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## THE RULE OF LAW AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE INDEPENDENCE OF THE JUDICIARY

*Ladies and Gentlemen,*

It is my great pleasure to participate today in this round table on *The Rule of Law and the European Court of Human Rights*. I would like to thank Professor Dragan Vukčević, President of the Montenegrin Academy of Sciences and Arts, for organising this interesting and important event and for inviting me to take part. I also salute and thank the presence of my dear colleague Judge Ivana Jelić.

Today's round table will focus on the rule of law and my intervention will concentrate on one crucial element of the rule of law which is the independence of the judiciary. This is a very topical subject.

Indeed, the Court chose two themes linked to judicial independence for two of its recent Judicial Seminars (these are organised in the morning before the Court's annual Opening of the Judicial Year held at the end of January). In 2018 the theme chosen was „*The authority of the Judiciary*” and in 2019 „*Strengthening confidence in the Judiciary*”. For each Seminar the Registry of the Court produced very useful Background Papers which set out the Court's relevant case-law.<sup>1</sup>

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<sup>1</sup> [https://www.echr.coe.int/Documents/Seminar\\_background\\_paper\\_2018\\_ENG.pdf](https://www.echr.coe.int/Documents/Seminar_background_paper_2018_ENG.pdf)

[https://www.echr.coe.int/Documents/Seminar\\_background\\_paper\\_2019\\_ENG.pdf](https://www.echr.coe.int/Documents/Seminar_background_paper_2019_ENG.pdf)

The Council of Europe's Parliamentary Assembly has addressed rule of law issues, including the independence of the judiciary, in its 2017 Resolution on *New threats to the rule of law in Council of Europe Member States*<sup>2</sup>, with a special focus on the rule of law in Bulgaria, the Republic of Moldova, Poland, Romania and Turkey. The Venice Commission has tackled these issues in its opinions on Bulgaria (2016), Poland (two in 2016 and two in 2017), Turkey (two in 2017), Romania (2018 and 2019), Malta (2018) and Serbia (2018).

At this point, I would also like to mention two of the Council of Europe's expert bodies on the judiciary: the Consultative Council of European Judges known as the „CCJE” and the European Commission for the Efficiency of Justice known as the „CEPEJ”. I have recently met with both bodies. Last November I met with the CCJE for a special session to celebrate their 20<sup>th</sup> anniversary.

On that occasion we discussed the Court's case-law on the independence of the judiciary and the relationship between their opinions and our jurisprudence.

I would like to begin today with some introductory words about the rule of law itself as a concept within the case-law of the European Court of Human Rights („the Court”), before turning the independence of the judiciary.

#### WHAT DO WE MEAN BY THE RULE OF LAW?

In the context of a democratic society, this term refers to the pre-eminence of the law over political decisions. The key principles thus include legality, legal certainty, preventing abuse of power, equality before the law and access to justice.

According to Article 3 of the Statute of the Council of Europe (ETS No. 1), every Member State of the Council of Europe must accept the principles of the rule law, human rights and democracy; these three core values are closely interlinked. Rule of law is considered part of the common heritage of European countries together with political traditions and ideals as set out in the Preamble to the European Convention on Human Rights („the Convention”).

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<sup>2</sup> <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en>

The „rule of law” (in French *prééminence du droit* and in German *Rechtsstaat*) is — or at least should be — a pillar of any national legal order or international organisation and appears in major international legal and political texts. According to Article 2 of the Treaty of the European Union, that organisation ‘... 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.’

But interestingly, the term as such has not been defined in any binding legal text.

The recent work of the European Commission for democracy through law (the „Venice Commission”) is highly relevant here. In their Rule of Law Checklist<sup>3</sup> the 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*” (§ 15).

## THE RULE OF LAW AND THE COURT’S CASE-LAW

The concept of the rule of law first appeared in the Court’s case-law in the *Golder v. United Kingdom* (1975). In that case, the Court based its broad interpretation of Article 6 § 1 of the Convention (right to a fair trial), from which it inferred the inherent right of access to the courts, on the reference to the „rule of law/*prééminence du droit*” made in the Preamble of the Convention. According to the Court, it would be a mistake to see the principle of „*prééminence du droit*” as „*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*” (§ 34).

While there is no abstract definition of the rule of law in the Court’s case-law, the Court has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality

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<sup>3</sup> Adopted at its 106th Plenary Session (Venice, 11–12 March 2016).

or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle of control of the executive whenever a public freedom is at stake, the principle of the possibility of a remedy before a court and the right to a fair trial. 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.

Since *Golder v the UK*, the principle of the rule of law has become a guiding principle for the Court, it „inspires the whole Convention” (*Engel v. the Netherlands*, 8 June 1976, § 69) and is „inherent in all the Articles of the Convention” (*Amuur v. France*, 25 June 1996, § 50). It is defined as „one of the fundamental principles of a democratic society” (*Klass v. Germany*, 8 September 1978, § 55). The close relationship between the rule of law and the democratic society has been underlined by the Court through different expressions: „democratic society subscribing to the rule of law” (*Winterwerp v. Netherlands*, 24 October 1979, § 39), „democratic society based on the rule of law” (*Vereiniging Weekblad Bluf! v. Netherlands*, 9 February 1995, § 35), and more systematically „rule of law in a democratic society” (*Malone v. United Kingdom*, 2 August 1984, § 79). Being linked to the notion of „democratic society”, the rule of law is also related to the broader concept of „European public order” (*United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45).

## INDEPENDENCE OF THE JUDICIARY

An efficient, impartial and independent judiciary is the cornerstone of any functioning system of democratic checks and balances. Judges are the means by which powerful interests are restrained. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law.

The Court has adopted important judgments related to the requirement that a tribunal be established by law under Article 6 of the Convention. It has also underlined the growing importance of the separation of powers in the interpretation of the independence requirement, in particular in cases concerning the dismissal of judges.

For the purposes of today’s speech I would like to address you on a recent Grand Chamber judgment of the Strasbourg Court and a very recent judgment of the Court of Justice of the European Union („CJEU”).

The first case I would like to refer to is the case of *Baka v Hungary (2016)*<sup>4</sup>. In that case the applicant, President of the Supreme Court, complained under two Articles of the Convention. I will look firstly at his Article 10 complaint and then deal with Article 6.

Under Article 10 he complained that his mandate as President of the Supreme Court had been terminated as a result of the views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice. He 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, all of which the Court deemed were questions of public interest.

His statements did not go beyond mere criticism from a strictly professional perspective. In the Court's view, having regard to the sequence of events in their entirety there was *prima facie* evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate. The Court concluded that there had been an interference with the exercise of his right to freedom of expression. On the question of the freedom of expression of judges, the Court stated that „*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.*”

According to the Court, it was not only the applicant's right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary, after having gathered and summarised the opinions of lower courts. He also used his power to challenge some of the relevant legislation before the Constitutional Court, and used the possibility to express his opinion directly before Parliament on two occasions, in accordance with parliamentary rules.

Furthermore, the premature termination of the applicant's mandate undoubtedly had a „chilling effect” in that it must have discouraged not

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<sup>4</sup> [GC], no. 20261/12, ECHR 2016.

only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary. The interference complained of was not „necessary in a democratic society”, notwithstanding the margin of appreciation available to the national authorities and accordingly there had been a violation of the applicant’s right to freedom of expression under Article 10.

The Grand Chamber in the *Baka* case also dealt with the inability of the applicant to contest the premature termination of his mandate. The Grand Chamber found a violation of Article 6 § 1. In my concurring opinion in that case, I noted that the Court’s case-law has so far addressed several aspects of the principle of judicial independence: independence vis-à-vis the parties, independence from the executive and legislative powers, and internal judicial independence.

However, all these aspects of judicial independence have been assessed from the perspective of the right of „[e]veryone ... to a fair and public hearing ... by an independent and impartial tribunal previously established by law...” In other words, the letter of Article 6 § 1 of the Convention has led the Court to analyse the issue of judicial independence from the perspective of the rights of persons involved in court proceedings and not from that of judges’ subjective right to have their own independence guaranteed and respected by the State.

Indeed, in my opinion I quote the CCJE’s *Magna Carta of Judges*, adopted in November 2010: „[j]udicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level...”

I also quote other non-binding and binding international texts, as well as the case-law of the Human Rights Committee and the Inter-American Court of Human Rights to support the view of a potential subjective right of judges to independence.

Accordingly, my question is whether Article 6 § 1 of the Convention can be interpreted in such a way as to recognise, in parallel to the right of persons involved in court proceedings to have their cases heard by an impartial court, a subjective right for judges to have their individual independence safeguarded and respected by the State. A positive response to this question would indicate that the judges themselves could rely on Article 6, without necessarily having to prove that an interference with their independence had simultaneously amounted to an unjustified

interference in the exercise of their right to freedom of expression or another right enshrined in the Convention. In other words, such an interpretation would strengthen the protection granted to judicial independence under the Convention.

The second case I would like to refer to is a judgment of the Grand Chamber of the Court of Justice of the European Union („CJEU”) from 19 November last year.<sup>5</sup> The case concerned the independence and impartiality of the new Disciplinary Chamber of the Polish Supreme Court. What is of particular interest in the judgment is that the CJEU set out in detail its case-law on the scope of the requirement that courts must be independent and held, in particular, that, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive. The CJEU relied very heavily in that judgment on the Strasbourg’s settled case-law under Article 6 § 1 on impartiality and independence.

## CONCLUSION

In December 2018, the Court hosted a conference entitled „*The Rule of Law under Assault? International and European Law Answers to the Illiberal Temptation*”. It looked at how the rule of law is under attack as a result of the rise in populism and nationalism in Europe. The resurgence of populist politics is a particularly worrying development in Europe given our recent history. We are all aware of examples of how liberal democracy, constitutionalism, and human rights are under attack in a number of States.

The dismissal, replacement and demotion of judges; the use of disciplinary proceedings against judges and prosecutors for political reasons; the use of threats reported by the media these are all dangerous attacks on the rule of law.

Accordingly, judicial systems that are best able to withstand populist attacks are those which exhibit high levels of independence and impartiality — at both the systemic and individual levels — and which command solid public trust. When the rule of law and the independence of judges are undermined, human rights suffer. Thank you.

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<sup>5</sup> Judgment in Joined Cases C-585/18, C-624/18 and C-625/18  
A. K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy

