VISIT OF THE SUPREME COURT OF BULGARIA

Friday, 6 December 2019

**The Rule of Law and the Independence of the Judiciary**

Robert Spano

1. **Preliminary Remarks**
2. Mr. President, dear fellow judges, it is a great pleasure for me to be invited to visit your beautiful city of Sofia and speak here at the Supreme Court. Along with my friend and fellow judge of the Strasbourg Court, Yonko Grozev, I come here to speak about one of the most pressing and important issues of our time. It is one in which courts like yours all over the continent are heavily engaged in the face of current challenges to the rule of law in Europe. The message of my intervention is this: the primordial principle of the rule of law is an empty vessel without independent, impartial and effective courts embedded within a democratic structure that protects and preserves fundamental rights.
3. I will proceed in two parts: I will first provide a synopsis of the main strands of case-law of the Strasbourg Court in this area as it is important to stress the historical pedigree of the Court’s rule of law jurisprudence which is both rich and long-standing. As your Supreme Court is also an integral part of the institutional framework of the European Union, I will subsequently in my second part attempt to analyse where the jurisprudential trajectories of the Strasbourg and Luxembourg Courts meet and identify some salient issues that merit our attention moving forward.
4. **Rule of Law and the Independence and Impartiality of the Judiciary in Strasbourg**
5. Now to my first part, the rule of law and the independence and impartiality of the judiciary in Strasbourg case-law.
6. In the famous judgment in *Golder v the United Kingdom* of 1975, forty-four years ago, the Court made clear that the rule of law is ‘one of the features of the common spiritual heritage of the member States of the Council of Europe’.[[1]](#footnote-1) As my colleague and friend, Judge Siofra O’Leary has recently stated in a public address, ‘[ever] since Golder ... [the court has] used the rule of law as an interpretative tool for the development of substantive guarantees’ set forth in the Convention.[[2]](#footnote-2) In short, it is unquestionable that the principle of the rule of law forms the cornerstone of the Convention system and has done so for decades.
7. There are multiple manifestations of recourse to the principle of the rule of law in the case-law and in a short intervention I am of course unable to do them justice. Let me thus focus in particular on the interplay between the rule of law and the independence of the judiciary. First, the Court has rendered important judgments related to the requirement that a tribunal be established by law under Article 6 of the Convention. Second, the Court has emphasised the growing importance of the separation of powers in the interpretation of the independence requirement, in particular in cases concerning the dismissal of judges.
8. As to the first strand of case-law, you will recall that Article 6 of the Convention, which inspired Article 47 of the Charter, requires that a tribunal be ‘established by law’. As the Strasbourg Court has held, the object of the term “established by law” in Article 6 § 1 of the Convention 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”.[[3]](#footnote-3) In other words, this expression reflects the principle of the rule of law which is inherent in the system of protection established by the Convention and its Protocols.[[4]](#footnote-4) Importantly, the Court has stated, and I quote, that ’a tribunal that is not established in conformity with the intentions of the legislator will, necessarily, lack the legitimacy required in a democratic society to resolve legal disputes.[[5]](#footnote-5) In short, as stated in the 2015 Grand Chamber judgment in *Morice v France*, “what is at stake is the confidence which the courts in a democratic society must inspire in the public”.[[6]](#footnote-6)
9. Although not final, as it is pending before the Grand Chamber at the request of the respondent Government, allow me to briefly mention the recent Chamber judgment in *Guðmundur Andri Ástráðsson v Iceland* of 12 March this year, where a majority held that the concept of “establishment” in the first sentence of Article 6 § 1 of the Convention encompasses, by its very nature, the process of appointing judges within the domestic judicial system which must, in accordance with the principle of the rule of law, be conducted in compliance with the applicable rules of national law in force at the material time. It furthermore held that it was in the first instance for the national courts to determine whether the other branches of Government had violated national law and if so whether that violation constituted a flagrant breach. So as to safeguard the principle of the irremovability of judges, a principle that I will revert back to in a moment, the concept of a ‘flagrant breach’ was however conceptually limited to only those deliberate or manifest “breaches of applicable national rules in the establishment of a tribunal that are of a fundamental nature, and form an integral part of the establishment and functioning of the judicial system”.[[7]](#footnote-7)
10. Summing up this first strand of the Court’s case-law, four conclusions can be drawn in my view: First, there is an inherent relationship between the rule of law, the independence and impartiality of the judiciary and the requirement that a tribunal be established by law. Second, it may be argued that it is simply anathema to the rule of law that a court’s very foundation, the creation of judicial power, be based itself on an act or acts which flagrantly breach national law, although the scope and content of this element remains to be finally determined in the Grand Chamber, as previously mentioned. Third, once States have adopted a legislative framework for the establishment of tribunals, including the appointment of judges, the rule of law quite clearly mandates that those rules be followed. Interestingly I note at this point that differently from Article 6 of the Convention, Article 47 of Charter makes this point even clearer by stating that the tribunal must ‘previously’ be established by law. When the nomination and selection of judges is in the hands of the executive and/or Parliament, it will first be for the national courts in Council of Europe member States to determine whether national law has been followed, albeit then subject to the final supervision of the Strasbourg Court under the autonomous principles provided for by Article 6 of the Convention. Fourth, although States are in principle free to choose the legislative framework for appointing and dismissing judges on the basis of their legal traditions and constitutional structure, such rules must always conform to the requirements flowing from the primordial principles of the rule of law and judicial independence regulated by Article 6 of the Convention.
11. This brings me then to the second strand of the case-law, the principle of judicial independence and its symbotic relationship with the rule of law and the separation of powers.
12. In the recent Grand Chamber judgments in *Baka v Hungary* of 2016 and *Ramos Nunes de Carvalho v Portugal* of last year, the Court made clear, and I quote, that “the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law”.[[8]](#footnote-8) The same applies according to the Court to the “importance of safeguarding the independence of the judiciary”.[[9]](#footnote-9) In concrete terms this means, as the Court explained in *Agrokomplex v Ukraine* of 2011, that the scope of the ‘State’s obligation to ensure a trial by an “independent and impartial tribunal” under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the State’s respecting the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices.’[[10]](#footnote-10)
13. An example of the practical application of this symbiotic relationship between the rule of law and the independence of the judiciary is the judgment in *Kinsky v the Czech Republic* of 2012. The applicant, Mr Kinsky, instituted several court proceedings in the attempt to gain possession of property which was confiscated after the Second World War. At the same time, various members of the Government and the Parliament assimilated him to a Nazi and declared publicly that they would do everything to prevent him, and others, from being successful in the court proceedings. Eventually, none of the claims brought by the applicant were accepted in the courts. It also transpired that the Minister of Justice had regularly been informed by the regional courts on the development of the proceedings. Before the Strasbourg Court, the applicant alleged, in particular, that he had not had a fair trial and that his property rights had thereby been breached. In finding a violation of Article 6 of the Convention, the Court stated inter alia that ‘what [was] at stake here [was] not actual proof of influence or pressure on judges but the importance of the appearance of impartiality. It [considered] that these activities undoubtedly alerted the judges that their steps in the applicant’s proceedings were being closely monitored. This [was] particularly worrying when considered in connection with some of the statements by politicians about the responsibilities of judges and their mental processes, and their assertions that they would do anything within their power to prevent the success of the applicant in the proceedings’. Furthermore, “the activities of certain politicians referred to by the applicant, be they verbal expressions to the media or other, aimed at creating a negative atmosphere around the legal actions of the applicant or constituting direct attempts to interfere in these proceedings, [were] unacceptable in a system based on the rule of law.”[[11]](#footnote-11)
14. As to the foundational principle of judicial independence, the Court’s case-law on the dismissal of judges is particularly important, especially the Chamber judgment in *Oleksander Volkov v Ukraine* of 2013 and the Grand Chamber judgment in *Baka v Hungary* of 2016. Together, these judgments stand for the proposition that the dismissal of judges, whether it is dealt with under Articles 6, 8 or 10 of the Convention, will be subjected to strict scrutiny by the Court due to the principle of the irremovability of judges, a primordial element constituting the foundations of the independence of the judiciary. First, the Court has, in particular, examined the influence of organs, like judicial councils, in dismissal and disciplinary proceedings, recruitment, transfer and promotion of judges. Second, a judge, who has been dismissed, will in principle have access to court under Article 6 of the Convention. Third, the dismissal of a judge may constitute an interference with Article 8 of the Convention, as further confirmed in the Grand Chamber judgment in *Denisov v Ukraine* of last year. Finally, when a judge is dismissed due to expressive activity that is related to his professional functions, Article 10 will be applicable, thus requiring compelling reasons, demonstrating a pressing social need, for his dismissal, taking account of the principle of the separation of powers and the independence of the judiciary. In the *Baka* case, the applicant, in his role as President of the Supreme Court, had expressed his views and criticisms on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges and the lowering of the retirement age for judges, all of which are questions of public interest
15. **Symmetry in the case-law of the ECtHR and the ECJ**
16. Allow me then to turn to the second part of my intervention, attempting to identify where the trajectories of the Strasbourg Court and Luxembourg courts meet and also where salient issues have yet to be addressed. I hope this is useful as the national judiciary here in Bulgaria must, as an EU and ECHR country, be always be fully aware of the manner in which jurisprudence in Strasbourg and Luxembourg are, respectively, developing.
17. The Court of Justice has in recent years made significant inroads into this area, in particular with its rulings in the *Portuguese Court of Audit case,*[[12]](#footnote-12) the *Irish European Arrest Warrant case*[[13]](#footnote-13) and the *Polish Judicial Reform cases*.[[14]](#footnote-14) The jurisprudential core of these rulings is readily identifiable in Strasbourg case-law. Turning to the substance, let me finally make the following four comments, the first more conceptual, the other three related to practical elements.
18. First, it is of importance in comparing the respective case-laws to appreciate that the Court of Justice proceeds on the basis that in interpreting the two core provisions informing its approach in this area, Article 19 TEU on judicial effectiveness and Article 47 of the Charter, it relies on the framework of values as espoused in Article 2 TEU, namely ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.
19. Now, is this framework of values within the EU different under the European Convention? My answer is emphatically in the negative. When one looks at the Preamble to the Convention, the core of its substantive provisions and its protocols and the case-law of the Strasbourg Court, which I have already referred to, it is clear that there is a symmetry of values between the two systems. This is an important conceptual building-block common to both systems which is important for to bear in mind.
20. Second, and turning to the first of my three remarks at the practical level, the Strasbourg Court’s jurisprudence on the rule of law and the independence of the judiciary has been, in my view, inspired by the foundational principle under the Convention system whereby member States must provide for effective domestic remedies to safeguard peoples’ fundamental rights. This principle is, as a general matter, reflected in Articles 13 and 35 of the Convention and is also a conceptual element of the overarching framework principle of subsidiarity. When one views the Court of Justice’s development of the principle of judicial effectiveness in Article 19 TEU, which is important for all EU national courts to consider, one sees perhaps a convergence of the conceptual starting-points adopted by the two Courts. For my part, it seems self-evident that the principle of subsidiarity is devoid of any meaningful content if the member States do not secure in law and practice the existence of independent, impartial and effective courts so as to safeguard fundamental rights. The same logic, *mutatis mutandis*, seems to inform the Court of Justice’s interpretation of Article 19 TEU on judicial effectiveness which that Court has also explicitly linked to Articles 6 and 13 of the Convention. Thus, as stated at § 35 of its judgment of February 2018, in the *Portuguese Court of Audit Case*, this principle in Article 19 TEU is a general principle of EU Law which is derived from the constitutional traditions common to the member States and which was entrenched by Articles 6 and 13 of the European Convention on Human Rights. In sum, as I have conveyed in a recent speech at our annual meeting with the Luxembourg court there are opportunities for both courts to take cognisance of our respective case-laws in the development of these principles in the future. That will of course benefit national courts within the European Union having also to take account of the minimum guarantees provided for by the Convention.
21. Third, one of the difficult transversal principles that has a bearing on the scope and substance of judicial independence is the principle of the irremovability of judges which I have already referred to. This is particularly salient when there is a justifiable allegation that a judge or a group of judges have been appointed in violation of existing laws or when existing laws grant the executive branch overly wide discretion in the appointment process. In its very recent judgment in *Commission v Poland* of June this year, the Grand Chamber of the Court of Justice stated at § 76 that the principle of the immovability of judges is ‘not wholly absolute, [although] there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality’. This is an important statement of principle. The question then arises whether it constitutes a legitimate and compelling ground, subject to the principle of proportionality, to dismiss a judge if his her or appointment has been made in violation of the existing legal framework or in cases where that framework does not meet the requirements of judicial independence, as was the case in the Polish case. The answer to that question may have a bearing on the scope and application of the requirement that a tribunal be established by law.
22. Fourthly, and finally, in recent cases, the Court of Justice has recognised that flaws in the legal framework related to the independence of the judiciary can constitute a systematic or generalised deficiency in the domestic legal system posing a threat to the rule of law and affecting for example the EU system of mutual recognition. Although the parameters of analysis are somewhat different in Strasbourg, due to our individual application system, the core of our case-law is, again, similar. However, the problem we in Strasbourg are facing in pending cases is one which relates to the probative value of evidence to sustain a finding at such a systematic and generalised level, for example in cases litigated also under Article 18 of the Convention. In other words, where does the burden of proof lie in this field and what is the standard of proof deployed when analysing a generalised claim of a lack of judicial independence? Is an abstract analysis of the legal framework in place sufficient for such a finding or is it necessary to advance more concrete evidence as to the actual interplay between judicial organs and other branches of Government? The answer to that question will probably have to be given in cases now pending before the Strasbourg Court.
23. **Conclusion**
24. Mr. President, fellow judges, allow me then to conclude with these words.
25. The national judiciary comprises the first and most important level of “Strasbourg judges”. The judges at national level are in other words at the forefront of securing the rights and freedoms provided by the Convention. We, the international judges of the Strasbourg Court are your collaborators, the ultimate guardians of the Convention and are entrusted with developing the rights it guarantees so they can be implemented by national judges in live cases that come before them. Together the national judiciary and the international judges must continue to reinforce a symbiotic relationship of mutual trust in line with the correct understanding of the principle of subsidiarity as a tool of shared distribution of labour, so as to give real and immediate effect to Convention rights for the good of peoples all over Europe.
26. However, let me be very clear: the effectiveness, the utility, the very foundations of the Convention system are premised on respect for the rule of law. The rule of law is embedded in the fabric of the system. The rule of law is not to be understood as being limited to a western liberal ideal. It is more than that. It is a moral ideal that transcends borders, traditions and cultures. It also comprises a set of legal standards that provide for a framework of laws that pay due respect for the rational autonomy of human beings. In the enforcement of human rights, the rule of law thus requires the existence of functioning institutions, most importantly national judges being independent, not in name only, but in fact.
27. Thank you for your attention.
1. *Golder v the United Kingdom* (1975), § 3. [↑](#footnote-ref-1)
2. Siofra O’Leary, ‘Europe and the Rule of Law’, European Central Bank, keynote speech, 11. [↑](#footnote-ref-2)
3. *DMD Group, A.S v Slovakia* (2010), § 60. [↑](#footnote-ref-3)
4. See, for example, *Jorgic v. Germany* (2007), § 64. [↑](#footnote-ref-4)
5. *Lavents v. Latvia* (2002) § 114. [↑](#footnote-ref-5)
6. *Morice v France* [GC], 2015, § 78. [↑](#footnote-ref-6)
7. *Guðmundur Andri Ástráðsson v Iceland* (2019), § 98 and 102. [↑](#footnote-ref-7)
8. *Ramos Nunes de Carvalho E SÁ v Portugal* [GC], (2018), § 144. [↑](#footnote-ref-8)
9. *Baka v. Hungary* [GC], (2016), § 165. [↑](#footnote-ref-9)
10. *Agrokompleks v Ukraine* (2011), § 136. [↑](#footnote-ref-10)
11. *Kinsky v the Czech Republic* (2012), §§ 95 and 98. [↑](#footnote-ref-11)
12. *Associacao Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16 (2018). [↑](#footnote-ref-12)
13. *Minister for Justice and Equality v Celmer* (the ‘LM’ case), C-216/18 (2018). [↑](#footnote-ref-13)
14. *Commission v Poland* (order of the Court), C-619/18, (2018), and *Commission v Poland* (judgment), C-619/18 (2019), [↑](#footnote-ref-14)