



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

Speaker at European Law Institute (ELI) panel

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Dear President Shetreet,
Fellow panellists,
Esteemed colleagues,
Ladies and gentlemen,

It is a pleasure to take part in this panel on the “Protection of Liberal Democracy and Judicial Independence”.

The European Court of Human Rights is often perceived as being primarily, or even exclusively, concerned with the protection of human rights. Yet, it also plays an important role in protecting the rule of law, a role which is sometimes overlooked. Today, I would like to focus on one critical aspect of that role: protecting domestic judiciaries from attacks on their independence.

The rule of law cannot exist without independent courts. And without the rule of law, there can be no genuine democracy. Domestic judiciaries thus form the first and most vital line of defence against those who seek to undermine democracy and the rule of law.

Given this prominent place that the judiciary occupies in a democratic society, the European Court of Human Rights has been particularly attentive to the protection of the judiciary against measures that can threaten judicial independence and autonomy.

The Court’s approach and commitment to protecting judicial independence and autonomy is best illustrated by the Polish rule-of-law cases, which addressed extensive judicial reforms in Poland designed to assert executive’s influence over the judiciary. These reforms began with grave irregularities in the election of Constitutional Court judges in December 2015 and expanded to include a restructuring of the National Council of the Judiciary – the body responsible for judicial appointments – as well as setting up of new chambers in the Supreme Court.

At the same time, the control of the Minister of Justice over the judiciary was significantly expanded, particularly in disciplinary matters. As a result, the judiciary was exposed to interferences by the executive and legislative powers and thus substantially weakened.

In the Grand Chamber case of *Grzęda v. Poland*¹ the Court examined the premature termination of a judge's mandate as a member of the NCJ, following legislative reforms.

The new legislation provided that judicial members of the NCJ were no longer to be elected by their peers but by the Polish Parliament, and that the terms of office of the NCJ's judicial members elected under previous legislation would continue until the election of its new members.

When the Parliament elected 15 judges as new members of the NCJ in 2018, the applicant's term of office was terminated *ex lege* thus excluding any form of judicial review.

The Court clarified that judicial independence had to be understood in an inclusive manner and applied not only to judges' adjudicating roles but also to other official functions, such as membership in judicial councils. It also reiterated the need to protect independence of judicial councils as bulwarks against political influence over the judiciary.

The Court further held that the members of the judiciary should enjoy protection from arbitrariness on the part of the legislative and executive powers, and that only review by an independent judicial body of a measure such as removal from office could render such protection effective. Consequently, the Court found that the complete lack of judicial review of the applicant's premature termination of his membership of the NCJ was in breach of his right of access to a court.

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

However, judicial independence needs safeguarding from the moment of appointment. Judicial appointments should not be subject to the unrestricted discretion or undue influence of the executive but must be governed by law. The Court addressed this somewhat indirectly, through another fundamental element of the rule of law: the principle of legality. Specifically, it relied on one of the institutional safeguards enshrined in Article 6 of the European Convention on Human Rights, which guarantees that everyone is entitled to a fair hearing by a tribunal "established by law."

In the case of *Guðmundur Andri Ástráðsson v. Iceland*² the Court developed a three-pronged test to determine when this institutional safeguard would be breached. Specifically, the Court considered that it had to examine whether during a judicial appointment (i) there was a manifest breach of domestic law, (ii) the breach concerned a fundamental rule of the appointment procedure, and (iii) the domestic courts effectively reviewed and redressed the breach in a Convention-compliant manner.

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

The Court applied the *Ástráðsson* test and reached the same conclusion in several cases concerning appointment procedures for various chambers of the Polish Supreme Court³, and in a case regarding the appointment of a Constitutional Court judge in Poland.⁴

¹ *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022.

² *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, §§ 243, 244, 246, 248-250, 1 December 2020.

³ *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, and *Żurek v. Poland*, no. 39650/18, 16 June 2022.

⁴ *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.

The case of *Juszczyszyn v. Poland*⁵ involved a judge who was suspended from his judicial duties by the Disciplinary Chamber of the Supreme Court. Applying the *Ástráðsson* criteria, the Court found that the irregularities in the appointment of members of the Disciplinary Chamber were of such gravity that the chamber could not be considered a "tribunal established by law." These irregularities also compromised that court's independence and impartiality.

Another tool the Court used to protect judicial independence in Poland is interim measures. Normally reserved for exceptional situations involving imminent risk to life or physical integrity, the Court nevertheless granted around 24 requests for interim measures in the Polish independence-of-judiciary cases thus recognising that disciplinary proceedings, lifting of immunity, and other measures faced by Polish judges posed an immediate risk of irreparable harm to judicial independence.

The subsequent developments have confirmed that the Court was right to do so and that damage to judicial independence is indeed difficult to repair. In particular, despite sincere efforts by Poland's recently elected Government to execute the Court's judgments and undo the damage caused by previous Government's judicial reforms, progress has been slow and difficult – demonstrating just how hard it is to restore the rule of law once it has been compromised.

However, the most important takeaway from the Polish example is this: even when democracy and the rule of law are undermined, liberal democracies can bounce back from such setbacks. In such circumstances, the role of courts is to maintain conditions for democratic recovery, by preventing democracies from slipping past the point of no return.

The burden on national judges is often immense, but they are not alone. International courts, such as the European Court of Human Rights, serve as additional safeguards. By holding States accountable to their international obligations, international courts protect independence of domestic courts and thereby legitimise and strengthen their efforts to resist political interference and to uphold democracy and the rule of law.

Thank you!

⁵ *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022.