanction him and to dissuade him from assessing the status of judges appointed upon the recommendation of the reconstituted NCJ. This ulterior purpose was incompatible with the Convention.

In the *Wałęsa* case[44] from 2023 which concerned the principle of legal certainty as a constituent element of the rule of law, the Court issued a pilot judgment concerning a complaint about the reversal of a final judgment adopted a decade ago in a defamation case in favour of Lech Wałęsa, famous political figure and a Nobel Prize winner, after an extraordinary appeal by the Prosecutor General. The Court viewed this as an abuse of legal procedure driven by political motives.

Its judgment pointed out the risks posed by extraordinary appeals, recalling that legal certainty, as one of the fundamental elements of the rule of law, required that where the courts have finally determined an issue, their ruling should not be called into question. The judgment also highlighted structural and repeated rule-of-law, separation-of-powers, and judicial-independence breaches, and called for significant reforms to restore judicial independence and uphold the rule of law in Poland.

Let me also mention our interim measures regarding the independence of judiciary in Poland.

Under Rule 39 of the Rules of Court, the European Court of Human Rights has the power to issue interim measures. Such measures can be indicated in exceptional circumstances where there is an imminent risk of irreparable harm. They play a vital role in avoiding irreversible situations that would prevent national courts and/or the Court from properly examining Convention complaints.

Cases where the Court indicates interim measures typically involve a genuine threat to life and limb, presenting a real risk of grave harm in breach of the core provisions of the Convention. These include Articles 2 and 3, which guarantee the right to life and protection from torture and other forms of ill-treatment.

Although the situation in the Polish independence-of-judiciary cases was unprecedented for the Court, as the requests did not concern the type of facts which had in the past, typically engaged such measures, it still granted around 24 requests for interim measures. The Court recognized that the disciplinary proceedings, lifting of immunity, and other measures faced by Polish judges posed an immediate risk of irreparable harm to judicial independence.

The recently elected Government of Poland has made very public and weighty commitments to execute the aforementioned judgment in the *Wałęsa* case, and other rule of law judgments adopted by the Court.

However, when a democracy withstands a close brush with executive overreach, the path to recovery is often long and arduous. Dismantling the negative effects of judicial reforms is riddled with numerous obstacles which serve as a warning that breaches of the rule of law are difficult to repair.

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

5. Conclusion

Democracy is not a given: it must be defended, nurtured, and, sometimes, restored. It cannot survive without the rule of law, which lies in the hands of the judiciary.

By upholding the rule of law and ensuring that the foundations of democracy remain intact even in times of political turmoil, strong and independent courts prevent undemocratic tendencies, such as democratic backsliding, from taking root.

When democratic backsliding does occur, the case of Poland serves as a powerful reminder that democracies can bounce back from such setbacks. In such circumstances, the role of courts is to maintain conditions for democratic recovery, by preventing democracies from slipping past the point of no return.

While domestic judiciaries are the first line of defence and the bulwark against democratic backsliding rests heavily upon their shoulders, in Europe they are not alone in this mission. International courts, like the European Court of Human Rights, serve as additional safeguards and can play a crucial role in reinforcing domestic courts' efforts to protect the rule of law. By holding the States accountable to their obligations under the Convention, the European Court of Human Rights has strengthened the independence of domestic judiciaries, thereby preserving the rule of law and democracy in countries under its jurisdiction.

Thank you!