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HABITUAL DEFERENCE? STRASBOURG STANDARDS OF JUDICIAL INDEPENDENCE AND CHALLENGES OF THE PRESENT

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I. Introduction

The European Convention on Human Rights is renowned for the discrepancy between its succinctly formulated provisions and the extensive scopes of rights that are effectively contained in them. Nonetheless, the jurisprudence of the European Court of Human Rights, which accounts for this gap, has its clear focal points and not every article of the ECHR has undergone equally extensive development in the case law. The Court's progressivism and judicial activism apply unequally to rights and freedoms of the Convention. Sometimes the ECtHR's attention is accompanied by profound transformations in domestic legal orders and social perception (for example, the deduction from Article 8 the right of same-sex couples to be legally recognised[1]). In this regard, the ECHR system might be credited for being a real trend-setter on the level of broadly construed international law (including EU law). Occasionally, however, the Court seems to lag behind both international and domestic standards, safeguarding a lower threshold of protection than the one which can be obtained in national constitutions, EU law or international soft law.

As I will attempt to demonstrate in this paper, judicial independence from other state powers is one of the areas in which the ECtHR displays some reserve in following the top international and domestic standards. In recent years, this question is no longer a matter of scholarly dispute or of honing the already highly developed standards. Alongside tensions and tectonic transformations in the approach to liberal

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[1] See the ECtHR judgments in *Oliari and others v. Italy* of 21 July 2015, app. nos. 18766/11, 36030/11; *Orlandi and others v. Italy* of 14 December 2017, app. nos. 26431/12, 26742/12, 44057/12.

democracy in Europe, judicial independence is becoming a more or less openly ignored value. Sometimes, as in the case of Poland,[2] it is even explicitly contested by the ruling majority.[3] Therefore the precise standards of the independence of judiciary, especially those concerning the appointment of judges and termination of their office, become nowadays an important bulwark against new forms of usurpation of power by the populist-dominated executive and legislative. As it was recently demonstrated by the populist upsurge in some European countries (predominantly Hungary and Poland), the ECHR – despite its apparently firm axiological anchoring in the concept of the rule of law – is not a particularly efficient mechanism in combating systemic infringements of standards of liberal democracy. Naturally, the Convention does not offer properly systemic legal remedies against dismantling the rule of law (such as Article 7 TEU in case of European law[4]), but even within the available options the defence of the judicial independence might be found less than satisfactory. Hopefully, there are some recent trends which demonstrate that the ECtHR may adopt a more rigid stance in defence against the populist undermining of the judiciary.

The paper is structured in the following manner. First, I attempt to reconstruct briefly the general understanding of the concept of the rule of law under the aegis of the Council of Europe and the ECHR. Secondly, I will elucidate the Court's case law on judicial independence and ask about the current trends in this matter. Finally, I will argue that the jurisprudence of the ECtHR is now in the state of transformation and might be developed in response to the populist upsurge.

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[2] On the ongoing reform of the Polish judiciary in the context of rule of law infringements see: P. Filipek, *The New National Council of the Judiciary and Its Impact on the Supreme Court in the Light of the Principle of Judicial Independence*, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 2018, vol. XVI, pp. 179–181; R.D. Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, Government and Opposition 2017, vol. 52, no. 2, pp. 211–238; L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies 2017, no. 19, p. 4; The European Commission, Reasoned Proposal in Accordance with Article 7(1) of The Treaty on European Union Regarding the Rule of Law in Poland, 20.12.2018, COM(2017) 835 final; *Rule of Law: European Commission takes next step in infringement procedure to protect the independence of the Polish Supreme Court*, 14.08.2016, IP/18/4987, source: europa.eu/rapid/press-release_IP-18-4987_en.htm [last access: 31.05.2019].

[3] In 2017 a Polish government-funded organisation Polska Fundacja Narodowa [Polish National Foundation] prepared a billboard smearing campaign targeted at Polish courts and judges. It was meant to justify the reforms adopted by the right-wing government, such as lowering the retirement age for the Supreme Court judges (in order to appoint new ones in their place) and gaining political control over the National Council of the Judiciary which plays a pivotal role in the process of appointing judges. See M. Orłowski, *PiS kontratakuje ws. sądów. Rządowe billboardy zawisną w całej Polsce*, Gazeta Wyborcza, 7 September 2017, source: http://wyborcza.pl/7,75398,22335331,pis-kontratakuje-ws-sadow-rzadowe-billboardy-zawisna-w-calej.html.

[4] Even though Art. 7 TEU provides a systemic remedy, its actual application is ravaged by inconsistencies and implicit political assumptions. See W. Rech, *Some remarks on the EU's action on the erosion of the rule of law in Poland and Hungary*, Journal of Contemporary European Studies 2018, vol. 26, issue 3, pp. 334–345.

II. Rule of law: Theory, the Council of Europe and the ECHR

The rule of law is a notoriously ambiguous concept, straddling legal theory and normative content. Its definitions are too numerous by far to produce an exhaustive and undebatable list of necessary elements. As noticed by Hans Petter Graver, "[i]t can encompass such diverse concepts as rule by laws, law and order, respect for property, equality before the law, the ruler being bound by law, legal certainty and fundamental rights."[5] Legal theorists compete in producing different lists of constitutive ingredients of the rule of law.[6]

Yet even if it has never had an unambiguous definition,[7] it is typically presented as having for its elements at least some of the following[8]: (1) generality of norms,[9] (2) stability and transparency of law,[10] (3) coherence of law, (4) lack of arbitrary and unmotivated decisions,[11] (5) non-retroactivity, (6) promulgation in advance,[12] (7) supremacy of law,[13] (8) independence and effectiveness of the judiciary, (9) effective obedience to legal norms,[14] (10) accountability of those in power for violating the law. Protection against anarchy has often been seen as a crucial value of the rule of law.[15]

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[5] H.P. Graver, *Judicial Independence under Authoritarian Rule – An Institutional Approach to the Legal Tradition of the West*, Hague Journal on the Rule of Law, October 2018, vol. 10, issue 2, p. 327.

[6] See P. Burgess, *Deriving the international Rule of Law: an unnecessary, impractical and unhelpful exercise*, Transnational Legal Theory 2019, vol. 10, issue 1, pp. 65–70.

[7] Cf. R.H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, Columbia Law Review, January 1997, vol. 97, no. 1, p. 1; D. Desai, R. Wagner, M. Woolcock, *The Missing Middle: Reconfiguring Rule of Law Reform as if Politics and Process Mattered*, Hague Journal on the Rule of Law 2014, no. 6, p. 231; R. McCorquodale, *Defining The International Rule Of Law: Defying Gravity?*, International Comparative Law Quarterly, April 2016, vol. 65, p. 278.

[8] Cf. L. Fuller, *Morality of Law*, New Haven 1969, p. 39–90; S.-E. Skaaning, *Measuring the Rule of Law*, Political Research Quarterly, June 2010, vol. 63, no. 2, p. 452; J.-E. Lane, *A Theory of Rule of Law (RL)*, Romanian Journal of Political Science, Winter 2016, vol. 16, issue 2, pp. 36–40; European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, adopted at its 86th plenary session (Venice, March 2011), source: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e, last accessed: 18 May 2019.

[9] C. Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, Law and Philosophy, May 2005, vol. 24, no. 3, p. 240.

[10] T.A.O. Endicott, *The Impossibility of the Rule of Law*, Oxford Journal of Legal Studies, Spring 1999, vol. 19, no. 1, pp. 1–2.

[11] E. Mak, S. Taekema, *The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application*, Hague Journal on the Rule of Law 2016, no. 8, pp. 28–29; T.A.O. Endicott, *op. cit.*, pp. 2–3.

[12] L. Fuller, *op. cit.*, p. 42–44; R.H. Fallon, Jr., *op. cit.*, p. 3.

[13] R. McCorquodale, *op. cit.*, p. 288.

[14] J.B. Slapin, *How European Union Membership Can Undermine the Rule of Law in Emerging Democracies*, West European Politics 2015, vol. 38, issue 3, p. 628.

[15] R.H. Fallon, Jr., *op. cit.*, p. 7.

All these features oscillate around the opposition between the rule of law and arbitrariness of power. Historically, this binary constellation mobilized the momentum of the rule of law as a fighting concept, deeply immersed in the liberal philosophy of government. As evidenced by the following quote from John Locke's *Second Treatise of Government*, the rule of law was understood as a cornerstone of the self-execution of liberty by individuals through their consent to be governed:

> The *natural liberty* of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The *liberty of man,* in society, is to be under no other legislative power, but that established, by consent, in the common-wealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it. Freedom then is not what Sir *Robert Filmer* tells us, *Observations, A. 55. a liberty for every one to do what he lists, to live as he pleases, and not to be tied by any laws:* but *freedom of men under government* is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man: as *freedom of nature* is, to be under no other restraint but the law of nature.[16]

In this respect, the rule of law is a twofold concept. On the one hand, it is deeply rooted in the very axiological, ideological and anthropological underpinning of modern liberal governing. On the other hand, it branches into particular domains of the state, producing detailed guarantees which safeguard equality before the law and argued, rule-based decision-making. For this reason, the rule of law will always be both an elusive concept (due to its theoretical surplus over precise normative context) and a contested value (as a result of its strict correlation with a particular paradigm of modern government).

The first of these characteristics is clearly discernible in the understanding of the rule of law under the aegis of the Council of Europe. The elusiveness of this concept, which was introduced into the CoE Statute without discussion,[17] but also without any definition, is self-evident. As noticed by Jörg Polakiewicz and Jenny Sandvig, "[d]espite the general commitment to the principle of the rule of law within the Council of Europe, the content of the notion is not strictly carved out. The extensive body of legal and political instruments within the Council of Europe does not provide any authoritative definition."[18] Within the Council of Europe the almost universal support for the rule of law among the member states (even if sometimes being little more than lip service) contrasts with the irremovable vagueness of the concept. This peculiar entanglement finds its embodiment in Article 3 of the CoE Statute which makes the respect of 'the principle of the rule of law' a requirement for accession to the organ-

[16] J. Locke, *Second Treatise of Government*, Indianapolis 1980, p. 17.

[17] J. Polakiewicz, J. Sandvig, *Council of Europe and the Rule of Law*, Civil & Legal Sciences 2015, vol. 4, issue 4, p. 160.

[18] *Ibid.*

isation. Nonetheless, the understanding of the rule of law has historically proved to be based on a pragmatic approach[19] focused on a couple of somewhat loosely determined *topoi* rather than on an exclusive catalogue of constitutive elements.

The Council, however, undertook the ambitious work of proposing a non-binding definition of the concept. Its elaboration was assigned to the so-called Venice Commission (the European Commission for Democracy through Law), whose day-to-day activity is based on control of compliance with the rule of law. In its 2011 Report on the Rule of Law,[20] the Commission pays due regard to historical and cultural differences between different understandings of the rule of law, as the term itself has an unambiguously Anglo-Saxon origin and does not overlap with the German *Rechtsstaat* or the French *État de droit* or *prééminence de droit*.[21] Nonetheless, the Commission managed to propose a working definition of the concept as based on what appeared to accommodate diverging past traditions through a new consensus. Its list of constitutive elements contains six: (1) legality, including a transparent, accountable and democratic process for enacting law, (2) legal certainty, (3) prohibition of arbitrariness, (4) access to justice before independent and impartial courts, including judicial review of administrative acts, (5) respect for human rights, (6) non-discrimination and equality before the law.[22]

On this list one element seems to be privileged: the fourth one. The Venice Commission puts it in the centre of institutional dimension of the rule of law and its key safeguard:

> The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State. It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.
> The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not be subject to political influence or manipulation. Impartial means that the judiciary is not – even in appearance – prejudiced as to the outcome of the case.[23]

Therefore the concept of the rule of law – also within the very framework of the Council of Europe – acts as a mediating concept between independence of the judiciary (construed as freedom from external pressure of other state powers, especially of the executive) and its axiological grounding in the idea of liberal democracy.

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[19] Cf. European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law*, adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011), CDL-AD(2011)003rev, §§ 19–21.

[20] *Ibid*.

[21] *Ibid.*, § 4.

[22] *Ibid.*, § 41.

[23] *Ibid.*, §§ 54–55.

Nonetheless, the work of the Venice Commission is more of theoretical rather than practical character, as it aims to provide a concrete list of substantial elements of the rule of law in the place of the CoE's vagueness. Whereas it might be deemed progressive, the practical approach to judicial independence exhibited by the ECtHR has historically recognised the link between the rule of law and judicial independence theoretically and with obsolete deference to national regulations.

III. Judicial Independence and the Rule of Law Before the ECtHR

In the preamble of the European Convention on Human Rights, the party states declare that they "are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law". The thus defined attachment to the rule of law serves as a conceptual bridge between the values of the Council of Europe and the axiological underpinning of the Convention itself. It does not mean, however, that the jurisprudence of the ECtHR provides any better clues as to how exactly it should be defined than the CoE documents predating the 2011 report of the Venice Commission. Despite this lack, it can be reasonably argued that judicial independence is instrumental in practical application of the concept of the rule of law. Upon the murky waters of vague and contradictory definitions, independence of the judiciary – alongside foreseeability of law and elimination of arbitrariness – serves as a stable reference point. This was first revealed in the *Golder*[24] case,[25] where the Court underlined the key importance of the preamble for interpretation of particular Convention provisions precisely in the context of the right of access to court as an independent and impartial organ. It opposed the stance of the British government which claimed that the interpretation of the ECHR should be limited and selective:

> As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the 'object' and 'purpose' of the instrument to be construed. (…) The Commission, for their part, attach great importance to the expression 'rule of law' which, in their view, elucidates Article 6 para. 1 (art. 6-1). The 'selective' nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference 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. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely

[24] Judgment of the ECHR from 21 February 1975 in *Golder v. the UK*, app. no. 4451/70.

[25] J.A. Frowein, W. Peukert, *Europäische Menschenrechtskonvention. EMRK-Kommentar*, Kehl am Rhein 2009, p. 13.

> proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention. This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), 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 (art. 3) which provides that 'every Member of the Council of Europe must accept the principle of the rule of law (...)' And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts."[26]

This formula is usually interpreted as granting normative value to the preamble, although in strict correlation with particular rights or freedoms guaranteed by the Convention.[27] Even though the concept of the rule of law was usually applied in the interpretation of limitation clauses,[28] it clearly privileges some rights and freedoms over others which are not that deeply anchored in the Convention axiology proclaimed in the preamble (even if it is understood as inherent in all provisions of the ECHR[29]). Independence of the judiciary, as guaranteed by Art. 6 (1) ECHR, should therefore belong to the core interest of the Court. However, it seems that ECtHR's approach to relations between the judiciary and other state powers lags behind international standards which could be absorbed into the Convention via the preamble.

IV. Judicial Independence in the Main Body of ECtHR Case-Law

As it is well-known, "the tribunal is an autonomous term of the Convention."[30] According to the established jurisprudence of the Court, it is an institution which matches three classes of requirements: (1) organisational (it must be established by law, guarantee the appearances of independence and impartiality as well as execute judicial function), (2) procedural (it must act according to procedural rules established by law), 3) functional (it must have full jurisdiction to deliver rulings, which cannot be subject to extra-judicial control[31]).[32] These general requirements do not determine, however, the exact relationship between the judiciary, the legislative and

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[26] Judgment in *Golder v. the UK*, § 34.

[27] See L. Garlicki (ed.), *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz*, vol. I, Warszawa 2010, p. 14.

[28] *Ibid.*, pp. 18–19.

[29] See J.L. Černič, *Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe*, Hague Journal on the Rule of Law 2018, vol. 10, pp. 114–115.

[30] Judgment of the ECtHR from 22 October 1984 in *Sramek v. Austria*, app. no. 8790/79, § 36; judgment from 1 July 1997 in *Rolf Gustafson v. Sweden*, app. no. 23196/94, § 45.

[31] It is for this reason that the ECtHR did not intervene in French discussions concerning the institution of the public prosecutor (*magistrat du parquet*), who, being a party to proceedings, does not rule on cases. See judgment of the ECtHR from 18 October 2018 in *Thiam v. France*, app. no. 80018/12, §§ 70–71.

[32] L. Garlicki (ed.), *op. cit.*, vol. I, p. 14.

the executive – especially as far as judicial appointment of judges is concerned. In this respect the party states have traditionally enjoyed considerable leeway.

Historically speaking, one of the first cases in this domain, *Zand v. Austria*[33], established a long tradition of deference to national arrangements. The applicant's allegation concerned the provision of an Austrian law which gave the Minister of Justice the power to establish labour courts of first instance by means of a decree.[34] The European Commission of Human Rights remarked that the requirement to establish courts by means of a law aims to safeguard their independence from the executive; they should be constituted by the power emanating from the parliament.[35] It does not mean, however, that a law cannot delegate some of this power to the executive, provided that it concerns exceptional or detailed matters. On top of these general findings the Commission established a high threshold of evidence required to declare that the executive exerted undue influence on the judiciary. The very possibility of such influence which consisted in granting the executive the competence to establish a court and determine its jurisdiction is not enough to declare a violation of the Convention.[36] It may only be declared if it is proven that a ruling on particular case was not delivered impartially or that the establishment of a given court was done with improper motives.

The approach inaugurated in *Zand* was therefore focused not on the objective way of determining relations between the executive and the judiciary, but on particular, evidence-backed violations of independence. General relations between state powers were still an object of enquiry, but of subsidiary importance.[37] A declaration of violation was relatively difficult and necessitated proving concrete manifestations of partiality or dependence on the part of judges.[38] Occasionally, the ECtHR found it sufficient to demonstrate that there was a link between the institutional bias of judges (for example being officers of the military) and their doubtful ruling.[39] The reluctance to find improper relations between the judiciary and other state powers on the general

[33] Report of the EComHR from 12 October 1978 in *Zand v. Austria*, app. no. 7360/76.

[34] Report of the EComHR in *Zand v. Austria*, § 3.

[35] *Ibid.*, § 69.

[36] *Ibid.*, § 77.

[37] Cf. Decision of the EComHR from 6 December 1989 in *Rossi v. France*, app. no. 11879/85, pp. 128–131.

[38] See judgment of the ECtHR from 1 October 1982 in *Piersack v. Belgium*, app. no. 8692/79, § 27; judgement from 23 November 2017 in *Haarde v. Iceland*, app. no. 66847/12, §§ 103–108; judgment from 18 February 2016 in *Rywin v. Poland*, app. nos. 6091/06, 4047/07, 4070/07, §§ 220–240; judgment in *Thiam v. France*, §§ 83–85.

[39] See judgment of the ECtHR from 17 November 2015 in *Tanışma v. Turkey*, app. no. 32219/05, § 81; judgment of the ECtHR from 31 May 2016 in *Sürer v. Turkey*, app. no. 20184/06, §§ 42–47; judgment of the ECtHR from 14 March 2017 in *Yeltepe v. Turkey*, app. no. 24087/07, §§ 31–33. See also a negative example: judgment of the ECtHR from 23 January 2018 in *İzzet Çelik v. Turkey*, app. no. 15185/05, §§ 29–34.

level made the Court accept, although in quite uncertain terms, the hybrid institution of the French Conseil d'État as concordant in principle with Art. 6 (1) ECHR.[40]

The legacy of this approach makes it understandable why the ECtHR elaborated a rather limited doctrine on the model relations between the judiciary and other state powers. Developing the definition of the term 'independent' contained in Art. 6 (1) ECHR, the Court found four main criteria: (1) appointment of judges, (2) the length of term and its stability, (3) means of protection against undue external pressure (such as criminal immunity of judges[41]) as well as (4) the external appearance of independence.[42] These criteria do not need to be guaranteed explicitly by a law, if they are recognised and respected in practice.[43]

The first of the above-mentioned criteria displays the ECtHR's tendency to combine the assessment of general arrangements with particular manifestations of dependence. As the Court noted in *Filippini v. San Marino* case,[44] the appointment of judges by another state power (the legislative in the case) cannot be held for sufficient to declare an infringement of judicial independence. Art. 6 (1) ECHR is violated only when it is proved that other state powers exerted undue influence, whereas judges bowed to it against their oath. Even the existence of political motivations behind their appointment – which is particularly frequent in relation to judges of constitutional courts – is not *per se* tantamount to a violation of judicial independence.[45]

In its jurisprudence, the Court has recognised a relatively large margin of appreciation as to how the states determine the appointment of judges. It has accepted models in which judges are nominated by the legislative or the executive,[46] as well as special bodies of mixed composition (also presided over by the head of state).[47] This standard is rooted in the early decades of the Convention, but it still enjoys surprising appreciation from the Court. Meanwhile, however, numerous acts of soft law began to point out that judges should be nominated or appointed by bodies in

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[40] Judgment of the ECtHR from 9 November 2006 in *Sacilor Lormines v. France*, app. no. 65411/01, §§ 65–67; judgment of the ECtHR from 7 June 2001 in *Kress v. France*, app. no. 39594/98, §§ 31–37.

[41] Decision of the EComHR from 18 December 1980 in *Crociani, Palmiotti, Tanassi, Lefebvre D'Ovidio v. Italy*, app. nos. 8603/79, 8722/79, 8723/79, 8729/79, p. 221.

[42] Judgment of the ECtHR from 28 November 2002 in *Lavents v. Latvia*, app. no. 58442/00, § 117; judgment of the ECtHR from 25 February 1997 in *Findlay v. the UK*, app. no. 22107/93, § 73; judgment of the ECtHR from 22 November 1995 in *Bryan v. the UK*, app. no. 19178/91, § 37; judgment of the ECtHR from 22 June 1989 in *Langborger v. Sweden*, app. no. 11179/84, § 32.

[43] Judgment of the ECtHR from 28 June 1984 in *Campbell and Feel v. the UK*, app. nos. 7819/77, 7878/77, § 80.

[44] Decision of the EComHR from 26 August 2003 in *Filippini v. San Marino*, app. no. 10526/02.

[45] Decision of the EComHR in *Crociani, Palmiotti, Tanassi, Lefebvre D'Ovidio v. Italy*, p. 222.

[46] See the judgment of the ECtHR in *Campbell and Feel v. the UK*, § 79; judgment of the ECtHR from 3 July 2007 in *Flux v. Moldova (no. 2)*, app. no. 31001/03, § 27.

[47] The judgment of the ECtHR from 15 November 2007 in *Galstyan v. Armenia*, app. no. 26986/03, § 62; judgment in *Thiam v. France*, §§ 81–83.

which representatives of the judiciary have a majority.[48] The ECtHR seems to ignore this trend, even though it made its way to the Recommendation of the Committee of Ministers no. CM/Rec(2010)12 from 2010.[49] The Committee strongly endorsed the model in which judges should be nominated by councils established by law and under the constitution as independent bodies.[50] Not less than half of their members should be judges elected by their peers from all levels of judiciary and with due respect of its internal pluralism. Moreover, the councils should exhibit highest transparency by developing 'pre-established procedures and reasoned decisions'.[51] Even though the ECtHR makes references to the Recommendation CM/Rec(2010)12,[52] it still has not adopted this standard as a binding model in its case law. The Court's reluctance might be explained by the fact that such a progressive step would require a declaration that a new European consensus has emerged, thereby curtailing the domestic margin of appreciation. The Committee's Recommendation might be taken for a sign that consensus is growing but is yet to reach the requisite level of development.

The deference of the Court to national arrangements is nonetheless limited by one crucial requirement. The states preserve considerable leeway in deciding on the exact institutional and procedural dimensions of the judiciary only if they respect the valid law. In other words, the executive and the legislative may lay down rules with significant discretion, but once they do that, they need to stick to the norms they have adopted. If they infringe upon them, a violation of the Convention may be declared even without proving that the infringement caused actual dependence or partiality of the court.

This tendency is clearly discernible in the *Posokhov v. Russia* judgment.[53] The application alleged that two lay judges who sat in the court deciding on the applicant's case at the moment of interrogation had fulfilled their functions for 88 days, although the Russian Lay Judges Act stipulated that a lay judge cannot sit in a court for longer than 14 days a year. Moreover, the lay judges in the case were not cast by lot as demanded by the act. Given that the authorities could not produce the documents concerning their appointment, it was surmised that they were in fact appointed in

[48] This standard was first adopted in Minimum Standards of Judicial Independence adopted by the International Bar Association in 1982 (Art. 3). Then it made its way to the Mount Scopus International Standards of Judicial Independence from 19 March 2008 (Art. 4.2 b). However, it is not present in Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan in 1985, later endorsed by UN Assembly Resolutions no. 40/32 from 29.11.1985 and 40/146 from 13.12.1985).

[49] Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010.

[50] *Ibid.*, §§ 26–29.

[51] *Ibid.*, § 28.

[52] See for example judgment from 12 March 2019 in *Guðmundur Andri Ástráðsson v. Iceland*, app. no. 26374/18, § 71.

[53] Judgment of the ECtHR from 4 March 2003 in *Posokhov v. Russia*, app. no. 63486/00. See also judgment from 17 May 2016 in *Yegorychev v. Russia*, app. no. 8026/04, §§ 64–68.

breach of procedures. These circumstances prompted the ECtHR to declare a serious violation of the Convention.[54]

The ECHR requires that the law referred to in Art. 6 (1) regulates not only establishment of a court, but also selection of judges for a particular formation. The margin of appreciation cannot, therefore, justify infringements of domestic law.[55] In subsequent case law a high standard of legality was adopted in this respect: violation of any domestic norm, not necessarily concerning the establishment or competence of a court, may be tantamount to violation of the Convention, if only as a result of it an unauthorised person sat in a court.[56] In particular, such norms may be targeted at protecting independence and impartiality of judges, length of their term or procedural guarantees.[57] Nevertheless, the precise scope of these norms is hardly definable, as is their exact link with functioning of courts. Quite recently the ECtHR underscored that the violation occurs not in case of any norm pertaining to establishment or proceedings of courts, but only to 'important' ones.[58]

It should be noted that in recent years the Court approaches the issue of judicial independence with respect of subsidiarity principle, developed within the framework of the Interlaken process. Accordingly, the ECtHR imposes on national courts the obligation of controlling whether domestic norms were respected. It intervenes only in case of flagrant violations.[59] It may be thus concluded that as far as judicial independence is understood under Article 6 (1) ECHR, the states enjoy a considerable margin of appreciation as to procedures of establishing courts, appointing judges and selecting particular formations, provided that these procedures – compliant with the four above-mentioned requirements deduced from Art. 6 (1) – are effectively respected[60] and possible violations are removed by domestic courts of higher instance.[61] Finally, all these requirements should be carried out with a general view to safeguarding also external appearances of independence and impartiality of courts.[62]

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[54] *Ibid.*, §§ 39–44.

[55] See decision of the EComHR from 4 May 2000 in *Buscarini v. San Marino*, app. no. 31657/96; judgment of the ECtHR from 20 July 2006 in *Sokurenko and Strygun v. Ukraine*, app. nos. 29458/04, 29465/04, § 24.

[56] See judgment of the ECtHR from 5 October 2010 in *DMD Group, A.S v. Slovakia* app. no. 19334/03, § 59; judgment from 20 October 2009 in *Gorguiladzé v. Georgia*, app. no. 4313/04, § 68; judgment from 7 September 2017 in *Ezgeta v. Croatia*, app. no. 40562/12, §§ 38–45; judgment from 12 April 2018 in *Chim and Przywieczerski v. Poland*, app. nos. 36661/07, 38433/07, §§ 135–142; judgment in *Guđmundur Andri Ástráđsson v. Iceland*, § 98.

[57] See judgment of the ECtHR from 11 July 2006 in *Gurov v. Moldova*, app. no. 36455/02, § 36.

[58] Judgment of the ECtHR in *Guđmundur Andri Ástráđsson v. Iceland*, § 102.

[59] Judgment of the ECtHR from 8 July 2014 in *Biagoli v. San Marino* app. no. 8162/13, § 75; judgment of the ECtHR in *Guđmundur Andri Ástráđsson v. Iceland*, § 100.

[60] See judgment of the ECtHR (Grand Chamber) from 15 October 2009 in *Micallef v. Malta*, app. no. 17056/06, § 99.

[61] See judgment of the ECtHR from 3 May 2007 in *Bochan v. Ukraine*, app. no. 7577/02, § 71.

[62] See judgment of the ECtHR from 26 May 2009 in *Batsanina v. Russia*, app. no. 3932/02, § 24 judgment of the ECtHR from 9 February in *Kinský v. the Czech Republic*, app. no. 42856/06, §§ 88–92; Jernej Letnar Černič, *op. cit.*, p. 127.

According to the ECtHR, in the last two decades the separation of powers – especially between the executive and the judiciary – gains in importance.[63] The basic vocabulary of liberal democracy evidently requires a new endorsement, especially in times of populist attacks on its foundations. These symbolic injunctions of the Court have, however, little bearing on the persistently high threshold of evidence required to prove that judicial independence, as guaranteed by Art. 6 (1) ECHR, was violated. As long as the executive respects domestic rules regulating its relations with the judiciary – even if in themselves they may lead to violations of judicial independence – the applicant is required to prove the actual undue influence.

Consequently, there are three configurations in which violation of judicial independence may be declared: (1) the relations between the judiciary and the executive or the legislative are shaped in an entirely improper manner, which entails structural judicial dependence on other state powers,[64] (2) disrespect of important domestic rules pertaining to the independence of the judiciary by the executive or the legislative; this configuration pertains actually to the requirement of tribunals 'established by law' rather than independence as such,[65] (3) demonstrating particular inadmissible interventions of the executive in the work of the judiciary.[66]

The extant case law of the ECtHR is therefore far from safeguarding a consistently applied high threshold of demands as to how judicial independence should be construed. The above-mentioned three configurations provide to thick a net to filter infringements of judicial independence disguised as neutral and objective 'reforms'. One can imagine a whole range of situations in which the executive may produce chilling effect for judges (e.g. by launching abusive disciplinary proceedings), even though neither a serious breach of systemic conditions of independence nor particular undue influence may be proven.

V. In Search of New Trends

These shortcomings might become acutely felt in confrontation with attacks on the judiciary which in recent years have been undertaken in countries ruled by right-wing populists, such as Hungary and Poland. There are a number of tried and tested techniques that these governments have adopted in undermining the rule of law, such as: (1) brazenly massive reforms, hailed as restoration of people's control over state institutions (including the judiciary), (2) creation of legislative chaos, in which minor details are omitted by critiques for the sake of defence against more pernicious

[63] Judgment of the ECtHR from 28 May 2002 in *Stafford v. the UK*, app. no. 46295/99, § 78; judgment of the ECtHR (Grand Chamber) from 6 November 2018 in *Ramos Nunes de Carvalho e Sá v. Portugal*, app. nos. 55391/13, 57728/13, 74041/13, § 144; judgment of the ECtHR (Grand Chamber) from 23 June 2016 in *Baka v. Hungary*, app. no. 20216/12, § 165.

[64] See judgment of the ECtHR from 19 April 2017 in *Kulykov et al. v. Ukraine*, app. nos. 5114/09 et al., §§ 135–137; judgment from 30 May 2017 in *Vardanean v. Moldova and Russia*, app. no. 22200/10, §§ 34–47.

[65] See footnotes 53–58 above.

[66] See footnotes 34 and 39 above.

provisions, (3) masking measures that go against the spirit of liberal democracy by disguise of literally understood legality. In Hungary and Poland, the judiciary was effectively curbed with little response from the ECtHR, whose case law is hardly a remedy against massive and sly assaults on judicial independence. Naturally, the very principles of the Convention limit its effectiveness in case of systemic violations. But the extant jurisprudence of the Court makes it often blind to the insidious play with the rule of law that some of European states began a few years ago.

The famous case *Baka*[67] could be theoretically heralded as the Court's victory over anti-liberal populism.[68] One of its most crucial aspects concerned termination of office of the president of the Hungarian Supreme Office, which was replaced by a new court, named *Kúria*. Mr. Baka was effectively prevented from applying for the analogous office in *Kúria* by targeted legislation (masking an individual norm, applicable to him, under the guise of a general one) of constitutional rank.[69] Even though these provisions were formally concordant with the Hungarian Constitution, the ECtHR found that in order to produce legal effects, they need to respect basic standards of the rule of law. In particular, one and the same act cannot produce a material legal effect and exclude the access to a court for an individual concerned by this effect. If such a situation occurs, the ECtHR is ready to consider such an act invalid:

> In the light of the above considerations, the Court is of the view that in the specific circumstances of the present case, it must determine whether access to a court had been excluded under domestic law before, rather than at the time when, the impugned measure concerning the applicant was adopted. To hold otherwise would mean that the impugned measure itself, which constituted the alleged interference with the applicant's ‚right', could at the same time be the legal basis for the exclusion of the applicant's claim from access to a court. This would open the way to abuse, allowing Contracting States to bar access to a court in respect of individual measures concerning their public servants, by simply including those measures in an *ad hoc* statutory provision not subject to judicial review.
>
> Indeed, the Court would emphasise that, in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law. This concept, which is expressly mentioned in the Preamble to the Convention and is inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application (…).[70]

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[67] On the *Baka* case see: I.C. Kamiński, *Europejska Konwencja Praw Człowieka i prawo do niezależnego wymiaru sprawiedliwości*, Europejski Przegląd Sądowy 2016, no. 9, pp. 4–9; M. Balcerzak, *Prawo sędziego do niezawisłości czy prawo człowieka do niezawisłego sądu? Refleksje na tle wyroku Europejskiego Trybunału Praw Człowieka w sprawie Baka p. Węgrom*, [in:] B. Krzan (ed.), *Ubi ius, ibi remedium: księga dedykowana pamięci profesora Jana Kolasy*, Warszawa 2016, pp. 11–24.

[68] See D. Kosař, K. Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, Hague Journal on the Rule of Law 2018, vol. 10, p. 84.

[69] Judgment of the ECtHR in *Baka v. Hungary*, §§ 12–37, 115.

[70] *Ibid.*, §§ 116–117.

Of all the interpretations of the *Baka* judgment, this conclusion may be understood as an attempt to give effectiveness to the principle of the rule of law by applying the related Convention provisions as *leges perfectae*. In other words, the rule of law acts as a source of standards that rank even above the constitution, because they decide between legality and illegality. Evidently, the specificity of the *Baka* case consists in the application of the so-called *Eskelinen* test, in which the Court had a perfect opportunity to refuse recognition of domestic provisions that violated standards of the rule of law. Analogous reasoning could be applied to the premise of 'being established by law' from Art. 6 (1) ECHR: the Court could simply refuse to recognise the status of law if a given provision, although formally legally adopted, violates standards of proper legislation or undermines the rule of law.

Despite this notable innovation of the Court, nowadays it seems rather a one-off opportunity[71] rather than a general trend. Obviously, the ECtHR remarks the growing importance of judicial independence,[72] but when called upon to decide on particular cases, it readily returns to its well-established case law. The 2019 case *Guđmundur Andri Ástráđsson* offers a telling example:

> In principle, a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 § 1 (*DMD Group, A.S*, cited above, § 61). It follows that a violation of this principle, like the principles under the same provision that a tribunal shall be independent and impartial, does not require a separate examination of whether the breach of the principle that a tribunal be established by law rendered a trial unfair. Furthermore, in the light of the requirement that a tribunal shall be established in accordance with national law, the Court is called upon to examine whether the domestic law has been complied with in this respect. The findings by the national courts are therefore subject to European supervision. However, having regard to the general principle that it is for the national courts themselves to interpret in the first place the provisions of domestic law, the Court may not question their interpretation unless there has been a flagrant violation of domestic law (see, *mutatis mutandis*, *Coëme and Others*, cited above, § 98 *in fine*, *Lavents*, cited above, § 114, *DMD Group, A.S*, cited above, § 61).[73]

The ambiguity of this judgment consists in the fact that, on the one hand, it effectively sanctioned a blatant act of infringing judicial independence by the Icelandic judiciary, but on the other hand it reconfirmed the somewhat positivist logic of ECtHR case law. It may be sufficient when the executive or the legislative violate sub-constitutional acts or the constitution, but it would not yield positive results in *Baka*. Simultaneously, the Court coupled this positivist logic with a more value-oriented ornament:

> Finally, the Court recalls that ‚the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law' (*Ramos Nunes de Carvalho E SÁ v Portugal* […]). The same applies to the ‚importance of safeguarding

[71] Cf. D. Kosař, K. Šipulová, *op. cit.*, p. 107.

[72] Judgment of the ECtHR in *Guđmundur Andri Ástráđsson v. Iceland*, § 103.

[73] *Ibid.*, § 100.

the independence of the judiciary' (*Baka v. Hungary* […]). Therefore, on the basis of the above-mentioned principles, and taking account of the object and purpose of the requirement that a tribunal be always established by law, and its close connection to the fundamental principle of the rule of law, the Court must look behind appearances and ascertain whether a breach of the applicable national rules on the appointment of judges created a real risk that the other organs of Government, in particular the executive, exercised undue discretion undermining the integrity of the appointment process to an extent not envisaged by the national rules in force at the material time.[74]

It is difficult to determine what the Court had in mind: 'looking behind appearances' might mean both the need to scrutinise more closely domestic governments in order to prevent undercover attacks on the judiciary and creating an additional requirement to the *Posokhov* configuration (exercising undue discretion). Consequently, there seems to be a significant gap not only between the conservative approach in *Guðmundur Andri Ástráðsson* and the progressivism of the *Baka* judgment, but also within the *Ástráðsson* ruling itself.

Perhaps then it may be surmised that the current case law of the ECtHR pertaining to judicial independence is in the state of ebullition. Currently it seems ravaged by contradictory references: on the one hand, the Court appears to be adamant in its loyalty to the previous model of three classes of infringements of judicial independence, but on the other hand the multiplying references to the rule of law and the significance of independence of the judiciary might point to new trends arising in the midst of somewhat conservative case law. Courts usually get back to basic principles when ossified case law can no longer confront the demands of the present and needs to be reformulated through axiological anchoring. Nonetheless, the current case law is overdetermined and might lead to almost any kind of development.

VI. Conclusions: The Need for Judicial Activism

If the ECtHR adopts an active approach and aims to close the gap in its current case law, it has three main options. The first one consists in upgrading the precise requirements deduced from Art. 6 (1) ECHR. The habitual deference to national arrangements – especially those concerning appointment of judges – should be replaced by including modern standards, like the ones proposed by the Committee of Ministers in Recommendation CM/Rec(2010)12. Independence of council of judiciary, as constituted primarily from judges and by judges, should be strongly endorsed. Even if this might be difficult due to persistent double standards among the Convention states, it could be the only means to tame their spread. Difficult as such upgrade would be for some member states, in which the executive has traditional prerogatives in relation to the judiciary (as in Germany), it would undoubtedly set an inspiring example and a sign of loyalty to CoE values.

Secondly, the concept of the rule of law, now neatly operationalised by the Venice Commission and already tested in *Baka*, should act as a mediating principle which

[74] *Ibid.*, § 103.

allows to open up the positivist clinch in which the three main configurations of violations of independence are entangled. As demonstrated by the *Ástráðsson* case, all the tools are already at hand. The direct use of the concept of the rule of law in order to transform the extant case law would square with the trend to invoke it in recent rulings. The Court could quite easily apply standards of proper legislation to the premise of 'being established by law' (Art. 6 (1) ECHR) and go beyond its positivist logic.

Finally, the Court could back up this jurisprudential turn with its recent interest in 'looking behind appearances' understood as superficial legality. Quite recently the ECtHR revived an almost obsolete Article 18 ECHR in order to transform it into an effective tool of denouncing abuse of limitation clauses by some states.[75] The recent judgment in the *Navalnyy* case[76] demonstrated that the Court finally found a method of combating superficial legality which veils improper motives. The rule of law is there clearly posited as a mediating concept between appearances of legality and the values enshrined in the Convention.[77] Even though Article 18 cannot be easily applied to infringements of judicial independence (principally because Article 6 contains no limitation clause), the evolution in how it is interpreted may support the focus on motives that domestic authorities conceal under formal legality.

The Europe of the coming years will be probably marked by political and legal struggles with anti-liberal populism and defence of the rule of law – as the Parliamentary Assembly itself admitted in its 2017 resolution.[78] Judicial independence has always been the focal part of the rule of law, and for this reason it might constitute a battlefield in which the future shape of European democracy will be fought. The European Court of Human Rights should now be more ready than ever to join this battle and openly endorse a progressive and activist understanding of judicial independence.

SUMMARY

The paper discusses the ECtHR's approach to judicial independence as protected by Art. 6 (1) ECHR. Independence of the judiciary constitutes one of the pivotal elements of the rule of law and, as such, is deeply inscribed into the axiology of the Convention. Nonetheless, the ECtHR's standards in this regard are quite limited. In particular, the Court imposes a lower threshold of protection against undue influence from other state powers than international soft law (including soft law of the Council of Europe). The

[75] See P. Tacik, *Artykuł 18 Europejskiej Konwencji Praw Człowieka: nowe-stare narzędzie obrony demokratycznych standardów*, Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 2018, vol. XVI, 2018, pp. 76–95.

[76] Judgment of the ECtHR from *Navalnyy v. Russia* from 15 November 2018, app. nos. 29580/12, 36847/12, 11252/13.

[77] *Ibid.*, § 175.

[78] Parliamentary Assembly of the CoE, Resolution 2188 (2017) *New threats to the rule of law in Council of Europe member States: selected examples* from 11 October 2017.

paper argues that the ECtHR's jurisprudence is currently in a period of transition, which desirably might lead to taking account of new dangers for the rule of law caused by right-wing populism.

STRESZCZENIE

ZWYCZAJOWA ULEGŁOŚĆ? STRASBURSKIE STANDARDY NIEZALEŻNOŚCI SĄDOWNICTWA A WYZWANIA TERAŹNIEJSZOŚCI

Artykuł omawia podejście ETPC do niezależności sądów, chronionej przez art. 6 ust. 1 EKPC. Niezależność sądownictwa stanowi jeden z kluczowych elementów rządów prawa i jako taka jest wpisana w aksjologię Konwencji. Niemniej jednak standardy ETPC w tym zakresie pozostają dość ograniczone. W szczególności Trybunał przyjmuje niższy próg ochrony przed ingerencjami innych władz państwowych w sądownictwo niż międzynarodowe *soft law* (w tym *soft law* Rady Europy). Artykuł dowodzi, że orzecznictwo ETPC znajduje się aktualnie w okresie przejściowym; może ono dać odpowiedź na nowe zagrożenia rządów prawa wiążące się z prawicowym populizmem.

Słowa kluczowe: rządy prawa, EKPC, ETPC, niezależność sądownictwa

Key words: rule of law, ECHR, ECtHR, judicial independence