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THE MEANING AND FUNCTION OF JUDICIAL INDEPENDENCE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. INTRODUCTION

Judicial independence is one of the cornerstones of modern constitutionalism. Without an independent judiciary, effective oversight of government action would be impossible, and the protection of fundamental rights and freedoms would likely remain illusory. Importantly, in contemporary Europe, judicial independence can no longer be viewed as solely a matter of domestic law. On the contrary, it is one of the pillars of the transnational European legal order, which is constituted by the standards developed by the Council of Europe and European Union law. These two systems influence each other, as evidenced by numerous references in the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) to one another. These references also concern the interpretation of the notion of judicial independence.¹

¹ See e.g. *A.K. v Krajowa Rada Sądownictwa, and CP and DO v Sąd Najwyższy* [2019] CJEU Joined Cases C-585/18, C-624/18 and C-625/18 at 126-133; *BN, DM, EN v Getin Noble Bank S.A.* [2022] CJEU Case C-132/20 at 116-128; *Wałęsa v Poland* [2023] ECtHR 50849/21 at 171; *Xhoxhaj v Albania* [2021] ECtHR 15227/19 at 298 and 313. On the dialogue between the two European Courts (with regards to the requirement of legality of establishment of courts) see e.g. Cecilia

This article aims to examine the significance of judicial independence under one of the founding documents of the European legal order, that is the European Convention on Human Rights (ECHR, Convention). The analysis focuses on how the ECtHR interprets the concept of ‘judicial independence’, and the role this safeguard plays within the Convention’s broader normative structure. The central thesis advanced here is that the significance of judicial independence cannot be reduced solely to Article 6 of the ECHR. In fact, it serves a dual function. On the one hand, it forms part of the individual’s right to a court. On the other hand, it serves as a value influencing the interpretation of all provisions of the Convention.

The article is divided into two main sections. The first part explores the substance of judicial independence as developed in the ECtHR’s case law. The second addresses the functions of this principle within the framework of the Convention. This section first briefly considers judicial independence as part of a subjective right under Article 6 ECHR, and then examines its broader impact on the interpretation of other Convention rights. The article concludes with a summary of the key findings.

2. THE MEANING OF JUDICIAL INDEPENDENCE UNDER THE ECHR

2.1. THE ESSENCE OF JUDICIAL INDEPENDENCE

In the text of the ECHR, the notion of an ‘independent tribunal’ appears exclusively in Article 6. This provision expresses the right of individuals to an independent tribunal, but it does not define what this independence entails. Such a definition was, however, provided in the recent case law of the ECtHR.

In the Grand Chamber judgment in *Guðmundur Andri Ástráðsson v Iceland*, the Court indicated that ‘judicial independence’ means ‘the necessary personal and institutional independence that is required for impartial decision-making, and it is thus a prerequisite for impartiality’.² According to the Court, it encompasses:

- (i) a state of mind, which denotes a judge’s imperviousness to external pressure as a matter of moral integrity and (ii) a set of institutional and operational arrangements – involving both a procedure by which judges can be appointed in a manner that en-

Rizcallah and Victor Davio, ‘The Requirement That Tribunals Be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust’ (2021) 17 *European Constitutional Law Review* 581.

² *Guðmundur Andri Ástráðsson v Iceland* [2020] ECtHR [GC] 26374/18 at 234.

sure their independence and selection criteria based on merit – which must provide safeguards against undue influence and/or unfettered discretion of the other State powers, both at the initial stage of the appointment of a judge and during the exercise of his or her duties.³

However, this definition does not resolve all uncertainties surrounding the concept of ‘judicial independence’. In particular, the question arises whether this independence pertains exclusively to judges as individuals, or whether it also encompasses courts as institutions. Secondly, doubts also concern the relevance, under the Convention, of understanding independence as a ‘state of mind’ of judges, given the obvious difficulties associated with assessing such a subjective condition. Finally, a crucial issue is the question of whom a judge must be independent from.

2.2. INSTITUTIONAL AND INDIVIDUAL INDEPENDENCE

Judicial independence is often considered to have two dimensions: institutional and individual.⁴ The former pertains to the judiciary as one of the three branches of government and to the courts as institutions entrusted with the administration of justice. The latter relates to individual judges who adjudicate within these courts.

These two dimensions of judicial independence are safeguarded through various measures. The protection of individual independence is ensured primarily by the adequate guarantees of the status of judges, such as irremovability or non-transferability. Institutional independence, on the other hand, may encompass such issues as judicial self-governance, principles of court administration, and the financial autonomy of courts.⁵

In the Court’s case law, breaches of the right to an independent tribunal most frequently result from serious shortcomings in individual independence. The institutional dimension of judicial independence poses a far more challenging issue to address within the framework of individual applications. Issues concerning the relationship between the judiciary and other branches of government are usually more abstract and relate to the principle of separation of powers. And

³ *ibid.*

⁴ See e.g. Shimon Shetreet, ‘The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges’ (2009) 10 *Chicago Journal of International Law* 275, 284–286.

⁵ Shetreet (n 4).

while the Court acknowledges the growing importance it attaches in its jurisprudence to the principle of separation of powers, it also stresses 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’.⁶

Having said that, one can find judgments in which violations of the ECHR were related to the realm of institutional independence. For example, the Court has found it problematic to grant an executive body broad powers to challenge the legality of final court judgments, as such a tool ‘may in practice become a tool of political supervision over court judgments by the executive’.⁷ Moreover, individual and institutional independence are closely intertwined,⁸ and some cases reviewed by the ECtHR are significant for both dimensions of judicial independence. For example, cases concerning the dismissal of court presidents⁹ relate, in the first place, to the individual independence of judges holding these positions. However, case law protecting them from arbitrary removal also limits the executive’s influence on court administration, thereby strengthening institutional independence.¹⁰

2.3. SUBJECTIVE AND OBJECTIVE JUDICIAL INDEPENDENCE

In the aforementioned definition presented in the judgment in *Ástráðsson v Iceland*, the Court identified two components of judicial independence. First, judicial independence involves a proper ‘state of mind’, which pertains to a judge’s resistance to pressure and ability to adjudicate independently. Second, it also includes a legal-institutional component, which concerns the existence of mechanisms protecting judges from undue influence. The former can be termed subjective independence, while the latter refers to objective independence.

⁶ *Kleyn and Others v the Netherlands* [2003] ECtHR [GC] 66394/10, 23115/13, 46621/12, 2679/12, 7215/12, 62560/11, 44311/11, 29826/11, 12868/11, 5691/11 at 193.

⁷ *Wałęsa v Poland* [2023] ECtHR 50849/21 at 231.

⁸ As the Committee of Ministers of the Council of Europe held: ‘The independence of individual judges is safeguarded by the independence of the judiciary as a whole’ – see Committee of Ministers, Recommendation CM/Rec(2010)12 – Judges: independence, efficiency, responsibilities, 17 November 2010, point 4.

⁹ See e.g. *Baka v Hungary* [2016] ECtHR [GC] 20261/12; *Broda and Bojara v Poland* [2021] ECtHR 26691/18, 27367/18.

¹⁰ Cf. Mathieu Leloup, ‘The Concept of Structural Human Rights in the European Convention on Human Rights’ (2020) 20 Human Rights Law Review 480, 490–492.

The objective aspect of judicial independence is obvious and does not require extensive explanations. The subjective aspect of judicial independence is more problematic. It is undoubtedly true that ensuring the actual independence of courts requires not only establishing an appropriate legal framework but also that judges themselves possess the psychological resilience to withstand such pressures.¹¹ The problem, however, is that it is practically impossible for the ECtHR to evaluate, without controversy, whether a specific judge exhibits psychological independence. For this reason, subjective independence has not played a significant role in the Court's case law to date.

However, given that in *Ástráðsson* the Court explicitly included the subjective aspect in the definition of judicial independence, this concept could be further developed in the Court's jurisprudence in the future. It could lead, for example, the ECtHR to scrutinise judicial appointment procedures more closely as appropriate appointment procedures are undoubtedly necessary to select judges who demonstrate adequate moral integrity and resilience to various pressures. Moreover, the concept of substantive independence may also have some significance in cases concerning the disciplinary responsibility of judges. On the one hand, it would strengthen the authorities' obligation to refrain from taking measures against judges that could negatively impact their ability to adjudicate independently. But on the other hand, it may justify measures applied against judges who do not exhibit sufficient subjective independence.

2.4. INTERNAL AND EXTERNAL INDEPENDENCE

As already mentioned, the ECtHR's interpretation of judicial independence entails protecting judges from various forms of pressure. Depending on the source of such pressure, two aspects of judicial independence can be distinguished: external and internal.¹² What is essential is that both of them were explicitly recognised in the case law of the ECtHR.¹³

¹¹ Martin Sunnqvist, 'Impartiality and Independence of Judges: The Development in European Case Law' (2022) 5 Nordic Journal of European Law 67, 71, 93; David Kosař and Samuel Spáč, 'Judicial Independence' in Jeff King and Richard Bellamy (eds), *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press 2025) 870, 882.

¹² See e.g. Committee of Ministers, CM/Rec(2010)12, points 11–25.

¹³ See e.g. Biljana Braithwaite, Catharina Harby and Goran Miletic (eds), *Independence and Impartiality of the Judiciary. An Overview of Relevant Jurisprudence of the European Court of Human Rights* (AIRE Centre 2021) 34–36; Joost Sillen, 'The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights' (2019) 15 European Constitutional Law Review 104.

The external aspect of judicial independence is more evident and directly linked to the principle of the separation of powers, which assumes the separation of the judiciary from the legislative and executive branches. In practice, it is particularly crucial to protect judges from pressures exerted by the executive branch. However, judicial independence also encompasses protection against actions by the legislature.¹⁴ The ECtHR also notes that the concept of independence includes independence from the parties to the proceedings. It could, therefore, be violated if, for example, members of a court were subordinate to one of the parties.¹⁵

Judicial independence, however, cannot be confined solely to protecting judges from external pressures and influences. In its judgment in *Parlov-Tkalčić v Croatia*, the Court stated that

judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court.¹⁶

However, thus far, the ECtHR has issued relatively few judgments addressing the limitations of internal judicial independence, and it has only found these to constitute violations of the Convention in isolated cases.¹⁷

2.5. DE JURE AND DE FACTO JUDICIAL INDEPENDENCE

For the judiciary to be truly independent, it is essential not only to have legal guarantees protecting courts and judges from unlawful pressures (*de jure* independence) but also to ensure that these guarantees are respected in practice (*de facto* independence).¹⁸

Legal mechanisms protecting judges against external and internal pressures may ensure that independence is protected *de jure*. However, for years, legal scholar-

¹⁴ See e.g. *Ovcharenko and Kolos v Ukraine* [2023] ECtHR 27276/15, 33692/15.

¹⁵ See e.g. *Sramek v Austria* [1984] ECtHR 57752/21 at 42.

¹⁶ *Parlov-Tkalčić v Croatia* [2009] ECtHR 24810/06 at 86.

¹⁷ Sillen (n 13) 106–110.

¹⁸ See e.g. Tetiana A Tsuvina and Alina Yu Serhieieva, 'Judicial Independence De Jure and De Facto: Lessons for Ukraine from the Case Law of the ECtHR' [2023] *International Comparative Jurisprudence* 50.

ship has debated and studied the extent to which *de jure* independence translates into *de facto* independence.¹⁹ Undoubtedly, the latter is also influenced by various non-legal factors, such as political culture or the level of corruption among judges.

The ECtHR recognises the need to ensure judicial independence in both law and practice.²⁰ When assessing whether a judicial body meets the requirements of Article 6(1) of the ECHR, the Court considers the existence of legal regulations protecting the independence of its members. However, it also emphasises that ‘the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective’.²¹ For this reason, ‘in determining whether or not there has been a violation of Convention rights, it is often necessary to look beyond the appearances and the language used and concentrate on the realities of the situation’.²² In the context of judicial independence, this means that ‘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’.²³

Respecting *de facto* independence requires state authorities to refrain from interfering in ongoing judicial proceedings or exerting pressure on judges. The ECtHR also stresses that authorities must respect court judgments in practice, even if they disagree with them.²⁴ Failures in this regard may result in a violation of the Convention, regardless of whether a state has adequate *de jure* guarantees of independence. At the same time, a high level of compliance with *de facto* independence may sometimes mitigate the lack of adequate legal mechanisms. For instance, in cases concerning the irremovability of judges, the Court notes that the absence of formal guarantees in law ‘does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present’.²⁵

¹⁹ See e.g. James Melton and Tom Ginsburg, ‘Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence’ (2014) 2 Journal of Law and Courts 187.

²⁰ See also Robert Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary’ (2021) 27 European Law Journal 211, 218–220.

²¹ *Beer and Regan v Germany* [1999] ECtHR [GC] 28934/95 at 57.

²² *Stafford v the United Kingdom* [2002] ECtHR [GC] 46295/99 at 64.

²³ *Agrokompleks v Ukraine* [2011] ECtHR 23465/03 at 136.

²⁴ *ibid.*

²⁵ *Campbell and Fell v the United Kingdom* [1984] ECtHR 7819/77, 7878/77 at 80.

3. TWO FUNCTIONS OF JUDICIAL INDEPENDENCE

3.1. INTRODUCTION

Judicial independence and the principle of the Rule of Law, of which judicial independence is one of the core elements, play various roles under the Convention. According to Robert Spano, the principle of the Rule of Law can operate as an optimisation principle, a rule with fixed content, or in a hybrid dimension that combines these two aspects at the same time.²⁶ Spano argued that this last dimension involves, in particular, judicial independence, which is a source of both fixed rules (e.g. requirement of judges to be appointed lawfully), as well as optimisation directives (necessity to ensure fair trial).²⁷

In my view, judicial independence serves primarily two functions under the ECHR. First, the right to an independent tribunal is a subjective right explicitly protected by Article 6(1) of the ECHR. Second, judicial independence also serves as a value that influences the interpretation of all provisions of the ECHR. In this dimension, its significance extends beyond the scope of Article 6.

3.2. JUDICIAL INDEPENDENCE AS AN ELEMENT OF THE INDIVIDUAL'S RIGHT TO A COURT

The right to an independent court must be interpreted within the broader framework of Article 6 of the ECHR. The scope of this provision is limited to cases concerning civil rights and obligations, and criminal charges. Both terms have an autonomous character and are interpreted quite broadly by the Court; however, certain categories of cases, such as electoral disputes²⁸ and those related to migration,²⁹ fall outside the scope of Article 6. Moreover, even if Article 6 is applicable, it does not necessarily mean that the given case has to be considered from start to finish in the proceedings, satisfying all the requirements stemming from this provision. The Court has indicated that a violation of this provision can be avoided, 'if any structural or procedural shortcomings identified in the proceedings before an administrative authority are remedied in the course of the subsequent control by a judicial body that has full jurisdiction'.³⁰

²⁶ Spano (n 20) 215.

²⁷ *ibid* at 217, 221.

²⁸ See e.g. *Karimov v Azerbaijan* [2014] ECtHR 12535/06 at 54–55.

²⁹ See e.g. *Mamatkulov and Askarov v Turkey* [2005] ECtHR [GC] 46827/99; 46951/99 at 82.

³⁰ *Ramos Nunes De Carvalho E Sá v Portugal* [2016] ECtHR [GC] 55391/13, 57728/13, 74041/13 at 132.

According to the ECtHR's case law, the right to a court comprises several elements. First, it guarantees access to a court, meaning the ability to bring a case before a court for adjudication.³¹ Second, it entails the right to a court that is independent, impartial, and established by law. Third, individuals have the right to proceedings that meet the requirements of fairness, public hearing, and being carried out without undue delay. Finally, the right to a tribunal also includes the right to the enforcement of a final judgment.³² Additional guarantees are provided in the context of criminal proceedings.

The right to an independent tribunal is thus one of several guarantees derived from Article 6(1) of the ECHR. However, similarly to other components of the right to a court, it has an autonomous character in the sense that a violation of judicial independence will result in a breach of Article 6, even if other requirements under the provision are not infringed. Nevertheless, the links between various components of the right to a court under Article 6 ECHR are strong. The relation between three values which concern the proper constitution of courts is particularly interesting in this regard. These are, besides the independence, impartiality and establishment by law.

The essence of judicial impartiality lies in the absence of 'prejudice or bias' towards the parties or the subject matter of the proceedings.³³ According to the well-established case law of the ECtHR, judicial impartiality can be analysed from two perspectives.³⁴ The subjective impartiality test examines whether, in a specific case, the judge 'held any personal prejudice or bias'.³⁵ In contrast, the objective impartiality test evaluates 'whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality'.³⁶ In certain cases, factors indicating both subjective and objective bias may coexist, as the Court emphasises that 'there is no watertight division between subjective and objective impartiality'.³⁷

There are significant connections between independence and impartiality of a court. The ECtHR accurately holds that judicial independence is a prerequisite for impartiality.³⁸ If a judge is not independent, a party may have reasonable doubts about the factors influencing the judgment, particularly concerns that extra-legal

³¹ *Golder v the United Kingdom* [1975] ECtHR 4451/70 at 26–36.

³² *Immobiliare Saffi v Italy* [1999] ECtHR [GC] 22774/93 at 66.

³³ See e.g. *Kyprianou v Cyprus* [2005] ECtHR [GC] 73797/01 at 118.

³⁴ See e.g. *ibid.*

³⁵ *Micallef v Malta* [2009] ECtHR [GC] 17056/06 at 93.

³⁶ *Morice v France* [2015] ECtHR [GC] 29369/10 at 73.

³⁷ *Micallef v Malta* (n 35) at 95.

³⁸ *Guðmundur Andri Ástráðsson v Iceland* (n 2) at 234.

circumstances, such as external pressure or career considerations, could play a role. Given this close relationship between the two values, the Court acknowledges that ‘the concepts of independence and objective impartiality are closely linked and, depending on the circumstances, may require joint examination’.³⁹

The requirement that a case be heard by a tribunal established by law pertains to the legality of the court’s functioning. According to the ECtHR, the primary purpose of this guarantee ‘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’.⁴⁰ However, the right to a tribunal established by law can be violated not only through breaches of legislative acts passed by Parliament, but also through violations of ‘other provisions of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular’.⁴¹

The requirement of being ‘established by law’ is closely connected with the other two institutional guarantees set out in Article 6(1) of the ECHR, as all three serve to protect the rule of law and the separation of powers.⁴² The links between the right to an independent tribunal and the right to a tribunal established by law can be observed, for instance, in how the judicial appointment process affects both guarantees. The difference lies in the focus: from the perspective of the right to a tribunal established by law, the critical question is whether sufficiently serious violations of domestic law occurred in the appointment process. In contrast, assessing a tribunal’s independence involves examining whether the process itself included mechanisms to protect against undue political influence and ensured the selection of judges based on merit-based criteria.

Nevertheless, as already mentioned, each of these requirements has an autonomous character and, as a result, a violation of judicial independence may arise even if there are no grounds to question the impartiality or legality of the establishment of a court. In light of the Court’s case law, the right to an independent tribunal can be violated by reasons that can be grouped into two categories.⁴³

First, such a violation may arise if, due to the improper legal regulation of the tribunal’s position and structure, a court is objectively perceived as not independent. In this context, the Court pays particular attention to factors such as: ‘the manner of

³⁹ *Denisov v Ukraine* [2018] ECtHR [GC] 76639/11.

⁴⁰ *Guðmundur Andri Ástráðsson v Iceland* (n 2).

⁴¹ *ibid* at 212.

⁴² *ibid* at 231–234.

⁴³ Cf. Przemysław Tacik, ‘Habitual deference? Strasbourg standards of judicial independence and challenges of the present’ (2019) 17 *Review of International, European and Comparative Law* 47, 58.

appointment of the body's members, the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.⁴⁴ The ECtHR considers all these factors collectively, meaning that deficiencies in one area do not necessarily preclude the tribunal's independence, as the other factors must also be taken into account.⁴⁵ The crucial question is whether, taking into account all relevant circumstances, the tribunal presents 'appearances of independence'. As Rafael Bustos Gilbert highlighted, 'This criterion operates as a fulcrum on which the three previous criteria are weighed simultaneously according to the circumstances of the case. In particular, a test of independence is applied based on the appearances conveyed to the parties or the public'.⁴⁶

The ECtHR's case law concerning the right to an independent tribunal is highly fact-specific,⁴⁷ and it is challenging to derive clear, precise standards regarding judicial organisation.⁴⁸ Such an approach by the Court may be justified, to some extent, by the principle of subsidiarity, under which the Court should refrain from establishing overly far-reaching standards that, without sufficient justification, would undermine the constitutional traditions of the Member States.⁴⁹

Therefore, despite some evolution in recent case law, the Court still grants states relatively broad discretion when it comes to, for example, designing the method of appointing judges. It holds that 'appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role'.⁵⁰ This suggests that the method of appointment itself holds secondary importance compared to the factors ensuring judicial independence after the appointment. Among these, the guarantee of irremovability appears to be the most prominent.⁵¹ According to the ECtHR's jurisprudence, the irremovability of judges constitutes a fundamental standard that 'must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para 1'.⁵² In contrast,

⁴⁴ *Ramos Nunes De Carvalho E Sá v Portugal* (n 30) at 144.

⁴⁵ *Braithwaite, Harby and Miletić* (n 13) 18.

⁴⁶ Rafael Bustos Gisbert, 'Judicial Independence in European Constitutional Law' (2022) 18 *European Constitutional Law Review* 591, 605.

⁴⁷ *ibid* 606.

⁴⁸ *Tacik* (n 43) 53–58.

⁴⁹ Marcin Szwed, 'Europejski Trybunał Praw Człowieka jako europejski sąd konstytucyjny' (2024) 2 *Przegląd Konstytucyjny* 51, 60–61.

⁵⁰ *Maktouf and Damjanović v Bosnia and Herzegovina* [2013] ECtHR [GC] 2312/08, 34179/08 at 49.

⁵¹ See e.g. Marcin Szwed, 'Problematyka nieusuwalności sędziów w orzecznictwie Europejskiego Trybunału Praw Człowieka' (2021) 3 *Przegląd Konstytucyjny* 143.

⁵² *Morris v the United Kingdom* [2002] ECtHR 38784/97 at 68.

the ECtHR's case law rarely addresses deficiencies in other guarantees of judicial independence, such as non-transferability, immunity, or adequate remuneration.

A violation of Article 6(1) of the ECHR may also occur if the independence of the court and its judges is safeguarded through appropriate legal mechanisms, but in practice, undue pressures on judges or other inappropriate interference in the proceedings occur in the course of a specific case. Such pressure may violate the independence of a tribunal both when it originates from bodies external to the judiciary and when it emanates from within. These may take the form of, for example, direct instructions given by a court's president to judges as to how to adjudicate in a given case, and such instructions are then followed.⁵³ Another form of pressure on courts may arise from public statements by politicians regarding ongoing proceedings.⁵⁴ When assessing whether specific statements have undermined the independence or impartiality of a court, the ECtHR considers primarily their content and form⁵⁵. Impermissible interferences in the proceedings may also take other forms, such as the reassignment of cases to different courts or judges,⁵⁶ or the adoption of laws with retroactive effect aimed at influencing specific judicial proceedings.⁵⁷

3.3. JUDICIAL INDEPENDENCE AS AN INTERPRETATIVE VALUE

The significance of judicial independence cannot, however, be reduced solely to Article 6 of the ECHR. It also constitutes an interpretative value – one that influences the interpretation of all the provisions of the Convention.

The Preamble to the Convention refers to certain values or principles that can be considered as underlying its foundations. Among such values are human rights, fundamental freedoms, democracy, justice, peace, subsidiarity, and the rule of law. Importantly, similar values (individual freedom, political liberty, rule of law, democracy) are also mentioned in the Statute of the Council of Europe. Certainly, these values, in themselves, do not create specific rights or obligations.⁵⁸

⁵³ See e.g. *Khrykin v Russia* [2011] ECtHR 33186/08.

⁵⁴ *Čivinskaitė v Lithuania* [2020] ECtHR 21218/12 at 117.

⁵⁵ *ibid* at 134; *Kinský v the Czech Republic* [2012] ECtHR 42856/06 at 91–99.

⁵⁶ See e.g. *Bochan v Ukraine* [2007] ECtHR 7577/02 at 71–85; *Moiseyev v Russia* [2008] ECtHR 62936/00 at 182–185; *Bahaettin Uzan v Turkey* [2020] ECtHR 30836/07 at 59–68.

⁵⁷ *Maggio and Others v Italy* [2011] ECtHR 46286/09, 52851/08, 53727/08, 54486/08, 56001/08 at 43–50.

⁵⁸ Jan Klabbbers, 'Treaties and Their Preambles' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 182; David Kosař and Katarína Šipulová, 'The Strasbourg Court Meets Abusive

Nevertheless, they still fulfil a very important normative function. The Court has repeatedly emphasised in its case law that the Convention must be interpreted in light of its Preamble.⁵⁹ Such an approach is consistent with the rules of interpretation of international treaties provided in the Vienna Convention on the Law of Treaties.⁶⁰ According to its Article 31(1), ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Article 31(2) clarifies that the preamble of the treaty is one of the elements constituting the important interpretative context of its provisions. Moreover, as noted in the scholarship, preambles can also assist in determining the object and purpose of the treaty.⁶¹

As already mentioned, among such fundamental values that influence the interpretation of the Convention is the rule of law. The interpretative importance of the rule of law has long been noted by legal scholars. According to Steven Greer, the principle of legality and the rule of law is one of the primary constitutional principles of the interpretation of the Convention,⁶² while Robert Spano considered it to be one of ‘several underlying doctrinal strands or principles’ permeating case law of the Court⁶³ or even ‘lodestar guiding the development’ of its case law.⁶⁴ The Court itself, too, has recognised that the rule of law is an inherent part of all its provisions, ‘and the whole Convention draws its inspiration from that principle’.⁶⁵ Therefore, as R. Spano aptly observed, the rule of law ‘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’.⁶⁶

Constitutionalism: *Baka v. Hungary and the Rule of Law*’ (2018) 10 *Hague Journal on the Rule of Law* 83, 101.

⁵⁹ See e.g. *Sadowski v Poland* [2025] ECtHR 56297/21 at 85; *M.L. v Poland* [2023] ECtHR 40119/21 at 167.

⁶⁰ See e.g. Eszter Polgári, ‘The Role of the Vienna Rules in the Interpretation of the ECHR: A Normative Basis or a Source of Inspiration?’ (2021) 14 *Erasmus Law Review* 82; Geir Ulfstein, ‘Interpretation of the ECHR in Light of the Vienna Convention on the Law of Treaties’ (2020) 24 *The International Journal of Human Rights* 917.

⁶¹ Klabbers (n 58) 182–188; Max H Hulme, ‘Preambles in Treaty Interpretation’ (2016) 164 *University of Pennsylvania Law Review* 1281, 1300–1305.

⁶² Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 195–202.

⁶³ Robert 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, 489.

⁶⁴ Spano (n 20) 211–212.

⁶⁵ *M.L. v Poland* (n 59) at 167.

⁶⁶ Spano (n 20) 215.

Given that judicial independence is undoubtedly a fundamental component of the rule of law, it must also be considered as ‘interpretative value’ under the ECHR. The significance of judicial independence in this dimension is best seen in the increasingly dynamic ECtHR case law concerning the protection of judges’ rights.⁶⁷ For instance, the Court developed a case law which extended the application of Article 6 of the Convention to almost every dispute concerning the professional relationship of a judge.⁶⁸ As the Court explains, ‘It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprived them of the guarantees of the Articles of the Convention on matters directly touching upon their individual independence and impartiality’.⁶⁹ Moreover, interference with the independence of individual judges often correlates with violations of their rights, particularly those enshrined in Articles 8 and 10 of the Convention. In theory, in such cases, the ECtHR rules not on whether there has been a breach of judicial independence but instead on whether the specific substantive rights of a judge have been respected. In practice, however, the Court often takes into account the special role of judges and the importance of judicial independence as a foundation upon which the entire Convention rests.⁷⁰ It has held, for example, that restricting judges’ freedom of expression to discourage them from speaking out in defence of the rule of law and judicial independence serves no legitimate purpose.⁷¹ Furthermore, the Court’s case law indicates that a state’s efforts to destroy judicial independence constitute an unacceptable purpose under the ECHR, potentially justifying a finding of a violation of Article 18 of the Convention.⁷² The protection of individual independence of judges could be further strengthened if the Court were to adopt an interpretation of Article 6 § 1 of the ECHR that derives from this provision a subjective right of judges to have their independence respected and protected by public authorities.⁷³

⁶⁷ See e.g. Hildur Hjörvar, ‘Judges as Rightsholders’ in Jon Fridrik Kjølbro, Síoífra O’Leary and Marialena Tsirli (eds), *Liber Amicorum Robert Spano* (Eleven Anthemis 2022).

⁶⁸ See e.g. Mathieu Leloup, ‘Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR’ (2022) 4 *European Convention on Human Rights Law Review* 23.

⁶⁹ *Bilgen v Turkey* [2021] ECtHR 1571/07; *Grzęda v Poland* [2022] ECtHR [GC] 43572/18.

⁷⁰ *Alparslan Altan v Turkey* [2019] ECtHR 12778/17 at 102.

⁷¹ *Tuleya v Poland* [2023] ECtHR 21181/19, 51751/20 at 542–542.

⁷² *Miroslava Todorova v Bulgaria* [2021] ECtHR 40072/13 at 203–214; *Juszczyszyn v Poland* [2022] ECtHR 35599/20 at 317–33. See e.g. Aikaterini Tsampi, ‘Article 18 ECHR as a New Pillar of Judicial Independence and Separation of Powers’ (2023) 7 *Europe des Droits & Libertés/Europe of Rights & Liberties* 369.

⁷³ Linos-Alexander Sicilianos, ‘The Subjective Right of Judges to Independence: Some Reflexions on the Interpretation of Article 6, para 1 of the ECHR’ in Paulo Pinto De Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World* (Springer International Publish-

The principle of judicial independence may also influence the interpretation of the Convention in cases unrelated to the rights of judges. This concerns, in particular, the interpretation of guarantees related to deprivation of liberty set out in Article 5 of the Convention. Paragraph 1 of this provision enumerates the permissible grounds for deprivation of liberty, one of which is ‘the lawful detention of a person after conviction by a competent court’ (Article 5(1)(a)). According to the ECtHR’s case law, a tribunal that is not independent or not properly constituted under the law cannot be considered ‘competent’ within the meaning of this provision, and consequently, it cannot decide on deprivation of liberty under this procedure.⁷⁴ Moreover, according to Article 5(4) of the Convention, persons deprived of liberty based on the decision of a non-judicial body must have access to judicial review of the legality of their detention. According to the ECtHR’s case law, a court considering such a case does not have to be a classical tribunal integrated with the rest of the judiciary, but it must be an impartial and independent body – meeting the same standards as those required by Article 6(1) of the ECHR.⁷⁵

Judicial independence, in its dimension as an interpretative value, may also influence the interpretation of limitation clauses contained in various provisions of the Convention. In this context, the requirement that any interference be ‘in accordance with the law’, also implies ‘that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence’.⁷⁶ The Court’s reference to an ‘independent body’ or ‘judicial or other independent scrutiny’ indicates that access to a court is not always mandatory. Nonetheless, if domestic law provides for the jurisdiction of courts, violations of judicial independence may result in a breach of the requirement of legality. Likewise, the requirement of legality can also be violated in cases where the source of interference with an individual’s freedom or rights is a judgment issued by a court that is unlawfully established and, consequently, also not independent. The Court presented such an interpretation in two recent cases against Poland. In *M.L. v Poland*, the source of unlawful restriction of the applicant’s rights was the judgment of the Constitutional Tribunal in the panel involving an irregularly appointed individual.⁷⁷ In *Wałęsa v Poland*, the interference with the applicant’s

ing 2019); Mathieu Leloup, ‘Who Safeguards the Guardians? A Subjective Right of Judges to Their Independence under Article 6(1) ECHR’ (2021) 17 European Constitutional Law Review 394.

⁷⁴ See e.g. *Ilaşcu and Others v Moldova and Russia* [2004] ECtHR [GC] 48787/99; *Yefimenko v Russia* [2013] ECtHR 152/04 at 101–111.

⁷⁵ See e.g. *J.B. and Others v Malta* [2024] ECtHR 1766/23 at 143.

⁷⁶ *H.F. and Others v France* [2022] ECtHR [GC] 24384/19, 44234/20 at 275.

⁷⁷ *M.L. v Poland* (n 59) at 160–176.

right was not carried out in accordance with the law because its source was the judgment of the Chamber of the Extraordinary Review and Public Affairs of the Supreme Court, which is composed solely of unlawfully appointed judges and, as such, has been questioned both by the ECtHR and the CJEU.⁷⁸

In some cases, the issue of judicial independence may be significant from the perspective of Article 13 of the ECHR, which guarantees a right to an effective remedy. This article does not require that the remedy always involves access to court,⁷⁹ and only in exceptional cases has the ECtHR explicitly indicated that, due to the gravity of the matter, access to a court was necessary to comply with Article 13 of the ECHR.⁸⁰ In many other cases, however, the Court has stated that the body adjudicating the remedy, even if not judicial, must be independent.⁸¹ Thus, in this context as well, providing an individual with a remedy adjudicated by a court that does not meet the independence standard would fail to fulfil the requirements of Article 13 of the ECHR.

An interesting problem in this context is the extent to which judicial independence may influence the interpretation of Article 34 of the ECHR. In particular, a question may arise as to whether the requirement to exhaust domestic remedies also includes those that would be examined by courts that, due to systemic deficiencies, fail to meet the standard of independence. According to the case law of the Court, parties are required to exhaust only those remedies that are effective in the specific circumstances of the case.⁸² It can be reasonably argued that, in assessing the effectiveness of remedies, consideration should also be given to issues related to the state of the rule of law in the country.⁸³ If it is evident that, on the one hand, due to the nature of the case, and on the other hand, due to the lack of independence of the body responsible for examining the matter, filing a remedy has no real prospect of success, requiring the party to do so nonetheless appears excessively formalistic.⁸⁴ However, the Court has not, to date, explicitly adopted such an interpretation.⁸⁵ This reluctance may stem from concern over the

⁷⁸ *Wałęsa v Poland* (n 7) at 290–291.

⁷⁹ *Hirsi Jamaa and Others v Italy* [2012] ECtHR [GC] 27765/09 at 197.

⁸⁰ *Ramirez Sanchez v France* [2006] ECtHR [GC] 59450/00 at 165–166.

⁸¹ *Khan v the United Kingdom* [2000] ECtHR 35394/97; *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [2014] ECtHR [GC] 47848/08 at 149–153.

⁸² *Vučković and Others v Serbia* [2014] ECtHR 17153/11 at 69–77.

⁸³ Alain Zysset and Başak Çalı, ‘Exhausting Domestic Remedies or Exhausting the Rule of Law? Revisiting the Normative Basis of Procedural Subsidiarity in the European Human Rights System’ (2023) 14 *Transnational Legal Theory* 157, 170–171.

⁸⁴ Zysset and Çalı (n 83); Mathieu Leloup, ‘The Question of Non-Independent Apex Courts as Effective Remedies to Be Exhausted’ (2024) 5 *European Convention on Human Rights Law Review* 320.

⁸⁵ Leloup (n 84) 327–330.

potential consequences of such an interpretation. In a situation where systemic problems with judicial independence exist in a given state, the Court may be overwhelmed with applications in cases that domestic courts have not first examined.

4. CONCLUSION

The essence of judicial independence is related to the state in which courts, and individual judges adjudicating within them, may be objectively perceived as acting in accordance with their legal knowledge and their own conscience, free from any pressures.⁸⁶ Judicial independence, understood in this way, is one of the pillars of the human rights system established by the Convention. It serves essentially two functions. First, it is a key element of the right to a court protected under Article 6 of the Convention. Second, as a core element of the rule of law, mentioned in the Preamble to the Convention as one of its founding values, it also constitutes a value that affects the interpretation of all the provisions of the ECHR. Therefore, systemic violations of judicial independence may lead to serious consequences under the Convention. These may involve not only a breach of Article 6, but also of other provisions.

The Court's case law, as analysed in this paper, must be generally assessed positively. It has developed certain standards related to the independence of the judiciary, impartiality, and the legality of its functioning. Moreover, it also extended the protection guaranteed by the Convention to the individual judges whose rights may be violated through various interferences with their independence. What is also important is that the recent case law of the Court, particularly in cases against Poland, shows that the Court has noted and reacted to serious, systemic violations of judicial independence carried out by illiberal, populist authorities.⁸⁷

This does not mean, of course, that the Court's approach to the protection of judicial independence is absolutely perfect and cannot be subject to justified criticism. For example, the Court was criticised in the past for being too deferential to domestic authorities and the national arrangements regarding the organisation of the judiciary.⁸⁸ This criticism is, to some extent, valid, as the Court's case law

⁸⁶ See also Paulo Pinto De Albuquerque and Alexandre Au-Yong Oliveira, 'The Twilight of the Gods: Independence of the Judiciary and the Rule of Law in Europe' in Filipe Marques and Paulo Pinto De Albuquerque (eds), *Rule of Law in Europe* (Springer Nature Switzerland 2024) 24.

⁸⁷ See e.g. Magda Krzyżanowska-Mierzevska, 'Proceduralna reakcja Europejskiego Trybunału Praw Człowieka na kryzys praworządności w Polsce' (2023) 2 Europejski Przegląd Sądowy 16.

⁸⁸ Tacik (n 43).

indeed does not impose stringent standards on the Contracting States regarding, for example, the procedure for judicial appointments. The Court's reaction to wide-scale violations of judicial independence in Turkey was likewise considered by some to be insufficiently effective.⁸⁹ Moreover, the Court's case law remains insufficiently clear or coherent in certain areas. This concern, for example, the interpretation of the *Ástráðsson* test (problem visible in particular in the context of wide debates in Poland over the status of judges irregularly appointed to courts other than the Supreme Court),⁹⁰ the applicability of Article 6 of the Convention to interferences with judicial status carried out *ex lege*,⁹¹ or the minimum threshold required for the applicability of Article 8 to cases concerning measures affecting professional lives of judges.⁹²

There is, therefore, still scope for the development of the Court's case law to strengthen the protection of judicial independence under the Convention. The Court has already communicated several cases in which it will consider whether Article 6 guarantees judges a subjective right to have their independence respected and protected by the State.⁹³ Moreover, some passages in the *Ástráðsson* judgment and subsequent cases,⁹⁴ emphasising the importance of basing the process of judicial appointments on merit, suggest that in the future, the Court could develop clearer standards in this area, exceeding the mere requirement of legality.⁹⁵ As indicated above, the ECtHR could also pay more attention to the independence of courts when assessing the effectiveness of domestic remedies for the purpose of determining the admissibility of the application. It is also possible that the future

⁸⁹ Dilek Kurban, 'Authoritarian Resistance and Judicial Complicity: Turkey and the European Court of Human Rights' (2024) 35 European Journal of International Law 355.

⁹⁰ See e.g. Wojciech Piątek, 'Restoring the Rule of Law in Poland: Towards the Most Appropriate Way to Put an End to the Systemic Violation of Judicial Independence: ECtHR 23 November 2023, No 50849/21, *Wałęsa v Poland*' (2025) 21 European Constitutional Law Review 139, 156–160; Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR' (2023) 15 Hague Journal on the Rule of Law 353.

⁹¹ See e.g. Mathieu Leloup and David Kosař, 'Sometimes Even Easy Rule of Law Cases Make Bad Law: ECtHR (GC) 15 March 2022, No 43572/18, *Grzęda v Poland*' (2022) 18 European Constitutional Law Review 753, 775–778; Mathieu Leloup, 'A right for judges to challenge legislation? Strasbourg's untenable ambiguity', Strasbourg Observers, 16 April 2024, <https://strasbourgobservers.com/2024/04/16/a-right-for-judges-to-challenge-legislation-strasbourgs-untenable-ambiguity/>. See also: concurring opinion of judge Pauliine Koskelo in *Kartal v Türkiye* [2024] ECtHR 54699/14.

⁹² See e.g. joint partly dissenting, partly concurring opinion of judges Krzysztof Wojtyczek and Péter Paczolay in *Juszczyszyn v Poland* (n 72).

⁹³ See e.g. *Biliński v Poland*, 13278/20; *Leszczyńska-Furtak and Others v Poland*, 39471/22; *Synakiewicz and Others v Poland*, 46453/21.

⁹⁴ *Guðmundur Andri Ástráðsson v Iceland* (n 2) at 220–222; *J.B. and Others v Malta* [2024] ECtHR 1766/23 at 151–153; *Catană v the Republic of Moldova* [2023] 43237/13 at 80–85.

⁹⁵ *Rizcallah and Davio* (n 1) 601.

evolution of the Court's case law in the area discussed here could be influenced by the case law of the CJEU. In this regard, it is worth noting, for example, the rule of non-regression in the field of judicial independence, which appeared in some rulings of the Luxembourg court,⁹⁶ but still has not been officially recognised by the ECtHR.⁹⁷

It is worth noting, however, that the gradual increase of the standard of protection of judicial independence in the Court's case law is not without controversy. The evolution of the Court's jurisprudence faced criticism even from some judges of the ECtHR. For instance, the application of Article 6 to disputes concerning the status of judges, as criticised by Judge Krzysztof Wojtyczek, who argues that the extension of this provision to public-law disputes between State organs may, in the long term, undermine the efficiency of human rights protection in Europe.⁹⁸ Similarly, the extensive interpretation of the right to private life in the context of judges was negatively assessed by judge Egidijs Kūris, who argued that in the Court's case law, Article 8 was becoming increasingly interpreted as ∞ (sign of infinity).⁹⁹

Therefore, even though I believe that the protection of judicial independence in the Court's case law could be strengthened, there are certainly some limits for the development of the jurisprudence in this direction. Although the ECtHR is sometimes perceived as the 'European Constitutional Court'¹⁰⁰ and the Court itself has recognised the constitutional character of the Convention,¹⁰¹ the latter is certainly not a sort of pan-European constitution, but a human rights treaty. Therefore, the Court's primary task is to monitor the protection of individual rights, rather than seeking the harmonisation of rules concerning the organisation of the judiciary in Europe. Moreover, the Court cannot adopt arbitrary, unforeseeable interpretations that are completely detached from the text of the Convention to impose new obligations on states in the sphere of judicial organisation. Likewise, it cannot ignore the principle of subsidiarity, which since the entry into force of Protocol 15, has a basis in the Preamble to the Convention.

⁹⁶ *Repubblika v Il-Prim Ministru* [2021] CJEU Case C-896/19 at 64.

⁹⁷ See also Bustos (n 46) 611–612.

⁹⁸ Dissenting opinion of judge Krzysztof Wojtyczek in *Baka v Hungary* (n 9).

⁹⁹ Dissenting opinion of judge Egidijs Kūris in *Erményi v Hungary* [2016] ECtHR 22254/14.

¹⁰⁰ See e.g. Szwed (n 49); Geir Ulfstein, 'Transnational Constitutional Aspects of the European Court of Human Rights' (2021) 10 *Global Constitutionalism* 151; Wojciech Sadurski, 'Quasi-Constitutional Court of Human Rights for Europe? Comments on Geir Ulfstein' (2021) 10 *Global Constitutionalism* 175; Robert Harmsen, 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford University Press 2007).

¹⁰¹ *Loizidou v Turkey* [1995] ECtHR [GC] 15318/89 at 75.

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