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The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary

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Abstract

The rule of law is a constitutional principle under the European Convention on Human Rights. Throughout its history, the rule of law has been the lodestar guiding the development of the case-law of the European Court of Human Rights. In recent years, the normative impact of this principle has been increasing in the case-law of the Court, in particular in cases dealing with the independence of the judiciary. The article discusses the conceptual core of the rule of law under the Convention system as a fundamental component of "European public order". Subsequently, the three-dimensional normative status of the rule of law is explored as well as the Court's statement that the principle is "inherent in all the Articles of the Convention". On this basis, an in-depth analysis is undertaken of the application in recent Strasbourg case-law of the independence of the judiciary as a fundamental organic component of the rule of law. Finally, the author reflects on the "symbiotic" relationship in the field of judicial independence between the Strasbourg Court and the Court of Justice of the European Union.

Lodestar: a star that is used to guide the course of a ship, especially the pole star; a person or thing that serves as an inspiration or guide.

1 | INTRODUCTION

The rule of law[1] is a constitutional principle in the system of human rights protection within the legal space of the Council of Europe. Throughout the history of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), the rule of law has been the *lodestar* guiding the development of the

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[1] This article will not explore the wider historical origins of the rule of law (l'État de droit (prééminence de droit), Rechtsstaat); for a comprehensive discussion, see B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), chs 1–4. Although the focus of this article is thus the principle of the rule of law under the Convention, it is important to immediately make clear that its interdependence with the other fundamental principles of *democracy* and the protection of *human rights* is of course of great significance for the Convention system, as transpires from its Preamble and the case-law of the Strasbourg Court; see, for example, in the context of Article 3 of Protocol No. 1, most recently *Selahattin Demirtaş v. Turkey (No. 2)* [GC] (no. 14305/17), 22 December 2020, para. 382: 'The Court reiterates that democracy constitutes a fundamental element of the "European public order", and the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law'. See, also, *Mugemangango v. Belgium* [GC] (no. 310/15), 10 July 2020, para. 67.

case-law of the European Court of Human Rights ("the Court", "the Strasbourg Court"). In recent years the normative impact of the rule of law has been increasing in the case-law of the Court, in particular in cases dealing with the independence and impartiality of the judiciary. However, judicial independence is only one of the prominent manifestations of a broader development towards a more robust enforcement of the rule of law which is now permeating the Court's jurisprudence. It is, and will continue to be, an important function of the Strasbourg Court to give concrete and effective expression to the principle of the rule of law under the Convention.

I will begin by reflecting on certain conceptual elements which lie at the core of the rule of law within the Convention system drawing from its origins in the Preamble to the Universal Declaration of Human Rights of 1948. The nexus between the rule of law and the notion of a "European public order", identified by the Court, will also be explored. Subsequently, the normative status of the rule of law within the Convention system will be analysed by focusing on one of the Court's statements of principle which is that the rule of law is "inherent in all the Articles of the Convention".[2] Finally, an in-depth analysis will be undertaken of the application in recent Strasbourg case-law of the rule of law as a fundamental element of judicial independence. This final section will include some observations on the "symbiotic relationship" between the current status of Convention law and the important case-law of the Court of Justice of the European Union ("the CJEU", "the Luxembourg Court").

2 | THE CONCEPTUAL CORE OF THE RULE OF LAW: A "FUNDAMENTAL COMPONENT OF EUROPEAN PUBLIC ORDER"

The principle of the rule of law seems simple at first glance, but, when one attempts to explore its conceptual scope and content, things become quite complex.[3] Indeed, much academic ink has been spilled on attempting to explain its constituent elements and jurisprudential nature.[4] However, in the landmark judgment in *Golder v. the United Kingdom* of 1975, the Strasbourg Court made clear that the rule of law under the Convention is "one of the features of the common spiritual heritage of the member States of the Council of Europe".[5] It is from the rule of law "which the whole Convention draws inspiration."[6] It is a principle "underlying the Convention" along with the "avoidance of arbitrary power".[7]

Nowhere in the provisions of the Convention or its protocols is the principle of the *rule of law* stated. However, it is expressly enshrined in the text of its Preamble, as follows:

> Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the *rule of law*,[8] to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration …

The Preamble to the Convention thus explicitly refers at the outset to the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations on 10 December 1948.[9] It is safe to assume that the

[2] See Section 3 below and the references therein.

[3] Some have argued that the "rule of law should not be the touchstone for all elements in the juristic landscape"; see W. Lucy, 'Access to Justice and the Rule of Law', (2020) 40(2) *Oxford Journal of Legal Studies*, 377, at 402.

[4] The seminal pieces are: L. Fuller, *The Morality of Law* (Yale University Press, 1964); J. Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law: Essays On Law and Morality* (Clarendon Press, 1979), 210; and also by Raz, 'The Law's Own Virtue', (2019) 39(1) *Oxford Journal of Legal Studies*, 1. See, also, Lord Bingham, *The Rule of Law* (Allen Lane, 2010). Within the Convention system, see G. Lautenbach, *The Concept of the Rule of Law and The European Court of Human Rights* (Oxford University Press, 2013).

[5] *Golder v. the United Kingdom* [PL] (no. 4451/70), 21 February 1975, Series A 18, para. 3.

[6] *Rozkhov v. Russia (no. 2)* (no. 38898/04), 31 January 2017, para. 76.

[7] *Ramda v. France* (no. 78477/11), 19 December 2017, para. 60.

[8] Emphasis added.

[9] *General Assembly Resolution 217 A*, 10 December 1,048. The first two recitals of the Preamble state as follows: "Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared …'.

drafters of the Convention were inspired by the way the Preamble to the Universal Declaration itself refers to the rule of law:

> Whereas 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*.[10] …

It is important to appreciate the direct correlation between the pronouncements in the Universal Declaration that human rights should be protected by the rule of law and the latter's purpose to prevent man having to rebel against tyrannical or oppressive governance. This is the same conception of the rule of law as that inherent in the Convention system.[11] Governing in accordance with the rule of law is a fundamental premise for any authoritative structure in a Member State of the Council of Europe for it to be capable of living up to its obligations under the Convention. A Government which disregards the rule of law cannot justifiably expect sustained allegiance and trust from the polity. As flows directly from the United Nations' Universal Declaration of Human Rights, tyranny is the antithesis of the rule of law; oppression of its peoples is the external manifestation of a society where the rule of law has been abandoned by those in power.

But what does the *rule of law* really mean? Why is it so important for the protection of human rights? Moreover, why is it fundamental to the progressive development of a democratic society and, even further, why is the rule of law the cornerstone, indeed the bedrock, of stable and peaceful communal life?

These are difficult questions. I would however submit that the foundational moral idea behind the rule of law, which lies at the core of Convention protections, is the respect for personal autonomy and the exclusion of the arbitrary use of governmental power.[12] For a person to be realistically able to retain and nurture independence of thought, to be able to manage his or her life as he or she wishes, to be able to strive for happiness, success and inner peace, all fundamental elements of human existence, it must conceptually be of paramount importance that the society in which that person lives is in reality, and not only fictitiously, governed by law. The law must be transparent, stable, foreseeable and allow for mechanisms of dispute resolution that are independent and impartial. Moreover, law must not only apply to the people, but also, and even more crucially, to those that hold the reins of power at any given moment. No man, not an emperor, not a king, no Prime Minister, no President, no one is above the law.

As clarified by the Court, the rule of law under the Convention, by requiring that governmental power be regulated by law and not the whims and caprice of men,[13] demands that laws are clear and not excessively vague and open to abuse,[14] and that laws, in particular criminal laws, are not applied retroactively,[15] so as to negate the autonomous choices made by members of society based on existing rules. The law must be relatively stable and secure legal certainty.[16] The rule of law does not allow for unfettered powers to be granted to the organs of

[10] Emphasis added.

[11] I note the view espoused by Raz, 'The Laws Own Virtue', above, n. 4, at 10, that it is incorrect that the UN Declaration's reference to the rule of law should be construed to mean that "the doctrine of the rule of law includes conformity to human rights". Raz claims that in fact "it is clear authority to the contrary: the rule of law is separate from human rights, but should be used to protect them". I will discuss the normative status of the rule of law within the Convention system in Section 3 below and reflect on the debate between those, like Raz, who argue in favour of a so-called *thin* understanding of the principle, also termed the *no-rights thesis* (see, E. Fox-Decent, 'Is the Rule of Law Really Indifferent to Human Rights', (2008) 27 *Law and Philosophy*, 533, at 533) and those, like Lord Bingham, above, n. 4, who support a *thicker* version of the rule of law; see, also, P. Lemmens, *The Protection of Human Rights: A Noble Task for Courts* (Intersentia, 2020), at 27.

[12] When referring to *personal autonomy* in this context, it is important to make clear that it does not mean that the Convention views the individual and his rights in isolation from his or her wider community. As I have observed elsewhere, Convention rights, in particular those that allow for justified qualifications, are "not mere expressions of the rights and responsibilities of individuals as islands unto themselves, but, importantly, of their status and responsibilities within a *democratic and communal (social entity)*"; see R. Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law', (2018) 18 *Human Rights Law Review*, 473, at 483.

[13] *Sinkova v. Ukraine* (no. 39496/11), 27 February 2018, para. 68; *Baydar v. the Netherlands* (no. 55385/14), 24 April 2018, para. 39.

[14] *Işikirik v. Turkey* (no. 41226/09), 14 November 2017, paras. 57–58.

[15] *Del Rio Prada v. Spain* [GC] (no. 42750/09), 21 October 2013, paras. 78 and 80. See, also, Advisory Opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law (P16–2019-001), 29 May 2020, paras. 75–92.

[16] *Panorama Ltd. and Milicić v. Bosnia and Herzegovina* (nos. 69,997/10 and 74,793/11), 25 July 2017, para. 62. In *Selahattin Demirtaş v. Turkey (No. 2)* [GC], above, n. 1, the Court also reconfirmed its previous view that "laws which are directed against specific persons are contrary to the rule of law", see para. 269.

government.[17] Laws must be interpreted and applied by independent and impartial courts,[18] and once courts have rendered final and binding judgments, they should not be called into question, a rule of law component which also flows from the principle of legal certainty.[19] This of course also applies to judgments rendered by the Strasbourg Court itself. Member States have, by conscious sovereign choice, undertaken to abide by the judgments of the Court pursuant to Article 46 § 1 of the Convention, the execution of final judgments being also one of the primordial manifestations of the rule of law. The Court has thus underlined "the binding force of its judgments under Article 46 § 1 and the importance of their effective execution, in good faith and in a manner compatible with the 'conclusions and spirit' of those judgments".[20]

These conceptual elements of the rule of law explain why this fundamental principle is anathema to authoritarian States or the realms of dictators. It is because such States are not in reality governed by pre-existing and generally applicable laws but merely by the will of the powerful. Raw and unfettered power, unconstrained by binding rules, is by definition arbitrary and prone to abuse, thus incompatible with proportionality and reasonableness. The unchecked will of those in power, when detached from the principle of the rule of law, is in reality nothing more than the preservation of self-interest and vested power structures.[21]

Due to developments in the European political landscape, it is important, moreover, to underline that the rule of law is not a legal principle which is limited to Western liberal democracies. Quite the contrary, it is a norm and a foundational ideal that transcends borders, traditions and cultures. The rule of law constitutes a core feature of any truly democratic system of communal human life regulated by legally binding norms.[22] The rule of law "[unites] cultures that otherwise differ, thereby providing a crucial framework for mutual toleration, individually and socially, and enabling world-wide cultural and economic exchanges".[23] Recall in this regard that the United Nations' Universal Declaration of Human Rights, with its direct reference to the rule of law in its Preamble, which lies at the origins of the Convention, is itself a global instrument guiding all 192 Member States of the United Nations.[24]

Finally, as the Strasbourg Court has made clear, the "Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member, refers in two places to the rule of law: first in the Preamble, where the signatory governments affirm their devotion to this principle, and secondly in Article 3, which provides that 'every Member of the Council of Europe must accept the principle of the rule of law.'"[25] Herein lies the core idea behind the Strasbourg Court's reference to the rule of law as being one of the "fundamental components" of European public order.[26]

In this sense, the Court has identified the core of the fundamental system of values,[27] which forms the bedrock of the Convention and to which the Court is duty bound, under Articles 19 and 32 of the Convention, to give life

[17] *Roman Zakharov v. Russia* [GC] (no. 47143/06), 4 December 2015, para. 230; *Beghal v. the United Kingdom* (no. 4755/16), 28 February 2019, para. 88.
[18] See Section 4 below.
[19] *Panorama Ltd. and Milićić*, above, n. 16, para. 62; *Ireland v. the United Kingdom* (revision) (no. 5310/71), 20 March 2018, para. 122.
[20] Proceedings under Article 46, para. 4 in the case of *Ilgar Mammadov v. Azerbaijan* [GC] (no. 15172/13), 29 May 2019, para. 149.
[21] M. Krygier, 'The Rule of Law: Pasts, Presents, and a Possible Future', paper for seminar co-sponsored by the Center for Study of Law and Society and the Kadish Center for Morality, Law and Public Affairs, University of California, Berkeley, March 2016, at 6: "A common thought has been that left to their own devices wielders of power cannot be relied on to avoid exercising it arbitrarily, and will constantly face the temptation and in many circumstances the incentive to act in their own, rather than the public interest (however that is defined)."
[22] Important instruments of the United Nations and the Council of Europe have attempted to formulate in rather precise terms the scope and content of the principle of the rule of law; see, in particular, *Resolution A/67/L/1*, adopted by the UN General Assembly on 24 September 2012 (Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels), and the Venice Commission of the Council of Europe's *Rule of Law Checklist*, adopted at its 106th Plenary Session (11–12 March 2016); see also P. Koskelo, 'The State of the European Union—Entrapment for those Committed to its Core Values?', (2020) *Thyssen Lectures 2017–2021*, at 21.
[23] Raz, 'The Laws Own Virtue', above, n. 4, at 2–3: "Importantly, these conditions of individual and social prosperity are universal: different societies have different cuisines, different social relations and manners, different economic structures, different religions or non, etc. But all require stability and predictability, and above all they must be intelligible to those subject to them, for people to feel at home within the framework of the law, and to have confidence and self-reliance to plan their life. … Hence the universality of the [rule of law]."
[24] When it was initially adopted in 1948, forty-eight countries voted in favour of the Declaration, eight countries abstained and two countries did not vote.
[25] *Aliyev v. Azerbaijan* (nos. 68,762/14 and 71,200/14), 20 September 2018, para. 225.
[26] At the Grand Chamber level, see *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC] (no. 5809/08), 21 June 2016, para. 145: "One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle." See, more recently, the Chamber judgment in *Aliyev v. Azerbaijan*, above, n. 25, para. 225. It should be noted that the Court has also held that "democracy constitutes a fundamental element of the 'European public order'"; see *Selahattin Demirtaş v. Turkey (No. 2)* [GC], above, n. 1, para. 382.

whilst interpreting and applying the rights and freedoms therein. As the Court has emphasised "[even] in the framework of a state of emergency, the fundamental principle of the rule of law must prevail".[28] Therefore, having by sovereign choice decided to become an integral part of a "European public order", embedded within the Convention system, the Member States of the Council of Europe cannot legitimately attempt to redefine the concept of the rule of law or the fundamental components of the system of rights and values enshrined in the Convention.

3 | THE NORMATIVE STATUS OF THE RULE OF LAW: A THREE-DIMENSIONAL PRINCIPLE "INHERENT IN ALL THE ARTICLES OF THE CONVENTION"

The Strasbourg Court has consistently held that the principle of the rule of law is "inherent in all the Articles of the Convention".[29] It is important to analyse the nature and scope of this doctrinal starting point in examining the normative status of the principle under the Convention.

First, when the Court states that the principle is "inherent" in all the Articles of the Convention, it expressly recalls that the effectiveness, the utility, the very foundations of the Convention system are premised on respect for the rule of law. The rule of law is embedded in the fabric of the system, the principle explicitly mentioned in the Preamble to the Convention as discussed in Section 2 above. It comprises a set of legal rules and standards under the Convention that provide for a framework of laws that pay due respect for the rational autonomy of human beings and precludes the arbitrary use of governmental power.

Further, the Court's finding that the rule of law is "inherent" in all the Articles of the Convention means that the principle provides for a methodological point of departure in the examination of any arguable Convention complaint whilst at the same time creating a frame of reference when the Court interprets and applies the rights and freedoms provided for by the Convention.[30] Therefore, in the Court's analysis of possible interpretative options, it will invariably seek to uncover the best *rule of law conforming understanding* of the Convention provision in question and, if necessary, adopt a solution in any required exercise of balancing between the individual right implicated and the public interest at stake that best preserves the core ideal animating the rule of law as a fundamental component of European public order.

This brings me to my second point: the three-dimensional normative force of the rule of law under the Convention. In some situations, it manifests itself primarily as a legal principle, which I will term here its *organic dimension*, whereby the rule of law sustains, as an overarching principle, the harmonious and interdependent relationship between the individual elements of the Convention system as a whole, as will be further explained below. In other situations, the rule of law comprises a rule with quite fixed content encompassing a particular functional element of the rule of law, which will thus be termed its *functional* dimension. Finally, the rule of law can appear in its *hybrid* dimension by simultaneously displaying its normative force as a legal principle and as a rule with fixed content. This applies in particular to the independence of the judiciary under Article 6 § 1 of the Convention.[31]

[28] *Pişkin v. Turkey* (no. 33399/18), 15 December 2020 (not final), para. 153. As I have observed elsewhere, "[a] state of emergency is not an open invitation to States Parties to erode the foundations of a democratic society based on the rule of law and the protection of human rights", see Spano, above, n. 12, at 493. See, also, E.J. Criddle and E. Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law', (2012) 34(1) *Human Rights Quarterly*, 39. For a very insightful discussion in the US context of whether "constitutional constraints on government action [should] be suspended in times of emergency (because emergencies are 'extraconstitutional'), or [whether] constitutional doctrines forged in calmer times adequately accommodate exigent circumstances", see L.F. Wiley and S.I. Vladeck, 'Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review', (2020) 133 *Harvard Law Review*, 179, at 180.

[29] At the Grand Chamber level, see *Lekić v. Slovenia* [GC] (no. 36480/07), 11 December 2018, para. 94, and most recently *Selahattin Demirtaş v. Turkey (No. 2)* [GC], above, n. 1, para. 249: "the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in its Articles."

[30] ECtHR Judge and President of Section, Siofra O'Leary, has argued that "[ever] since [*Golder v. the United Kingdom*, the court has] used the rule of law as an interpretative tool for the development of substantive guarantees set forth in the Convention"; see 'Europe and the Rule of Law', in M. Bobek and J. Prass (eds.), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020), 37–68, at 60.

[31] See Section 4 below.

As a legal principle in its organic dimension, the rule of law operates as an "optimization requirement"[32] preventing Member States from restricting rights and freedoms under the Convention arbitrarily or in a manner which negates the very essence of the right in question. The rule of law, when respected, secures in this manner the rational and reasonable use of governmental power,[33] which adequately balances conflicting values inherent in the tension between individual rights and the public interest. It does this both in a substantive and procedural sense. The rule of law thus imposes strict substantive requirements as to the content, quality and temporal application of the domestic legal basis relied upon to restrict Convention rights. Procedurally, the rule of law requires that the final determination of the content of the law, when disputes arise, be made not by those in power but by independent and impartial judges. In sum, the rule of law as a legal principle constitutes an organic framework of values which together comprise the fundamental component of "European public order" created by the Convention, as also elaborated in Section 2 above.

When analysing the normative status of the rule of law under the Convention, it is lastly of interest to reflect on whether the principle, as applied by the Court,[34] should be considered a formal concept[35] (the *thin version* of the rule of law), or whether it is, as a matter of substance, inherently encompassing human rights protections (the *thick version* of the rule of law).

To begin with, it is interesting to observe the ways in which the Strasbourg Court has referred to the rule of law in its judgments. The Court has, for example, held within the context of Article 3 of Protocol No. 1, on free elections, that the rule of law is one of the "foundations of an effective and meaningful democracy."[36] Under Article 9 of the Convention, the right to manifest one's religion, the Court has referred to the "principle of secularism" as being in "harmony with the rule of law and respect for human rights and democracy".[37] Furthermore, it has identified a direct connection between the rule of law, democracy and freedom of expression under Article 10 stating that "in a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression".[38] Moreover, the Court has made clear that "retaliatory prosecutions and misuse of criminal law" are acts which constitute a "defiance of the rule of law".[39]

These non-exhaustive judicial pronouncements of the Strasbourg Court suggest that the rule of law under the Convention system is not understood as a purely formal concept limited in its scope to the *thin or no-rights* based versions advocated by some scholars, in particular Joseph Raz.[40] Rather, the Convention-based principle of the rule of law seems to find more direct resonance in the theoretical account presented eloquently by the late Lord Bingham, encompassing a more substantive view, including a positive obligation for the law to "afford adequate

[32] I draw here on Professor Robert Alexy's theoretical analysis of the distinction between principles and rules in his seminal work, *A Theory of Constitutional Rights* (Oxford University Press, 2010), 47.

[33] R. Spano, 'The Democratic Virtues of Human Rights Law—Response to Lord Sumption's Reith Lectures' (2020) 2 *European Human Rights Law Review*, 132, at 138. See also R. Deinhammer, 'The Rule of Law: Its Virtues and Limits', 74(1) *Obnovljeni život*, 33, at 37: "In aiming to reduce arbitrariness and despotism, the rule of law can be seen as a principle that ensures a minimum of rationality and reasonableness within the political process".

[34] Within the context of the Council of Europe, it is important to highlight the significance in this regard of the work of the Venice Commission, which has clearly based its work on the rule of law on the "thick version" of the concept; see, in particular, CDL-AD(2011)003rev-e Report on the rule of law, adopted at its 86th Plenary session (25–26 March 2011) and its *Rule of Law Checklist*, adopted at its 106th Plenary Session (11–12 March 2016).

[35] Some have called the *thin version* of the rule of law a "no-rights based concept", see Fox-Decent, above, n. 11, at 533. See, also, R.P. Peerenboom, 'Human Rights and Rule of Law: What's the Relationship?', (2005) *UCLA Public Law & Legal Theory Series*, 18. Similarly, Ronald Dworkin famously distinguished between the "rule-book" conception of the rule of law and the "rights" conception; see his, *A Matter of Principle* (Harvard University Press, 1985), at 11.

[36] *Uspakich v. Lithuania* (no. 14737/08), 20 December 2016, para. 87.

[37] *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC] (no. 41340/98), ECHR 2003, para. 93.

[38] *Döner and Others v. Turkey* (no. 29994/02), 7 March 2017, para. 107. See also, *Magyar Kétfarkú Kutya Párt v. Hungary* [GC] (no. 201/17), 20 January 2020, para. 101: "In the Court's opinion, this kind of supervision naturally extends to the assessment of whether the legal basis relied on by the authorities in restricting the freedom of expression of a political party was foreseeable in its effects to an extent ruling out any arbitrariness in its application. A rigorous supervision here not only serves to protect democratic political parties from arbitrary interferences by the authorities, but also protects democracy itself, since any restriction on freedom of expression in this context without sufficiently foreseeable regulations can harm open political debate, the legitimacy of the voting process and its results and, ultimately, the confidence of citizens in the integrity of democratic institutions and their commitment to the rule of law."

[39] *Aliyev v. Azerbaijan*, above, n. 25, para. 223.

[40] Raz, 'The Laws Own Virtue', above, n. 4.

protection of fundamental human rights" and that the rule of law "requires compliance by the state with its obligations in international as well as national laws".[41]

4 | THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY

4.1 | The concept of judicial independence and the separation of powers

As discussed in Section 3 above, the normative force of the rule of law under the Convention is three-dimensional. It operates as a *legal principle* in some situations (the *organic* dimension) whereas in others as a constellation of *rules with fixed content* (the *functional* dimension). When it comes to the latter, one can readily deduce from the Convention that certain provisions include rights which, in themselves, are clear manifestations of the rule of law as a norm with fixed content, such as Article 5 § 1 on the requirement of a legal basis for depriving a person of their liberty and Article 7 encompassing the principle of *nullum crimen, nulla poena sine lege*.[42] Still in other situations, the rule of law operates in its *hybrid* dimension, at the same time having normative force as a legal principle and a rule with quite fixed content. The most prominent example of this dimension, and the focus in what follows, is the most important structural principle of the rule of law under the Convention, the *independence of the judiciary*.

Before proceeding with discussing various strands of Strasbourg case-law on judicial independence, it is necessary to say a few words about the concept itself[43] as it finds its expression in two different albeit related elements, independence of judges *de jure*, on the one hand, and their *de facto* independence, on the other.[44]

I begin by recalling the principled starting point which the Strasbourg Court has made clear in Grand Chamber judgments which is that "the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law". The same applies to the "importance of safeguarding the

[41] Lord Bingham, above, n. 4. My counterpart, Koen Lenaerts, President of the CJEU, has in the same vein emphasised "that fundamental rights, democracy and the rule or law are interdependent, as one cannot exist without the other", see 'The Two Dimensions of Judicial Independence in the EU Legal Order', (2020) *Fair Trial: Regional and International Perspectives, Liber Amicorum Linos-Alexandre Sicilianos*, 333, at 348.

[42] The *principle of legality*, as articulated in Articles 5 § 1 and 7 of the Convention encompasses, as such, a primordial rule of law-Convention right. Differently from the requirement that a restriction on Convention rights shall be "prescribed by law" (see, in particular Articles 8–11), in which the rule of law operates primarily *as a legal principle*, the *rights themselves* under Articles 5 § 1 and 7 of the Convention require the existence of a sufficiently accessible and foreseeable legal basis to deprive a person of his or her liberty and for a criminal conviction, respectively. They therefore constitute examples of rule of law norms with fixed content. It is therefore no coincidence that the Court has not accepted that the same kind of deference is due to the national legislator and the domestic judge, applying national laws, in cases in which the principle of legality is implicated under these provisions, akin to the less stringent review of legality applied under Articles 8–11 of the Convention. See, in the Article 7 context, *Kononov v. Latvia* [GC] (no. 36376/04), 17 May 2010, para. 198: "the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant's conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts (a conviction for war crimes pursuant to section 68–3 of the former Criminal Code) was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of purpose."

[43] In the case-law of the CJEU (see, for example, Case C-506-04, *Wilson*, EU:C:2006:587, paras. 49–52), the concept of judicial independence has been divided into two aspects: the *external* and the *internal*, the external implying that "judges must be protected against external intervention or pressure that could jeopardise their independent judgment in proceedings before them, while the second *internal aspect* is linked to impartiality and seeks to ensure a level playing field for the parties to proceedings and their respective interests with regard to the subject matter of those proceedings"; see M. Vilaras, 'The Rule of Law Milestone: Upholding Judicial Independence in the Member States under Union Law', (2020) *Fair Trial: Regional and International Perspectives, Liber Amicorum Linos-Alexandre Sicilianos*, 709, at 710.

[44] My colleague on the Court, Judge Pauliine Koskelo, has emphasised, correctly in my view, that the "independence of office alone provides no guarantees unless it is associated with an independence of mind. Judges must not only be institutionally but also intellectually independent and impartial." See Koskelo, above, n. 22, at 24. It is noteworthy that the Strasbourg Court stated similarly in the Grand Chamber judgment in *Guðmundur Andri Ástráðsson v. Iceland* [GC] (no. 26374/18), 1 December 2020, that "it is inherent in the very notion of a 'tribunal' that it be composed of judges selected on the basis of merit—that is judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required in a State governed by the rule of law", see para. 220.

independence of the judiciary".[45] Thus, the Court has discerned "a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and separation of powers".[46] The "need to maintain public confidence in the judiciary and to safeguard its independence *vis-à-vis* the other powers underlies each of those requirements".[47]

On this basis, I have emphasised in recent extrajudicial speeches that the principle of the rule of law is "an empty vessel without independent courts embedded within a democratic structure which protects and preserves fundamental rights. Without independent judges, the Convention system cannot function".[48] The Court has and will continue to be ever mindful of the crucial importance of securing the independence of the *community of European judges*, which constitutes the bulwark of the Convention system.

Judicial independence has both *de jure* and *de facto* components. As to *de jure* independence, the Court has held in a series of important Grand Chamber judgments that the law itself must provide for clear and foreseeable guarantees in respect of judicial activities and the status of judges, in particular in relation to appointment, security of tenure and dismissals, promotions, irremovability, judicial immunity and discipline.[49]

In this regard, the Court's case-law on the dismissal of judges is particularly important, especially as laid out in the Chamber judgment in *Oleksandr Volkov v. Ukraine*[50] and the Grand Chamber judgments in *Baka v. Hungary* and *Denisov v. Ukraine*.[51] Together, these judgments stand for the proposition that the dismissal of judges, whether viewed from the perspective of Articles 6, 8 or 10 of the Convention, will be subject to strict scrutiny by the Court on the basis of the principle of the irremovability of judges. First, the Court has examined the influence of organs, like judicial councils, in dismissal and disciplinary proceedings.[52] In such situations a judge will in principle have access to court under Article 6 of the Convention.[53] Second, the dismissal of a judge may constitute an interference with his right to private life under Article 8 of the Convention.[54] Furthermore, the Court has held that when a judge is dismissed due to expressive activity that is related to his professional functions, Article 10 will be applicable, requiring compelling reasons demonstrating a pressing social need for his dismissal, taking account of the principle of the

[45] *Baka v. Hungary* [GC] (no. 20261/12), 23 June 2016, para. 165. See, further, Section 4.3 below. It should be noted that in *Guðmundur Andri Ástráðsson v. Iceland* [GC], above, n. 44, para. 215, the Court noted that "neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction … In the Court's opinion, a certain interaction between the three branches of government is not only inevitable, but also necessary, to the extent that the respective powers do not unduly encroach upon one another's functions and competences."

[46] See A. Tsampi, 'Separation of Powers and the Right to a Fair Trial under Article 6 ECHR: Empowering the Independence of the Judiciary in the Subsidiarity Epoch', (2020) *Fair Trial: Regional and International Perspectives, Liber Amicorum Linos-Alexandre Sicilianos*, 693.

[47] *Guðmundur Andri Ástráðsson v. Iceland* [GC], above, n. 44, para. 233. On public confidence in the judiciary, see M.N. Pikramenos, 'Public Confidence and the Judiciary in a Democratic Society', (2020) *Fair Trial: Regional and International Perspectives, Liber Amicorum Linos-Alexandre Sicilianos*, 417.

[48] R. Spano, *Conference of the Ministers of Justice of the Council of Europe: "Independence of Justice and the Rule of Law"*, Strasbourg, 9 November 2020, and also *Human Rights Lecture at the Justice Academy of Turkey – "Judicial Independence – The Cornerstone of the Rule of Law"*, Ankara, 3 September 2020.

[49] *Baka v. Hungary* [GC], above, n. 45; *Ramos Nunes de Carvalho E SÁ v. Portugal* [GC] (no. 55391/13), 6 November 2018; *Denisov v. Ukraine* [GC] (no. 76639/11), 25 September 2018, and, most recently, *Guðmundur Andri Ástráðsson v. Iceland* [GC], above, n. 44.

[50] *Oleksandr Volkov v. Ukraine* (no. 21722/11), 9 January 2013.

[51] *Baka v. Hungary* [GC], above, n. 45; *Denisov v. Ukraine* [GC], above, n. 49.

[52] *Ramos Nunes de Carvalho E SÁ v. Portugal* [GC], above, n. 49. See also *Selahattin Demirtaş v. Turkey (No. 2)* [GC], above, n. 1, in which the Court, within the context of Article 18 of the Convention (see para. 434), relied on the Venice Commission's findings considering that the "composition of the Supreme Council [of Judges and Prosecutors in Turkey] would seriously endanger the independence of the judiciary because it was the main self-governing body of the judiciary, overseeing appointments, promotions, transfers, disciplinary measures and the dismissal of judges and public prosecutors. It added that '[g]etting control over the [Supreme Council] thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges is frequent and where transfers of judges are a common practice'".

[53] *Baka v. Hungary* [GC], above, n. 45, paras. 107–119, *Denisov v. Ukraine* [GC], above, n. 49, paras. 44–57. It should be noted that in *Baka*, former President Linos-Alexandre Sicilianos opined in a widely discussed concurring opinion that there are strong arguments in favour of interpreting Article 6 § 1 of the Convention as recognising, in parallel to the right of persons involved in court proceedings to have their cases heard by an independent and impartial court, a "subjective right for judges to have their individual independence safeguarded and respected by the State". The Strasbourg Court has not, as yet, embraced this approach and I therefore take no position on the issue. I would simply note that such a development would be in line with the current trajectory of the case-law in this field and the robust enforcement of the rule of law which now permeates the jurisprudence of the Court. It should in this regard be noted that EU law also "protects national judges in their institutional capacity as members of the courts of general jurisdiction for the application and enforcement of that law". President Koen Lenaerts has explained that, differently from the view presented by former President Sicilianos, which he considers to be based on a "fundamental rights discourse", the approach of the CJEU relies rather on a "rule of law discourse"; see Lenaerts, above, n. 41, at 334–335.

[54] *Denisov v. Ukraine* [GC], above, n. 49, paras. 92–117.

separation of powers and the independence of the judiciary.[55] In sum, the case-law of the Strasbourg Court in relation to the dismissal of judges, as well as the imposition of disciplinary measures, is a core manifestation of the deployment of the principle of the rule of law as encompassing a requirement of judicial independence *de jure*.

But this formal *de jure* independence, that is the framework on judicial status and activity set out in legislation, does not alone guarantee nor secure judicial independence adequately. What is also needed, and perhaps even more crucially, is *de facto* independence. As the Court explained in *Agrokomplex v. Ukraine*, this means in concrete terms that the scope of the State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention

> implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the State's respect for the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices.[56]

This latter requirement of *de facto* judicial independence has been further developed in the important judgments in *Kinský v. the Czech Republic*[57] and more recently in *Rinau v. Lithuania*,[58] in which public statements by politicians and measures taken by the executive to monitor ongoing judicial proceedings were considered to have had an impact on the fairness of pending proceedings before national courts. In *Rinau*, the Court, moreover, held that the national authorities, including politicians, child care officials and prosecutors, had created a negative atmosphere around the legal actions of the applicant and that such actions constituted direct attempts to interfere in those proceedings which were unacceptable in a system based on the rule of law.[59]

With these judgments, the Court has made clear that the Convention is not blind to the fact that the formal confines of judicial independence, as laid down in legislation, may potentially be no more than a façade. Although crucial, independence *de jure* is therefore not sufficient under the Convention; it does not alone fulfil the requirements of the rule of law as it finds its expression in a truly independent judiciary. Evidence submitted before the Court of pressure and undue influence being placed on judges in the exercise of their functions may itself lead to a finding that the principle of judicial independence has not *de facto* been secured in a particular case or may even give rise to concerns of a systemic nature. It is not excluded that such evidence can thus lead to a violation of Articles 5 § 4 or 6 of the Convention in cases brought under these provisions, although the Court has set a high threshold in this regard.[60] Moreover, evidence of this nature can have an impact on the level of deference afforded to national courts when the Court is called upon to examine complaints lodged under other provisions, like, for example, Article 8 on the right to private life which was the case in the above-mentioned judgment in *Rinau v. Lithuania*. Moreover, evidence of pressure placed on judges in the exercise of their functions or of attempts by those in power to influence their work may constitute an important or even a decisive factor for the Court when examining allegations of measures having been taken to restrict Convention rights under Article 18 of the Convention.[61]

[55] *Baka v. Hungary* [GC], above, n. 45, paras. 140–176.

[56] *Agrokompleks v. Ukraine* (no. 23465/03), 6 October 2011, para. 136.

[57] *Kinský v. the Czech Republic* (no. 42856/06), 9 February 2012, para. 98.

[58] *Rinau v. Lithuania* (no. 10926/09), 14 January 2020, para. 211.

[59] Ibid.

[60] See *Baş v. Turkey* (no. 66448/17), 3 March 2020, which concerned a complaint lodged under Article 5 § 4 alleging the lack of independence and impartiality of magistrates in Turkey who had ordered the detention of the applicant. The Court considered the principles on judicial independence developed in the context of Article 6 § 1 of the Convention to apply equally to Article 5 § 4; see para. 268. Dismissing the complaint as manifestly ill-founded the Court considered *inter alia* that it was "unable to establish, on the basis of the materials in its possession, any correlation between the statements by the executive and the decisions by the magistrates' courts"; see para. 276.

[61] See *Kavala v. Turkey* (no. 28749/18), 10 December 2019, para. 229, and, in particular, *Selahattin Demirtaş v. Turkey (No. 2)* [GC], above, n. 1, paras. 432–436, in particular para. 436: "In the present case, the concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant's conduct as one of the leaders of the opposition, to the conduct of other HDP members of parliament and elected mayors, and to dissenting voices more generally". For a general discussion and a critique of the Court's Article 18 case-law, see E. Küris, 'Wrestling with the 'Hidden Agenda'—Towards a Coherent Methodology for Article 18 Cases', *Human Rights with a Human Touch, Liber Amicorum Paul Lemmens* (2019), 539.

4.2 | Judicial independence in cases lodged by detained judges under Article 5 of the Convention

The increasingly forceful normative impact of the rule of law has been evident in recent judgments of the Court dealing with the principle of judicial independence as implicated in cases on the *detention of judges* in Turkey after the attempted *coup d'état* in July 2016; applications examined under Article 5 of the Convention.

In these judgments, the Court has, when finding violations of Article 5 § 1 of the Convention, emphasised the

> special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties. … [Where] domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, [the Court has held that it] must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the Convention.[62]

These judgments are quintessential rule of law pronouncements by the Court in which the various components of the principle, taken cumulatively, form the basis of a very robust application of Article 5 § 1 of the Convention. The principle of judicial independence, a bedrock of the rule of law, is methodologically fused, so to speak, with another fundamental rule of law component, the principle of legality, operating as a strong interpretative tool in giving life to the requirements of Article 5 § 1 of the Convention in this context. This permits the Court to review strictly the application of the domestic legal basis relied upon to detain members of the judiciary. These judgments constitute a clear example of the Court's appreciation of the risk of governmental power being used in a manner which excessively impacts the independence of the judiciary. They demonstrate once again that, in its interpretation and application, the Convention does not tolerate extremes.

4.3 | The right to an independent and impartial tribunal established by law under Article 6 § 1 of the Convention

The right to an independent and impartial tribunal established by law under Article 6 § 1 of the Convention constitutes one of the cornerstones of the rule of law under the Convention. The Court has a well-developed body of case-law related to the concepts of "independence" and "impartiality" of judges.[63] However, the question whether the provision is applicable to the *appointment of judges*, by the other branches of government of a Member State, was answered for the first time in the landmark Grand Chamber judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland*,[64] delivered on 1 December 2020. In this judgment, the Court held, unanimously, that the respondent State had violated Article 6 § 1 due to grave breaches of national law in the appointment of a judge to the newly established Court of Appeal in Iceland.

The following four important elements that flow from this judgment deserve special attention. First, the articulation of the object and purpose of the right to a tribunal established by law. Second, its scope as a stand-alone right under Article 6. Third, the methodological steps that must be taken to ascertain whether the right has been

[62] *Alparslan Altan v. Turkey* (no. 12778/17), 16 April 2019, para. 102, and *Baş v. Turkey*, above, n. 60, para. 144.
[63] *Ramos Nunes de Carvalho E SÁ v. Portugal* [GC], above, n. 49, paras. 144–150.
[64] *Guðmundur Andri Ástráðsson v. Iceland* [GC], above, n. 44.

breached. Fourth, the important balance to be struck between this right under Article 6 and the countervailing interests of legal certainty and the principle of the irremovability of judges.

First, the Court held that under Article 6 § 1 of the Convention, a court or tribunal must always be established by law as this expression reflects the principle of the rule of law which is inherent in the Convention system. A tribunal that is not established in conformity with the intentions of the legislator will, necessarily, lack the legitimacy required in a democratic society to resolve legal disputes. The object of the term established by law is to ensure "that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament". The Grand Chamber held that having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, the process of appointing judges necessarily is an inherent element of the concept of "establishment" of a court or tribunal by law, and an interpretation to the contrary would defy the purpose of the relevant requirement.[65]

With this reasoning, the Court thus deployed an interpretation based on the text of Article 6 § 1, and the term *establishment*, along with the traditional purposive or teleological method of interpretation relying heavily on the principle of the rule of law, to sustain its finding that the appointment of judges falls in principle under the right as provided for by the provision.

Second, the Court held that the right to a "tribunal established by law" is a "stand-alone right" under Article 6 § 1 of the Convention, although it has a "very close interrelationship" with the guarantees of "independence and impartiality".[66] It is important to appreciate the doctrinal significance of this interpretative finding by the Court. It resulted in the Court, firstly, not having to take a position on whether the Court of Appeal judge, whose appointment was considered in violation of the Convention, had lacked independence or impartiality[67] or, secondly, whether the trial of the applicant had lacked overall fairness.[68] The reason is that the rule of law operates here in its hybrid dimension,[69] both as a norm with fixed content (requiring that judges be appointed in accordance with national law), and as a legal principle (an optimization requirement) sustaining the fundamental structural premise for the enjoyment of the overarching right to a fair trial. Therefore, if a judge, who is appointed in violation of Article 6 § 1 of the Convention according to the threshold test set out by the Court (see below), adjudicates a case dealing with a person's civil rights or a criminal charge, alone or in a multi-member panel, there is no need for a separate analysis of the actual, *in concreto*, fairness of the trial. The violation of the right to a tribunal established by law, as a stand-alone right and fundamental organic component of the rule of law, creates an *unrebuttable presumption of unfairness* of the proceedings in which the unlawfully appointed judge took part. I will revert to this element below in Section 4.4 in my discussion of the relationship between the case-law of the Strasbourg Court and the CJEU.

Third, the Court adopted a three-step *threshold test* for the determination of whether the right to a tribunal established by law is violated. First, it has to be ascertained whether the breaches of domestic law were manifest. If so, and secondly, an analysis has to be performed of whether such breaches pertained to a fundamental rule of procedure for appointing judges.[70] Thirdly, it has to be determined whether the allegations regarding the breaches to the right were effectively reviewed and remedied by the national courts.[71]

The test formulated by the Grand Chamber sets a very high threshold. It thus seeks to reconcile the inherent tensions between the principle of subsidiarity, requiring deference to the national courts in the interpretation and

[65] Ibid., paras. 211, 214 and 227.

[66] Ibid., para. 231.

[67] A majority of the Grand Chamber (12 votes to 5) thus found that it was not necessary to examine separately the applicant's complaint as regards the lack of independence and impartiality of the Court of Appeal judge in question; see *Guðmundur Andri Ástráðsson v. Iceland*, above, n. 44, para. 295.

[68] On this issue, a different view is presented in the joint partly concurring, partly dissenting opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski; see, in particular, paras. 30–33.

[69] See the discussion in Section 3 above.

[70] See, for a discussion on the Chamber judgment, J.-P. Costa, 'Qu'est-ce qu'un tribunal établi par la loi? *Fair Trial: Regional and International Perspectives, Liber Amicorum Linos-Alexandre Sicilianos* (2020), 101–106, at 103, and Tsampi, above, n. 46, at 702–704.

[71] *Guðmundur Andri Ástráðsson v. Iceland*, above, n. 44, paras. 243–252.

application of national law, and the principle of the effective protection of Convention rights, in particular those rights under Article 6 § 1 securing the independence of the judiciary. The test thus relies in large parts on the effective engagement by national courts with determining whether a manifest breach of national law in the appointment of judges has occurred and, if so, imposes on them a requirement to effectively review and remedy credible allegations of such breaches. The second step further delineates and limits the scope of the right by requiring that the breach in question, although manifest, must pertain to a fundamental rule of procedure. Although the Strasbourg Court will draw on the national court's assessment in this regard, the autonomous nature of the right in question and its origins in the principle of the rule of law require that the Court has the final say on whether the breach in question rises to the high level of constituting a violation of Article 6 § 1 of the Convention.[72] If not, the Convention right would be devoid of purpose.

Fourth, in the judgment, the Court confronts the inherent tension between the right to a tribunal established by law, on the one hand, and the potentially severe consequences of a finding that this right has been breached on the principles of the irremovability of judges and of legal certainty, on the other. The Grand Chamber thus formulates the second step of the threshold test as requiring that a breach of national law is of a certain seriousness or gravity for it to rise to the level of potentially resulting in a violation of Article 6 § 1 of the Convention. It is of importance to note that when formulating the scope and content of the principle of irremovability of judges, the Grand Chamber makes an explicit reference[73] to the CJEU's Grand Chamber judgment in *Commission v. Poland*.[74]

Summing up the Court's findings in *Ástráðsson*, the following conclusions can be drawn from this important judgment.

First, when it comes to the right to a tribunal established by law and the right to an independent and impartial court under Article 6 § 1 of the Convention, the rule of law operates both as a legal principle with dispositive interpretative effect, but is also the source of the norm itself which has fixed parameters.

Second, it is quite simply anathema to the rule of law that a court's very foundation, the creation of judicial power, be itself based on an act or acts which manifestly breach fundamental rules on the appointment of judges laid down in national law coupled with the lack of strict judicial review at national level.

Third, once States have adopted a legislative framework for the establishment of tribunals, the rule of law, a norm embedded in Article 6 of the Convention, quite clearly mandates that those rules be followed. When the selection of judges is in the hands of the executive and/or Parliament, it will first be for the national courts to determine whether national law has been respected, as explained in *Ástráðsson*, albeit then subject to the final supervision of the Strasbourg Court under the autonomous principles provided for by Article 6 of the Convention. As to the determination of whether a manifest breach of national law has occurred, the Court will, in principle, defer to the findings of the national courts unless they are arbitrary or manifestly unreasonable. However, as to the nature of such breaches and, in particular, their consequences for the purposes of Article 6 of the Convention, the principle of subsidiarity will not preclude strict European supervision by the Court.

Fourth, States are in principle free to choose the legislative framework for appointing judges on the basis of their legal traditions and constitutional structures. However, such rules and the procedures applied must always conform to the requirements flowing from the primordial principles of the rule of law as it finds its expression in the requirements of judicial independence and impartiality regulated by Article 6 of the Convention.

[72] Ibid., paras. 250–251.

[73] Ibid, para. 239.

[74] CJEU, Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, para. 76: "While it is not wholly absolute, there can be no exceptions to [the principle of irremovability of judges] unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality".

4.4 | The symbiotic relationship between Strasbourg and Luxembourg on judicial independence

As is well known, the CJEU has in recent years rendered important rulings in the field of judicial independence under the Treaty on European Union (TEU) and the EU Charter of Fundamental Rights, in particular with its rulings in *Commission v. Hungary*,[75] in the *Portuguese Judges* case,[76] in *Minister for Justice and Equality v. Celmer (LM)*,[77] the *Polish Judicial Reform* cases,[78] and, most recently, in the follow-up to *LM*, in *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*.[79] The jurisprudential core of these rulings is readily identifiable in Strasbourg case-law as can be seen by the reliance of the CJEU on the judgments rendered by the Court and vice versa, manifesting what can be termed a *symbiotic relationship* between the two Courts in this important area of the law, although it is clear that challenges remain. The following four points are worth mentioning in this regard.

First, when comparing the case-law of the respective courts, it is important to appreciate that the CJEU proceeds on the basis that in interpreting the two core provisions regulating its approach in this area, Article 19 § 1 TEU on judicial effectiveness and Article 47 of the Charter, it relies on the framework of values as espoused in Article 2 TEU, namely "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Some may question whether this framework of values within the EU is different under the European Convention. The answer is emphatically no. When one looks at the Preamble to the Convention, the core of its substantive provisions and its protocols and the case-law of the Strasbourg Court, it is clear that there is a symmetry of values between the two systems. This symmetry is an important conceptual building block common to both systems, which facilitates the necessary judicial dialogue between the two Courts.

Second, the Strasbourg Court's jurisprudence on the rule of law and the independence of the judiciary has been inspired by the principle whereby Member States must provide for effective domestic remedies to safeguard fundamental rights. This principle is, as a general matter, reflected in Articles 13 and 35 of the Convention and is also a conceptual element of the overarching framework principle of subsidiarity. When one views the CJEU's development of the principle of judicial effectiveness in Article 19 § 1 TEU, one sees the convergence of the conceptual starting points adopted by the two Courts. Indeed, it is self-evident that the principle of subsidiarity within the Convention system is devoid of any meaningful content if the Member States do not secure in law and practice the existence of independent, impartial and effective courts so as to safeguard fundamental rights. The same logic, *mutatis mutandis*, seems to inform the CJEU's interpretation of Article 19 § 1 TEU on judicial effectiveness which the Luxembourg Court has also explicitly linked to Articles 6 and 13 of the Convention. Thus, as stated in the *Portuguese Judges* case, the principle in Article 19 § 1 TEU is a general principle of EU law which is derived from the constitutional traditions common to the Member States and from Articles 6 and 13 of the European Convention on Human Rights.[80] As President Lenaerts has opined, the CJEU's interpretation of Article 19 § 1 TEU "is based on a structural understanding of the EU legal order: independent national courts—acting as the courts of general jurisdiction for the application and enforcement of EU law in the Member States—are indeed an essential building block of the EU's constitutional structure".[81] In sum, there are opportunities for both courts, in close cooperation with the national judiciaries, the *European community of judges*, to continue to take full cognisance of their respective case-laws in the development of these principles in the future.

[75] CJEU, Case C-286/16, *Commission v. Hungary*, EU:C:2012:687.

[76] CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, above, n. 27, n. 24.

[77] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality v. Celmer* (the 'LM' case), EU:C:2018:586.

[78] CJEU, Case C-192/18, *Commission v. Poland (Independence of Ordinary Courts)*, EU:C:2019:924; Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, above, n. 74; and CJEU, Joined Cases C-585/18 and C-625/18, *AK and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.

[79] CJEU, Joined cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité d'émission)*, 17 December 2020.

[80] CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, above, n. 27, para. 35.

[81] Lenaerts, above, n. 41, at 346.

Third, one of the difficult transversal principles that has a bearing on the scope and substance of judicial independence is the principle of the irremovability of judges to which I have already referred above. In *Commission v. Poland*, the CJEU stated that the principle of the irremovability is "not wholly absolute, [although] there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality".[82] This is an important statement of principle relied on explicitly by the Grand Chamber of the Strasbourg Court in *Ástráðsson*,[83] a good example of the symbiotic nature of the ongoing dialogue between the two Courts.

The legal question examined in *Ástráðsson* was whether a grave violation of the existing legal framework at national level, in the appointment of a judge, could, potentially and after a careful balancing of interests, constitute a legitimate and compelling ground for an exception to the principle of irremovability of judges. In substance, the Court answered that question in the affirmative,[84] albeit subject to the very high threshold of gravity of the breaches of national law flowing from the strict criteria laid down in the Grand Chamber judgment discussed in Section 4.3 above. In this regard, it is to be welcomed that the CJEU in the *Simpson and HG* cases[85] has already adopted, for the purposes of EU law, a similar fundamental breach test (by reference to the Chamber judgment in *Ástráðsson* which in substance remained the same in the Grand Chamber judgment)[86] for the assessment of a claim of a violation of the right to a "tribunal previously established by law" under Article 47 § 2 of the Charter.

Fourth, in its judgment in the *LM* case,[87] the CJEU recognised that flaws in the legal framework related to the independence of the judiciary of an EU Member State can constitute a systemic or generalised deficiency in the domestic legal system posing a threat to the rule of law and affecting the EU system of mutual recognition as it finds its expression in the field of the European Arrest Warrant (EAW).[88] In this regard, the CJEU set out a two-step test, recently reconfirmed in *Openbaar Ministerie*,[89] whereby an executing judicial authority must first determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by Article 47 § 2 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary. Under the second step, that authority must determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject. In this context, the executing judicial authority must have regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued. In the light of any information provided by that Member State, the authority must on this basis determine whether there are substantial grounds for believing that that person will run a risk of a breach of the right to a fair trial if he or she is surrendered to that Member State.[90]

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[82] CJEU, Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, above, n. 74, para. 76. See Lenaerts, above, n. 41, at 344.

[83] *Guðmundur Andri Ástráðsson v. Iceland*, above, n. 44, para. 239.

[84] Ibid., para. 240: "A finding that a court is not a 'tribunal established by law' may, evidently, have considerable ramifications for the principles of legal certainty and irremovability of judges, principles which must be carefully observed having regard to the important purposes they serve. That said, upholding those principles at all costs, and at the expense of the requirements of 'a tribunal established by law', may in certain circumstances inflict even further harm on the rule of law and on public confidence in the judiciary. As in all cases where the fundamental principles of the Convention come into conflict, a balance must therefore be struck in such instances to determine whether there is a pressing need—of a substantial and compelling character—justifying the departure from the principle of legal certainty and the force of res judicata… and the principle of irremovability of judges, as relevant, in the particular circumstances of a case."

[85] CJEU, Joined cases C-542/18 RX-II and C-543/18 RX-II, *Simpson and HG*, 26 March 2020, paras. 74–76.

[86] *Guðmundur Andri Ástráðsson v. Iceland*, above, n. 44, para. 242. It should be noted that in their joint partly concurring, partly dissenting opinion, Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski, opined (see para. 39) in a slightly different manner on the Grand Chamber's reliance on the CJEU's judgment in *Simpson and HG*, above, n. 85: "The CJEU did not reject the logic of the Chamber's departure in *Ástráðsson*, but in our view clearly sought to work around it. In particular, it relied on the principle of legal certainty, which it regarded as necessary to ensure the stability of the judicial system, in order to avoid any automaticity in terms of consequences (the setting aside of a judicial decision in which the impugned judge had participated) which the new departure in this Court's case-law risked—and now risks—entailing."

[87] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality v. Celmer*, above, n. 77.

[88] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

[89] CJEU, Joined cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité d'émission)*, above, n. 79.

[90] CJEU, Case C-216/18 PPU, *Minister for Justice and Equality v. Celmer*, above, n. 77, paras. 61 and 74–77.

The Strasbourg Court has not yet taken a position on whether the two-step test, adopted by the CJEU within the context of the EAW in cases related to judicial independence, conforms to Article 6 § 1 of the Convention. Therefore, I will not enter into that issue over and above mentioning the following two general points.[91]

First, the CJEU's two-step approach for the examination of EAW requests by an executing judicial authority in one EU Member State, for the surrender of a person to another issuing State, must be assessed strictly within the particular context of the EU system of mutual recognition. As the CJEU emphasised explicitly in *Openbaar Ministerie*, when an executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State, the "existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case". The primary reason for this interpretation, according to the CJEU, is that a contrary conclusion, in other words a refusal to execute an EAW only on the basis of the first step, would amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond "exceptional circumstances", as worded by the CJEU and referring to its case-law, leading to a general exclusion of the application of those principles in the context of EAWs issued by the courts of the Member State concerned by those deficiencies.[92] Therefore, the interpretation adopted by the CJEU, and its two-step test, is primarily influenced by the specific nature and purposes of the system of mutual recognition[93] which, in the EU context, must have a bearing on the way in which the principle of judicial independence under Article 47 § 2 of the Charter plays out in the EAW context.[94]

Secondly, it is important not to lose sight of the differences between cases lodged under Article 6 of the Convention before the Strasbourg Court, where an allegation is made by an applicant of a breach of the right to an independent and impartial tribunal established by law, and the EAW as an intra-EU system of legal norms requiring the *extraterritorial assessment* by a court in one Member State of the independent status of courts in an another State in proceedings which are still pending. When the Strasbourg Court determines the existence of state responsibility under the Convention in the Article 6 context, it is seized of an application which, differently from the EAW context, is directed at the Member State in which the court or tribunal is situated and the applicant is a party to the same proceedings. Importantly, for the Strasbourg Court to be able to examine the application on the merits, the condition of the exhaustion of domestic remedies under Article 35 § 1 of the Convention must be fulfilled, thus requiring that the proceedings have come to an end at the national level.

As in *Ástráðsson*, the Court is, in such cases, called upon to examine directly the operation of the judiciary in the respondent State for the purposes of determining whether the right to an independent and impartial tribunal established by law under Article 6 has been respected. The examination of such applications is therefore not conceptually amenable to the same type of risk-based assessment which is, in principle, applicable for the purposes of examining Convention complaints in the extraterritorial context, including in cases under the EAW

[91] See, also, the joint partly concurring, partly dissenting opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski in *Guðmundur Andri Ástráðsson v. Iceland*, above, n. 44, para. 40.

[92] CJEU, Joined cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité d'émission)*, above, n. 79, paras. 41–43.

[93] D. Spielmann, 'La notion de l'État de droit dans la jurisprudence de la Cour de justice de l'Union européenne', *Liber Amicorum in memoriam of Stavros Tsakyrakis* (2020), 354, at 355–356: "L'emploi par la Cour de "l'État de droit" doit donc toujours être placé dans le contexte spécifique de la structure de l'ordre juridique de l'UE: la CJUE n'a pas recours à cette notion dans l'abstrait. Le recours à "l'État de droit" se met toujours au service de la garantie de la primauté de l'ordre juridique de l'UE par rapport à ceux des États membres, en ce qui concerne les actes mettant en œuvre le droit de l'Union. En outre, l'État de droit est étroitement associé au principe de la confiance mutuelle, érigée par la CJUE en principe constitutionnel de l'UE. La CJUE considère que la confiance mutuelle entre les États membres présuppose l'existence d'un espace constitutionnel unifié et régi par les mêmes valeurs."

[94] Judge Koskelo has expressed concerns with the CJEU's two-step approach, above, n. 22, at 48–49: "This is a very tall order for the national judges. One may wonder whether and how they will be in a position to make those double determinations, which concern complex situations outside their own jurisdictions. … Although independence is at the core, and although systemic problems exist, mutual recognition should be denied only where the individual risks suffering specific harm from a lack of this core requirement. This appears to pose quite a problematic contradiction. … Now, … we have landed in a situation where, as the foundations on which mutual recognition is based is failing, the national courts are required to engage with and to verify matters they were not supposed to have to worry about or to deal with".

system.[95] However, if confronted with an application lodged under the Convention directed at the operation of the EAW system under Article 6 of the Convention, within the context of judicial independence, the Strasbourg Court will have to determine to what extent it can take due account of the nature and purposes of the EU system of mutual recognition, as it has done in its existing case-law applying the *manifest deficiency test*.[96] In this assessment the Strasbourg Court might have to consider the very high threshold set in this regard in the extraterritorial EAW context under Article 6 of the Convention by the "flagrant denial of justice" test, as applied in the decision in *Stapleton v. Ireland*[97] and, in particular, in the more recent judgment in *Pirozzi v. Belgium*.[98]

5 | CONCLUSION

I conclude where I started. The rule of law is a fundamental constitutional principle in the European system of human rights protection. As I have attempted to explain, the rule of law has been the *lodestar* guiding the development of the case-law of the European Court of Human Rights for decades. Due to developments in the legal space of the Council of Europe, the normative impact of this principle has been increasing in the case-law of the Court, in particular in cases dealing with the independence and impartiality of the judiciary which have been explained in detail in this article. It is therefore of utmost importance that the conceptual core of the rule of law, its normative status within the Convention system and its various manifestations continue to be reflected in a coherent and principled manner in the case-law of the Court. Also, it is important that the Strasbourg and Luxembourg Courts continue to develop and reinforce their continuing jurisprudential dialogue in this field.

Recently, some have asked whether the rule of law has become a worthless slogan, a fantasy that has lost all semblance of realism in our polarised world, a world increasingly fraught with divisions originating not from mere reasonable differences of opinions but from dramatically clashing visions of what constitute first principles of communal human life. The clear answer is in the negative, as I hope transpires from the discussion in this article.

[95] Important examples in the case-law of the Strasbourg Court of the extraterritorial application of Article 6 of the Convention in the criminal context are the inadmissibility decision in *Stapleton v. Ireland* (no. 56588/07), 4 May 2010; the judgment in *Othman (Abu Qatada) v. the United Kingdom* (no. 8139/09), 17 January 2012; and, in particular, the judgment in *Pirozzi v. Belgium* (no. 21055/11), 17 April 2018. In the first case (*Stapleton*), a magistrate's court in the United Kingdom issued a European arrest warrant for the arrest of the applicant, who lived in Ireland, on multiple charges of fraud. The applicant argued before the Irish courts that he faced a risk of an unfair trial were he to be surrendered from Ireland to the United Kingdom by reason of inordinate delay. The Irish Supreme Court disagreed and made an order for the applicant's surrender to the British authorities. The Strasbourg Court noted, *inter alia*, that the "right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society so that the Court does not exclude that an issue might, exceptionally, be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country", see para. 25. However, in dismissing the applicant's complaint as manifestly ill-founded, the Court observed that under its case-law the "delay in prosecuting a crime does not, necessarily and in and of itself, render criminal proceedings unfair under Article 6", see para. 26. In the second case (*Othman*), the applicant complained, *inter alia*, under Article 6 of the Convention that he would be subjected to a real risk of a "flagrant denial of justice" if retried in Jordan for either of the offences for which he had been convicted in absentia. The Court accepted his claim and found that the applicant's deportation to Jordan would be in violation of Article 6 of the Convention on account of the real risk of admission at the applicants retrial of evidence obtained by torture of third persons; see, in particular, paras. 258–287. In the third case (*Pirozzi*), the applicant complained that his surrender by the Belgian authorities to the Italian authorities, based on a European arrest warrant, had been in violation of Article 6 § 1 of the Convention as the warrant had been issued following a conviction in an Italian court in his absence. The proceedings in Italy had thus been contrary to the Strasbourg Court's case-law in *Sejdovic v. Italy* [GC] (no. 56581/00, CEDH 2006-II). The Court first recalled that within this extraterritorial context, a violation of Article 6 § 1 of the Convention would only exceptionally occur if a suspect was subjected to or risked being subjected to a "flagrant denial of justice" in the receiving State (see para. 57). The Court then went on to reaffirm its finding in *Avotiņš v. Latvia* [GC] (no. 17502/07), 23 May 2016, para. 116, that it would take account, in a "spirit of complementarity", of the "manner in which the EU mechanisms of mutual recognition operate and in particular the aim of effectiveness which they pursue". However, if a "serious and substantiated complaint" were raised before courts of a State, which is both an EU Member State and a Contracting Party to the Convention, to the effect that the protection of a Convention right had been "manifestly deficient", and that this situation could not be remedied by European Union law, they could not refrain from examining that complaint on the sole ground that they were applying EU law. Thus proceeding with applying the "manifest deficiency test", within the context of the very high threshold set by the Convention, requiring a showing that the proceedings in Italy constituted a "flagrant denial of justice", the Strasbourg Court concluded on the facts that there had been no violation of Article 6 § 1.

[96] See *Avotiņš v. Latvia* [GC], above, n. 95, para. 116; *Romeo Castaño v. Belgium* (no. 8351/17), 9 July 2019, para. 84; and, in particular, *Pirozzi v. Belgium*, above, n. 95, para. 62–64.

[97] *Stapleton v. Ireland*, above, n. 95.

[98] *Pirozzi v. Belgium*, above, n. 95.

Attempts to legitimise relativistic conceptions of the rule of law, quite often tied to politics of national identity and parochial definitions of the common good, defined by the closed circle of the powerful, must be rejected.[99] The rule of law under the European Convention on Human Rights, a fundamental component of "European public order", is conceptually incapable of being transformed to fit the political agenda of those that seek unfettered power coupled with the subjugation of independent judicial review.[100] The principle of the rule of law, the Convention's lodestar, is organically embedded within an international system of law which rejects unequivocally the arbitrary use of governmental power.

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[99] It should, however, be emphasised, as explained by Judge Koskelo, that "[even] societies where the rule of law is seemingly well established are not free from [risks that it be neglected or eroded]. Respect for the rule of law is not only a matter of the requisite constitutional guarantees being formally in place. It is ultimately also a matter of constitutional culture. A genuine and resilient respect for the rule of law must be solidly rooted not only in the formal legal structures or the rhetoric customs of society, but in the actual practice of governance. The most testing moments are not those of harmony but situations where tensions arise", above, n. 22, at 28.

[100] For a very important discussion of the contemporary challenges for the Convention system, see J. Petrov, 'The Populist Challenge to the European Court of Human Rights', (2020) 18(2) *International Journal of Constitutional Law*, 476.