

THE ROLE OF EUROPEAN AND NATIONAL COURTS IN UPHOLDING THE RULE OF LAW

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It is my great pleasure to participate in this High-Level Conference and also an immense privilege to be here with you in person in Coimbra. After numerous online video messages, nothing can quite compare to the experience of taking part in a real life conference. I would like to thank the organisers and the moderator of this session, Paulo Pinto de Albuquerque, for bringing us together. I would also like to greet today's distinguished panellists. I very much look forward to our discussions.

We are all aware of the context in which this conference takes place, with recent examples of challenges to the rule of law and judicial independence; what the Secretary General of the Council of Europe calls "democratic backsliding".¹ This is evidenced by litigation before the Court of Justice of the European Union and the Strasbourg Court.

Accordingly, I will define the question to be answered as follows: what role can international courts play in upholding this core principle within the current political climate?

It is actually a very interesting question and I will answer by making four points.

My first point is that the European Court of Human Rights upholds the principle of the rule of law through the various substantive guarantees which the Court has inferred from this notion. These include

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¹ "State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe", Report by the Secretary General of the Council of Europe, 2021.

the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle of control of the executive whenever a public freedom is at stake, the principle of the possibility of a remedy before a court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State.

Since the Convention system is founded on the principle of subsidiarity, these substantive guarantees are to be applied by domestic judges who make up, what I have called our “European community of judges”, who apply Convention principles at the domestic level.

My second point is that the European Court of Human Rights upholds the rule of law through the development of its rich jurisprudence on judicial independence.

The complaints brought before the Strasbourg Court are often based on the right to a fair trial by an ‘independent and impartial tribunal established by law’ under Article 6 § 1 of the Convention, but also on Article 5 (the right to liberty), Article 8 (the right to private life) and Article 10 (freedom of expression). Case by case, judgment by judgment, the Court has built up a substantial arsenal of case-law on crucial aspects of judicial independence: the detention of judges; judicial appointment processes; disciplinary processes; dismissals and demotions.

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

The judiciary is therefore an essential component of democratic societies and a key institution that needs to be protected.

Judges must be independent from other organs of the state; this is crucial in any democracy. As the Court has stated, “the notion of separation of powers between the executive and the judiciary has assumed growing importance in the case-law of the Court”.²

² See *Stafford v. the United Kingdom* [GC], no. 46295/99, § 78, ECHR 2002-IV.

My third point underlines the quality and importance of judicial dialogue between the Strasbourg and Luxembourg Courts on rule of law issues. The Court of Justice of the European Union 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. The jurisprudential core of many of these rulings relies upon Strasbourg case-law and Strasbourg case-law itself relies upon the findings of the Luxembourg Court. The recent case of *Guðmundur Andri Ástráðsson v. Iceland* [GC] is a case in point, and in particular the Grand Chamber's reliance on the principle of irremovability as set out in *Commission v Poland*.

In my view there is a clear symmetry of values between the two systems. This is the case despite the procedural differences between the cases brought to each European Court. Rule of law issues are raised before the Luxembourg Court by way of references for preliminary rulings and infringement proceedings. Before the Strasbourg Court, the individual applicants are the directly affected parties to domestic proceedings. Yet, the two systems are evidently complimentary and mutually reinforcing.

My fourth point focuses on the implementation of judgments of the Court and how this contributes in a very concrete way to upholding the rule of law.

In a State governed by the rule of law, final and binding judgments of courts must be executed without exception. The same applies to judgments of the European Court of Human Rights by which a State is bound under international law.

As regards executing the Court's own rule of law judgments, I would to mention the case of *Oleksandr Volkov v. Ukraine*. Considering the special circumstances identified in the judgment, the Court made specific indications under Article 46 of the European Convention for its implementation regarding both individual and general measures.

In February 2015, the Supreme Court of Ukraine reinstated the applicant Judge to his post. Regarding general measures these were adopted to ensure the structural independence of the judiciary in Ukraine, *inter alia*, by excluding political bodies (the President and the Parliament) from the process of the appointment and dismissal of judges. To this end Constitutional changes were adopted by the

authorities in 2016. However, the Committee of Ministers continues to supervise the execution of this case, adopted by the Court in 2013, and others in the same group, as certain outstanding issues as regards structural independence of the judiciary remain, mostly related to giving effect to constitutional amendments in practice.

This case demonstrates on the one hand the effect that a judgment may have on the individual applicant concerned but also the complexity of implementing rule of law reforms at the domestic level, through notably important constitutional reform. Judgments of the European Court of Human Rights point out deficiencies at the national level, however remedying these deficiencies takes political will as well as financial and other resources.

This brings me to *my conclusion*.

The European Court of Human Rights plays a crucial role in upholding key rule of law principles through its developed and developing jurisprudence. This will be reinforced in the future, as our new case-processing strategy aims at targeting “impact” cases, which often raise rule of law issues.

The principle of subsidiarity means that these principles are then applied at the level of domestic courts, demonstrating the full extent of the reach of Strasbourg case-law.

Yet, we should not rely *solely* on the courts to solve the rule of law challenges we are witnessing. The judiciary cannot strengthen the rule of law alone.³

In my opinion, a true human rights culture cannot be sustained in the long run by the top-down imposition of legal norms that do not resonate in contemporary societies. Human rights must exist in the hearts and minds of peoples and their representatives in communal life. A pervasive rule of law and human rights culture must exist not just within the judiciary, but also in parliaments and with civil society, as well as with citizens.

It is through joint and joined up action that we uphold the rule of law.

Thank you.

³ “State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe”, Report by the Secretary General of the Council of Europe, 2021.