Are Rights of Judges Becoming Rule of Law Standards in Europe?

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ABSTRACT

Recent examples from the case law of the European Court of Human Rights as well as of the Court of Justice of the European Union show that the situation of judicial independence across Europe is still under stress. In the last 4 years, a rich body of jurisprudence has been developed by the ECtHR around the rights of judges: right to a fair trial, right to privacy, freedom of expression, right to liberty and security. These cases comprise a strong component of rule of law references by the Strasbourg Court. The attacks against judicial independence that have been at the origin of these cases are diverse and there is no unique recipe of how to respond. The article posits that this jurisprudence can become one of the criteria to assess a state’s compliance with the rule of law requirements, although the results still depend too much on the political will of the states.

KEY WORDS:

rule of law, judges, right to a fair trial, freedom of expression, right to private life, European Court of Human Rights, judicial independence
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1. Context

„The mission of the judiciary in a democratic state is to guarantee the very existence of the rule of law.”2 This statement of the European Court of Human Rights in one of the „early” cases involving the rights of judges was at the origin of the idea of this article. While researching how the concept of ‘rule of law’ has been developed in the case law of the European Court of Human Rights (“the Court”, “the Strasbourg Court”), it became obvious that a significant part of the recent rule of law-related cases concern judges or prosecutors as applicants. Therefore, some questions may arise: are judges rights-holders in the original meaning of the Convention? Do the rights of judges – or the lack of these rights – influence the degree of rule of law compliance in a given society? The study of the rights of judges could be important in order to determine the quality of the rule of law in a given society. However, this is not an easy task. The difficulty comes from the fact that most judicial systems are extremely opaque and, except from the quite a few of their members who applied to the Strasbourg Court, it is rather difficult to find out if and how their rights are being respected or not.

This article aims to establish what rights do judges have and in which countries are these rights most challenged, by reference to the European Court of Human Rights case law. The article has three parts: (i) an overview of the European Court of Human Rights case law and its approach regarding the rights of judges as well as their relationship with the rule of law; (ii) a special focus on the situation in Romania from the perspective of the rights of judges and other magistrates; (iii) a conclusion on the present context of the independence of judges and the impact of the new developments on the rights of judges on the rule of law discourse. The article argues that, given the weight of the European Court of Human Rights’s judgments regarding the rights of judges, the respect of these rights, in the growing controversy regarding the decay of judicial independence in certain parts of Europe, could become an important indicator of a country’s compliance with the principle of the rule of law.

It is also interesting that most of these cases come from a certain part of Europe, namely the CEE countries, once the „periphery” of the democratic world. The transformation

1 LL.M, PhD, Professor, Lucian Blaga University of Sibiu. The research for this paper was partly undertaken at the MPIL Heidelberg as a part of the research fellowship granted by the Max Planck Society and partly facilitated by the project PN-III-P4-PCE-2021-0319 Rule of Law at the European Periphery: (Dis)Incentive Structures and Conceptual Shifts, funded by the Romanian Research Funding Agency (UEFISCDI).
2 Harabin v. Slovakia 58688/11 (ECtHR, 20 November 2012), para 133.
suffered by these countries in the last three decades are concerning for the idea of rule of law consolidation: from the liberal democratic enthusiasm in the 1990s-early 2000s, to the major violations of the rule of law principle in the last decade. Therefore, in this context, especially when it comes to interpreting the concept of “periphery”, the fundamental individual rights approach becomes relevant. Therefore, a question is inevitable: are these problems concerning the violations of the rights of judges occurring in a certain type of countries, which overlaps with the primary concept of “periphery”, i.e. marginal, less developed from the liberal constitutionalism point of view (in this case, especially CEE countries, as I shall argue later on)? The article posits that the pattern of the studied cases is a good indicator for this center-periphery designation. That is why, besides the well-known ‘landmark’ cases in the matter, the article uses cases and examples from Romania in order to better illustrate the main argument, although they are neither the most numerous nor the most important in the big picture.

2. From the Right to a Judge to the Rights of Judges Before the ECtHR

Are the individual judges’ rights protected by the Convention, or is only the right to a judge a Convention right? As part of the “judicial power”, judges cannot claim rights violations? There are voices that argue that judges are representatives of the third branch of the government, and in thus capacity they are deprived of the majority of the rights recognised to ‘ordinary citizens’. However, the recent European Court of Human Rights case law seems to indicate the contrary.

Traditionally, the ECtHR judiciary-related case-law was mainly focused on the “judge” as a part of the right to a fair trial guarantees, more specifically on the right to an independent and impartial “tribunal”, established by law, or, briefly said, “the right to a judge”.

In this equation, the “judge” was seen as an institution and not as a person or holder of rights. The lack of independence and/or impartiality of a certain judge was considered a breach of an objective guarantee of the fair trial, expressly set forth by Article 6 (1) of the Convention and the attempts to undermine this independence were not seen as breaches of the rights of the judges themselves.\(^3\)

The issue of the rights of judges seen as holders of rights in relation with their own independence, rather than an institutional guarantee of the right to a fair trial came forward rather recently in the Strasbourg Court’s case law: in the 2010s, in the context of the attacks against the judicial independence in some states parties. As the Court’s intervention depends on the claims of violations of rights ex post facto, it took longer until

\(^3\) Guðmundur Andri Astraðsson v. Iceland 26374/18 (ECtHR, 1 December 2020), Reczkowicz v. Poland 43447/19 (ECtHR, 22 July 2021).
cases from the states where such attacks took place after 2012-2015 to actually be solved.\(^4\) In these judgments, some judges of the Court opposed the view that members of the judiciary, especially those in high-rank positions, should be regarded as holders of the Convention rights when exercising their official function. However, the opposite view prevailed as majority view and the Court gradually built a consistent body of case law on the rights of judges - more specifically and importantly, fair trial-related rights: access to justice, fair hearing, right to an independent and impartial tribunal etc. In recent years, the European guarantee of these rights was extended from judges to other actors of the judicial system, namely prosecutors.

Which are the rights of judges, protected by the Convention, according to this recently developed case law of the European Court? As I pointed out before, they are mainly fair trial-related rights, but not exclusively. The first prominent case was Baka v. Hungary (2016), dealing with Articles 6 and 10 of the Convention, which somehow opened the way to the present case law. However, there were also older cases in which the issue arose: Olujic v. Croatia Harabin v. Slovakia or Oleksandr Volkov v. Ukraine. The most important fair trial-related cases that followed concerned: the right of access to a court (Kövesi v. Romania (2020), Camelia Bogdan v. Romania (2020) ), the right to a fair hearing (Golovin v. Ukraine (2023), Grzeda v. Poland (2022), Żurek v. Poland (2022), Bilgen v. Turkey (2021), Eminağaoğlu v. Turkey (2021)), the right to be judged by a tribunal established by law in a criminal case (Tuleya v. Poland, 2023). There were also other rights of judges that the Court decided were violated alone but mostly in conjunction with the rights guaranteed by Article 6: freedom of expression, alone (Brisc v. Romania) or in combination with the right to a fair trial (Baka v. Hungary, Kövesi v. Romania, Tuleya v. Poland); the right to private life (Oleksandr Volkov v. Ukraine, Denisov v. Ukraine [the right to private life was discussed but not applied], Tuleya v. Poland (2023)); the right to liberty and security (Alparslan Altan v. Turkey (2019), Bas v. Turkey, (2020) ). As it can easily be noticed, most of these cases were decided in the last five years. All of them were treated by the Court with a view to emphasising the importance of protecting the independence of the judiciary.

\(^4\) According to a Press release from 18 February 2021 (ECHR 066 (2021) ), “the Court has decided that all current and future applications concerning complaints about various aspects of the reform of the judicial system in Poland should be given priority (Category I). In accordance with the Court’s prioritisation policy, this level of priority is assigned to urgent cases.”
2.1. Rights of Judges under Article 6 of the Convention

2.1.1. The Applicability of Article 6 and the Right to Access to a Court

The developments of the Court’s arguments in the cases involving judges were considered “revolutionary” in respect of the interpretation of the applicability Article 6. This new approach meant the reinforcement of the procedural protection of judges, via the reinterpretation of the *Eskelinen* test regarding the applicability of the guarantees of Article 6 to litigations involving civil servants.

As it is well-known, the scope of Article 6 is not unlimited. The Convention itself provides that the fair trial guarantees are only applicable in cases on “civil rights and obligations” or in criminal matters, but it was the Court’s task, over the years, to clarify these rather vague notions, which often have different meanings in different legal systems. I will not delve in the successive avatars of the criteria of applicability of Article 6 to civil servants (ante-*Pellegrin* judgment, the *Pellegrin* criterion introduced in 1999 and the “new” *Eskelinen* criterion introduced in 2007), but I will focus on the post-*Eskelinen* developments related to the right of access to a court as an individual right of judges.

The “original” test, established in 2007 in the famous judgment *Eskelinen v. Finland*, imposed two cumulative conditions in order to remove the application of Article 6 to a dispute concerning a civil servant: (1). the civil servant in question was expressly excluded from having access to a court for the particular dispute and (2). the exclusion was justified by objective reasons in the state’s interest. In other words, the Court established a presumption that Article 6 is always applicable and the burden of rebutting this presumption belongs to the state. As it is, this presumption provides a strong protection, because rarely a state can actually prove the fulfilment of the two conditions together.

This presumption reinforced the fair trial guarantees for civil servants. Nevertheless, in cases regarding judges, this protection was not considered strong enough, so the Court, once confronted with leading cases having as applicants judges from countries with rule of law compliance issues, started to reinforce it even more.

The first leading case on the applicability of Article 6 to judges was *Baka v. Hungary* (2016). The case was firstly decided by a Chamber of the Court, which found a violation

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5 For a commentary on the Court’s possible acknowledgement of a „subjective right of a judge to his or her independence under the ECHR”, see 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 394-421.


7 *Eskelinen v. Finland* 63235/00 (ECtHR, 19 April 2007) para 62.
of Article 6(1) and of Article 10 of the Convention. Due to the matter at stake and to the position of the applicant, the Government requested the referral to the Grand Chamber, which was granted by the 5-judges panel. The case concerned the early termination of the applicant's mandate as President of the Supreme Court of Hungary, three and a half years ahead of time, as an effect of the entry into force of a package of laws meant to change the Constitution. The applicant had previously criticised multiple times the new legislation “reforming” the judiciary.

In its judgment, the Grand Chamber assessed the applicability of Article 6 by applying the Eskelinen test and found that the first condition was not fulfilled: “the applicant’s access to a court was impeded by the fact that the impugned measure, namely the premature termination of his mandate as President of the Supreme Court, was included in the transitional provisions of the Organisation and Administration of the Courts Act, entered into force on 1 January 2012. This precluded him from contesting that measure before the Service Tribunal, which he would have been able to do in the event of a dismissal on the basis of the existing legal framework”.

Therefore, the Court concluded that national law did not expressly exclude access to a court for a claim based on the alleged unlawfulness of the termination of the applicant’s mandate and that the first condition of the Vilho Eskelinen test has not been met. As a consequence, Article 6(1) was applicable and was violated with regard to the applicant.

In the more recent cases, the second condition of the Eskelinen test was considered and reinterpreted by the Court. For example, in Bilgen v. Turkey (2021), the Court stated that the right of judges to be protected against arbitrary transfer or appointment falls within the scope of Article 6(1). To do so, the Court applied the Eskelinen test and found that the first criterion was met, as the Turkish Constitution expressly excluded the decisions of the High Council of the Judiciary from any judicial review (not only in the case of the applicant). However, as regards the second criterion, i.e. the justification of the exclusion on objective grounds in the state’s interest, the Court was not satisfied with the Government’s claims. First of all, the Court distinguished this case from other previous cases involving civil servants, in which it considered the criterion fulfilled: those cases involved members of the military or high-ranking civil servants, all being in a very close “relationship of loyalty and trust” with the state or Government power. This is not the case of the members of the judiciary, said the Court. Their role, on the contrary, is, among others, “to provide a check on government wrongdoing and abuse of power”.

In this line of argument, judges are “loyal only to the rule of law and democracy, not to the holders of the state power”. Therefore, it cannot be justified to exclude members of the

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9 Baka v. Hungary (GC) 20261/12 (ECtHR, 23 June 2016) para 115.
10 Bilgen v. Turkey 1571/07 (ECtHR, 9 March 2021) para 79.
11 Ibid.
judiciary from the scope of Article 6(1) on the basis of an alleged “bond of loyalty to the state”. Having said that, the Court concluded that Article 6(1) is applicable to the dispute in question, regarding the right to access to a court. This was the first step towards the reinforcement of the *Eskelinen* test and making it almost impossible to generate an acceptable exclusion of judges from the protection of Article 6. The reasoning in *Eminağaoğlu v. Turkey* (2021) followed the same path of arguments, while also stating that “given the prominent place among State organs that judges and prosecutors hold in a democratic society, together with the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the justice system (...), the Court must pay particular attention to the protection of judges when it is called upon to review disciplinary proceedings against them in the light of the Convention provisions.”

In its earlier case law regarding the applicability of Article 6 to judges, the Court held that “Justice is not an ordinary public service insofar as it constitutes one of the essential expressions of sovereignty. The office of magistrate involves the exercise of prerogatives that are inherent to the sovereignty of the state and was therefore directly related to the exercise of the public power” and therefore the second criterion of the *Eskelinen* test was met. That is why the 2021 cases meant such an important change of approach.

However, it must be noted that not any exclusion of a case from judicial review, in domestic law, can be considered as a breach of the first criterion of *Eskelinen* test and thus a violation of Article 6. If the decision-making body itself can be considered a “tribunal” within the meaning of Article 6(1), then the first criterion will be met – this was the approach of the Court in *Olujic v. Croatia* (2009), *Oleksandr Volkov v. Ukraine* (2013).

The cases concerning Turkey paved the way towards the so-called “Polish” jurisprudence. In the landmark case *Grzeda v. Poland* (2022), the Grand Chamber of the Court already included its considerations in *Bilgen et seq* among the “general principles applicable to the case”. *Grzeda* is also a landmark judgment as regards the expression of the Court’s views on rule of law and judicial independence as an element of

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12 *Eminağaoğlu v. Turkey*, para 76.
14 In a similar vein, see cases *Broda & Bojara v. Poland* 26691/18 27367/18 (ECHR, 29 June 2021), *Gumenyuk v. Ukraine* 11423/19 (ECHR, 22 July 2021), *Loquifer v. Belgium* 54534/14 (ECHR, 20 July 2021). In *Gumenyuk*, for example, the Court reiterated its views on the importance of the rights of the members of the judiciary in a democratic state based on the rule of law: “the Court notes that it has on many occasions emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (...). Given the prominent place that the judiciary occupies among State organs in a democratic society (...), the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.
it, the role of the judiciary and separation of powers. Moreover, the Court extensively quotes the rule of law requirements of various organs and agencies of the Council of Europe - Committee of Ministers, Parliamentary Assembly, Venice Commission, the Consultative Council of European Judges. There are also extensive references to the rule of law clauses of the Treaty on the European Union (Articles 2 and 19(1)) to the Charter of Fundamental Rights. The quotes from the rule of law case law of the CJEU complete the picture: Judgment in Associação Sindical dos Juízes Portugueses\textsuperscript{15}, Judgment in A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)\textsuperscript{16}, Judgment in A.B. and Others (Appointment of judges to the Supreme Court – Actions)\textsuperscript{17}, Judgment in Repubblika\textsuperscript{18} and in Commission v. Poland.\textsuperscript{19} The European Commission and the European Parliament are also quoted in this respect. Thus, the Strasbourg Court provides a mini-compendium of “European rule of law” arguments and “seems to have transformed the right to access to a court into a new weapon in the arsenal for the fight against rule of law backsliding”\textsuperscript{20}.

As the case concerned the premature termination of the mandate of a member of the national Council of the Judiciary, the Court asked for and included in its judgment a comparative law study, which found that “there is no clear consensus in favour or against the possibility of legislative reform leading to a premature termination of office of a member of judicial council. The justification of such reform in a concrete situation and the existence of safeguards preserving the independence of courts and the judiciary, including transitional provisions, are relevant factors.”\textsuperscript{21}

All these show a special preoccupation of the Court to strengthen its arguments in a wider European rule of law context, given the importance of the issue at stake.

Concerning the applicability of Article 6, the Court firstly accepted that, since the Polish Constitution provides, in Article 187(3)\textsuperscript{22}, that a member of the National Council of the Judiciary is elected for a 4-years term of office, this counts as a ‘civil right’ within the meaning of Article 6(1). Thus, the applicant has the right, granted by the Constitution to bring his office to term. Then, the Court went on with the Eskelinen test but made a striking change of approach regarding the first criterion. Namely, it accepted that an implicit exclusion from national law of any remedies counts towards the fulfilment of the first requirement of the test. This is an important change of strategy from the Court,\textsuperscript{23}

\textsuperscript{15} C-64/16, EU:C:2018:117
\textsuperscript{16} C-585/18, C-624/18 and C-625/18, EU:C:2019:982
\textsuperscript{17} C-824/18, EU:C:2021:153
\textsuperscript{18} C-896/19, EU:C:2021:311
\textsuperscript{19} C-791/19, EU:C:2021:596
\textsuperscript{20} Mathieu Leloup, n 12, 25
\textsuperscript{21} Grzędzka v. Poland 3572/18 (ECtHR, 15 March 2022) para. 171.
\textsuperscript{22} For a critique of the initiative of the Court to interpret the Polish Constitution, see Mathieu Leloup, David Kosar, Sometimes Even Easy Rule of Law Cases Make Bad Law. ECtHR (GC) 15 March 2022, No. 43572/18, Grzędzka v Poland, in (2022) 18 European Constitutional Law Review 756.
which had been very strict in requiring only *express* exclusions from the access to justice in national law in order to consider the first criterion as fulfilled. This serious departure from the Court’s established case law could be considered dangerous for future cases, as it will extend the possibility of the states to simply deny access to justice to some categories of civil servants, without any express national rule.\(^{23}\) Yet, even in such a hypothesis, they would have to meet the second criterion of the test, i.e. to prove that the exclusion was made in the state’s interest. In the *Grzeda* case, this criterion was not met because the respondent government could not prove that the removal from office of the applicant was related to his exercise of state power (as the Court ‘relaxed’ the interpretation of this requirement concerning judges, who are not considered in all circumstances as representatives of the state’s power). Moreover, as the Court noticed, the new law which led to the applicant’s removal from office was directed at a limited number of persons and thus could not be considered as being “in the state’s interest”. Therefore, the second criterion was not met and Article 6 was applicable to Mr. *Grzeda’s* case.

A similar approach took the Court in the more recent judgment *Żurek v. Poland* (2022), in a case involving the same situation of premature termination of office of a National Judicial Council member.

The merits of both leading Polish cases – *Grzeda* and *Żurek* - were focused on the impossibility of the government to justify the lack of remedies of the applicants against the measures of removal from office. In both cases, the Court referred to the wider context that generated the restriction of the right of access to a court – “the reforms undertaken by the Polish Government which have resulted in the weakening of judicial independence and adherence to rule-of-law standards”\(^{24}\) and stated that such measures directed against individual judges and against the judicial governance bodies at the same time are not compatible with the rule of law and with the Convention, having impaired “the very essence of the applicant’s right to access to a court” and constituting, therefore, a violation of Article 6(1).

The right to access to a court of judicial actors was analysed from another perspective, in the case *Kövesi v. Romania* (2020). Firstly, this case involved a prosecutor and not a judge, but the approach of the Court was similar as regards the applicability of Article 6. The applicant was at the time of the facts the chief prosecutor of the national prosecutorial anti-corruption directorate (DNA). As a result of an evaluation performed by the minister of justice, which included references to alleged disciplinary offences (which had been, in fact, investigated and dismissed by the SCM in the past) and to her criticisms expressed, on various occasions, about the draft legislation which was

\(^{23}\) Ibid., p. 762.

prepared as a ‘reform’ of the judiciary, the procedure of her removal from office was initiated. This procedure includes the advisory opinion of the Superior Council of Magistracy, who, after examining the report and hearing the applicant, decided not to endorse the minister’s proposal. Following this decision of the SCM, the President of Romania, who was the decision-making authority in the procedure of removal from office of chief prosecutors, refused to sign the decree regarding the dismissal of the applicant. The minister of justice, via the Prime-Minister, challenged the decision of the President at the Constitutional Court, by means of a complaint regarding the existence of a “legal conflict of a constitutional nature” between the authorities. If the Constitutional Court establishes their existence, it is competent to solve such conflicts under Article 146 (f) of the Constitution. The Constitutional Court accepted the existence of the conflict (despite serious problems regarding the interpretation of its ‘constitutional nature’) and decided that the President cannot assess or counter the reasons invoked by the minister of justice in his removal from office proposal and that, therefore, he “is obliged” to issue the decree of removal from office of the applicant. The Constitutional Court went further and stated that the applicant could not challenge this decree before any administrative court. As a consequence, the President issued the decree and the applicant’s term of office was ended. Because, according to the Constitutional Court’s decision, she had no other domestic remedy at hand to challenge the decree, the applicant addressed the European Court of Human Rights, invoking alleged violations of Articles 6(1) and 10 of the Convention.

Regarding the lack of access to a court, the Court examined the complaint from the two angles – applicability and merits – in a similar vein with its previous case law. From the national legislation regulating the appointment of chief-prosecutors, the Court deduced that “there existed a right for the chief prosecutor of the DNA to serve a term of office until his or her judicial mandate came to an end” and that “the applicant’s premature removal from her position had a decisive effect on her personal and professional situation preventing her from continuing to carry out certain duties at the DNA”25, all these constituting the basis for a right, whose ‘civil’ nature was then examined by applying the Eskelinen test. In this case, too, like in Baka previously, the Court found that “the applicant could arguably claim to have had an entitlement under Romanian law to protection against alleged unlawful removal from her position as chief prosecutor of the DNA during her mandate”26. However, the Government did not contest the fact that there was no express exclusion, in the national law, of the applicant from the right to access to a court in order to challenge her dismissal from office. Even the decision of the Constitutional Court stating that Ms. Kövesi had no such right could not be considered such an “express, general exclusion”. Therefore, the Court decided that the first Eskelinen criterion was not met. Although it could stop here the assessment, like in many

25 Kövesi v. Romania 3594/19 (ECtHR, 5 May 2020) para. 115.
26 Ibid, para. 121.
other cases related to judges or prosecutors, the Court went further to examine the fulfillment of the second criterion. This examination led the Court to make some general considerations about the dismissals from office of “senior members of the judiciary”, who are entitled to be “protected against arbitrariness” just like other citizens. Therefore, “the absence of any judicial control of the legality of the decision of removal cannot be in the interest of the State” and the second criterion is not fulfilled. As a consequence, the Court held the Article 6(1) applicable to the case.

The merits of the Kövesi case on Article 6(1) are interesting because the Strasbourg Court is assessing the lack of access to courts through the prism of the Constitutional Court’s decision no. 358/2018. It must be pointed out that this decision was not a classical judicial review decision, but one solving an alleged conflict between authorities regarding the dismissal from office of a chief-prosecutor.\(^\text{27}\) The Constitutional Court specifically stated that the administrative courts could only review the lawfulness of formal requirements of the decree – i.e. its issuing authority, its legal basis, the existence of the removal proposal by the Minister of Justice and the forwarding of this proposal to the CSM for its endorsement, the signature and, if needed, its publication in the Official Journal. Such an avenue, said the Strasbourg Court, is not an effective one, because the administrative court should have the full jurisdiction to examine the formal and material conditions of the decree. Therefore, the right of the applicant to access to a court was limited in such a way to deprive it of its very essence of protecting the applicant against arbitrariness and therefore there was a violation of Article 6(1) of the Convention. In this context, the Court made some remarks on the “growing importance which Council of Europe and European Union instruments attach to procedural fairness in cases involving the removal or dismissal of prosecutors, including the intervention of an authority independent of the executive and the legislature in respect of decisions affecting the appointment and dismissal of prosecutors”\(^\text{28}\).

What can be retained from the Kövesi case is that prosecutors are also protected by the Court’s interpretation of the applicability of Article 6 and that a Constitutional Court decision can be equally “toxic” by depriving an applicant from access to justice.

A few conclusions can be drawn from all these developments detected in the recent case law of the Court on the right of judges and prosecutors to access to a court. Firstly, it is clear that this change of approach – in the sense of reinforcing those rights – was determined by the “rule of law crisis” in Europe. The Court repeatedly referred to the importance of an independent judiciary for a rule of law-based state, it repeatedly


\(^{28}\) Kövesi v. Romania para. 156.
stressed the importance of national judicial councils – not as an obligation of the states to establish them, but, where they have been established, as an obligation to preserve their independence. It stated that laws that are directed against specific individuals holding specific functions within the judiciary are contrary to the rule of law. It included the prosecutors in the sphere of rights holders who need a reinforced protection from unjustified interferences from political authorities.

Secondly, the Court seems to create a new standard of applicability of Article 6 to litigations regarding civil servants from the point of view of the relationship of the said “civil servants” with the state or Government. Those civil servants who do not have a direct “bond of loyalty to the state” seem to be more protected from this perspective.

Thirdly, these cases allowed the Court to reinforce its own test for assessing the applicability of Article 6, while, at the same time, showing its will to engage in the more general rule of law debate.

Fourthly, there is a small drawback in the approach of the Court from Grzędą and Żurek cases, where it accepted that the first Eskellinen criterion can be met even by an implicit exclusion of the access to justice. This is however somehow countered by the reinforcement of the second criterion as regards judges, but not in the case of other civil servants, so the Court will have to bring more light to the matter in the future.

2.1.2. The Right to an Independent Tribunal Established by Law

In the European Court’s case law concerning judges, other breaches of Article 6 were found, but mostly the lack of an independent tribunal established by law.

_Eminağaoğlu v. Turkey_ (2021) was a clear case in this respect. The applicant complained that the High Council of Judges and Prosecutors ( _Hakimler ve Savcılar Yüksek Kurulu_ – “the HSYK”), i.e. the body which imposed disciplinary sanctions against him, was not a “tribunal” within the meaning of Article 6 as it did not meet the conditions of fairness and independece required by this text. The Government stated that indeed, the HSYK was not considered a judicial body in the domestic law, but “an administrative body which, moreover, enjoys a _sui generis_ status: it is a constitutional body exercising its duties in accordance with the principle of the independence of the courts and the guarantees enjoyed by members of judiciary under Article 159 of the Constitution.”29 The Court established that, despite the fact that, according to its established case law, a body can be considered “tribunal” within the meaning of the Convention even if the national law does not qualify it as such, in this case there were no guarantees that would lead to a conclusion contrary to the national law qualification. Moreover, the applicant had no

29 _Eminağaoğlu v. Turkey_ para 98.
chance to appeal against the decision of the HSYK to a “tribunal” established by law, as the Plenary Assembly of the HSYK is the one that examines such appeals and it does not constitute a “tribunal” either. Therefore, the right of the applicant to have his case examined by a court in the sense if Article 6(1) was violated.

Earlier on, in Oleksandr Volkov v. Ukraine (2013), the Court took the same two-steps algorithm in analysing the compliance with the requirement of an independent tribunal established by law. Firstly, it found that the national judicial council (HCJ) could not be considered such a “tribunal” because of its composition and the way of appointment of its members, but also because the procedure did not meet the guarantees of independence: for instance, “the members of the HCJ who carried out the preliminary inquiries in the applicant’s case and submitted requests for his dismissal (…) subsequently took part in the decisions to remove the applicant from office”.\textsuperscript{30} As for the second step - the appeal against the decision of the HAC -, the Court was not persuaded that the administrative Court did perform a review compliant with the requirements of Article 6, \textit{inter alia} because its “inability to formally quash the impugned decisions and the absence of rules as to the further progress of the disciplinary proceedings produces a substantial amount of uncertainty about what the real legal consequences of such judicial declarations are.”\textsuperscript{31} Therefore, the case of the applicant was not examined, in first and second instances, by a tribunal that would meet the requirements of Article 6(1).

\textit{Oleksandr Volkov} was one of the first cases where the Court linked the violations of the rights of judges with the principle of rule of law and its components - legal certainty, independence of the judiciary, clarity of the law. Although the following case law of the Court concerning the link between the principle of the rule of law and the right to an independent and impartial tribunal established by law was not part of the “rights of judges” case law (Xero Flor, Advanced Pharma, Reczkowicz, all cases against Poland), it is clear that the Court attaches a particular importance on this right, especially when it reflects on judges. In these cases, although the applicants were not judges, the violations derived from the same kind of pressures against judges (dismissals and appointments contrary to the rule of law).

\textbf{2.2. The Right to Respect of Private Life}

The Court’s assessment of the right to respect of private life was another important tool to reinforce the status of judges’ rights in the context of them facing dismissals, disciplinary sanctions, removals from magistracy and other measures taken against them.

\textsuperscript{30} Oleksandr Volkov v. Ukraine para 114.
\textsuperscript{31} Ibid para 125.
One of the first cases concerning the judges’ right under Article 8 was *Oleksandr Volkov v. Ukraine* (2013), where the Court interpreted the notion of “private life” as including activities of a professional nature. The applicant was dismissed by the Parliament, from the position of judge, for “breach of oath”, at the proposal of the national judicial council (HCJ). The dismissal was also found in breach of Article 6(1) of the Convention, for lack of independence and impartiality of the decision-making organ. From Article 8’s point of view, the dismissal of the applicant from its position at the supreme court affected “a wide range of his relationships with other persons, including relationships of a professional nature. Likewise, it had an impact on his “inner circle” as the loss of his job must have had tangible consequences for the material well-being of the applicant and his family. Moreover, the reason for the applicant’s dismissal, namely breach of the judicial oath, suggests that his professional reputation was affected.”\(^{32}\) These three points of impact on the applicant’s life led the Court to establish the existence of the interference with the applicant’s right to private life – the first step in the assessment of the existence of a breach of this right. The second step – the justification of the interference – brought the Court to examine whether the national law establishing the interference – namely the law which served as grounds for the removal from office for “breach of oath” – was sufficiently clear and predictable. By taking into account that national law lacked any “guidelines and practice establishing a consistent and restrictive interpretation of the offence of breach of oath”, as well as any “appropriate legal safeguards”, the Court concluded that the relevant provisions lacked clarity and foreseeability and therefore the impugned interference with the applicant’s right to privacy was not lawful, resulting in a violation of Article 8.

However, in *Denisov v. Ukraine* (2018), the Court, after deciding on its own to examine the case on the grounds of Article 8, took a more restrained view and held, as a matter of principle, that, although employment-related disputes are not *per se* excluded from the scope of “private life” within the meaning of Article 8 of the Convention, it will only accept that Article 8 is applicable where these consequences are very serious and affect their private life to a very significant degree. In order to appreciate the seriousness of the consequences, the Court established a set of criteria that was developed in the following cases: the degree of the applicant’s suffering by reference to the way in which this suffering affected the person’s life, the subjective perception of the applicant against the background of objective circumstances of each case, the degree of affecting the applicant’s reputation and his/her relationship with others. In all cases, a causal connection must be established between the suffering and the impugned facts or measures. In the case at hand, the Court did not find any of these aspects of the private life of the applicant as seriously affected by his dismissal from the position of court president and therefore found Article 8 not applicable.

\(^{32}\) Ibid para 166.
A particularly important case regarding Article 8 in relation to judges is *Tuleya v. Poland* (2023). The importance of this case lies in the fact that the Court transforms the analysis on Article 8 in a strong statement on the role of preliminary ruling requests addressed to the Luxembourg Court. Also, this is another example of the extensive interpretation of the Court in the sense of including employment-related disputes into the scope of Article 8: “Article 8 is applicable where the consequences of the impugned measures [employment-related] are very serious and affect [the applicant's] private life to a very significant degree”. In *Tuleya*, at stake was the applicant’s immunity lifting and dismissal by a Disciplinary Chamber whose composition infringed Article 6(1). As regards Article 8, the innovation stems from the connection made by the Court with the preliminary ruling procedure set forth by Article 267 TFEU: “the most relevant question as to the lawfulness of the measure [concerned] arises in so far as its compatibility with EU law is concerned (...)” and from the references to the CJEU case law, especially *Commission v. Poland* of 15 July 2021: “the Court cannot but concur with the CJEU’s conclusion that the interference in the form of a preliminary inquiry into the reference for a preliminary ruling was contrary to Article 267 TFEU. This conclusion is equivalent to the finding that section 114(1) [applicable to the case] was incompatible with Article 267 TFEU (...) It follows that the interference with the applicant's right [based on that article] was not in accordance with the law within the meaning of Article 8 of the Convention”. Thus, the Court extended the meaning of “law” from Article 8(2) to the EU law, while, at the same time, concluding that the measures in question were in breach of the Polish Constitution and did not meet the quality of the law requirement of foreseeability.33 In doing so, the Court stressed again that “in its assessment of the applicant's complaint under Article 8 [it] must have regard to judicial independence, which is a prerequisite of the rule of law (...). It must be particularly attentive to the protection of the members of the judiciary against measures that can threaten their judicial independence and autonomy, given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary.”34 This seems to be the reason why the Court proceeded to the analysis of the quality of law requirements, although, in its own words, the first conclusion on the unlawfulness would have been sufficient to establish a breach of Article 8.

The “twin” cases *Ovcharenko and Kolos v. Ukraine* (2023) and *Golovin v. Ukraine* (2023), are relevant for the Court’s approach towards the applicability of Article 8 in dismissal from office situations. The cases regarded the judges of the Constitutional Court of Ukraine who had been dismissed from office by the Parliament, for the way in which they voted in a particular case. The Court accepted that the dismissal for “breach of oath” affected their private life to a very significant degree in view of the negative financial

33 *Tuleya v. Poland* 51751/20 (ECtHR, 6 July 2023) para 452.
34 Ibid para 451.
and reputational consequences and therefore that an interference with the right to respect of private life occurred. This interference was considered unlawful by the Court on the grounds that it has been taken in the absence of a clear and foreseeable rule: “insufficient clarity of the law on the dismissal of Constitutional Court judges, as well as its application by Parliament and the courts without detailed legal reasoning on, in particular, the constituent elements of “breach of oath” under the applicable law, is difficult to reconcile with the very goal pursued by sanctioning breaches of oath – maintaining confidence in the rule of law.” The sensitive matter that determined the measure against the applicants – which was also a controversial rule of law issue, on which the Venice Commission and the Parliamentary Assembly of the Council of Europe expressed concerns was also an important contextual point which led the Court decide the breach of Article 8.

An interesting Article 8 case resulted from the application of the vetting legislation in Albania was Xhoxhaj v. Albania (2021). The applicant was dismissed from her office as a Constitutional Court judge with a lifetime ban to reenter the judicial profession on two grounds, based on the Vetting Act 2016, a law adopted in order to eradicate the high degree of corruption that affected the Albanian judicial system. According to the Act, all judges who could not justify a proportion of their assets according to the officially declared income were to be dismissed from office. The applicant complained, inter alia, that her dismissal was in breach of Article 8 of the Convention because it affected her family life and relationships with others and because it was disproportionate with the reasons invoked by the Vetting Committee (inability to justify a large amount of her and her partner’s income and undermining the trust in the judicial system for not recusing herself from a constitutional case).

The Court assessed the applicability of Article 8 from a double angle: the reason-based approach and the consequence-based approach. The first one could not justify, in the Court’s view, the applicability of Article 8, because the applicant was not dismissed for reasons pertaining to her private life, but to her position as a judge. The consequences of her dismissal, however, affected her private life in a serious manner, which led the Court to the conclusion that there was an interference with the applicant’s private life and that Article 8 was indeed applicable. The examination of the merits of the case was more complex. The Court found that the interference was provided by law and went on to assess whether the interference pursued a legitimate aim according to Article 8(2). In this assessment, the rule of law served as a shield not in favour, but against the applicant, because the legislation on vetting judges for corruption and failure to justify large wealth was aimed at guaranteeing “the proper functioning of the rule of law, the true independence of the justice system, as well as the restoration of public trust in the

institutions of [that] system”. The Venice Commission supported that view on the Vetting Act and, based on these arguments, the Court found that a legitimate aim existed. The last test was the one of the necessity in a democratic society. The Court accepted the existence of a “pressing social need” of vetting all members of the judiciary in order to clean the system of the “scourge” of corruption. While not going into the details of the national authorities’ reasoning of the decisions concerning the applicant's failure to declare parts of her wealth and to justify large amounts of her assets, the Court stated that it did not find anything arbitrary or manifestly unreasonable in the domestic decisions and that the applicant's dismissal from her post as a Constitutional Court judge was proportionate with the legitimate aim pursued. Therefore, there was no violation of Article 8.

These examples from the case law on Article 8 concerning judges show that the Court proves more cautious in applying the private life-professional life test especially in sensitive cases like Xhoxhaj. Extensive corruption and the pressing social need to have a corruption-free judicial system - a requirement of the rule of law - may justify, in the view of the Court, drastic vetting legislation leading to dismissals and lifetime bans from the judicial profession. The rule of law was also invoked in cases where judges were dismissed for expressing their opinions or for political reasons, but for finding a violation of Article 8 of the Convention.

2.3. Right to Liberty and Security

A special type of cases are the ones in which the applicant judges have been subjected to unlawful detention. So far, the Court dealt with a very limited number of such cases, coming from a single jurisdiction and originated in a very particular political context.

In Alparslar Altan v. Turkey (2019), the applicant, a judge at the Constitutional Court, was arrested in the aftermath of the attempted coup of July 2016 on the accusation of attempted overthrow of the constitutional order. He denied all charges and maintained that his arrest was due to the dissenting opinions he expressed to the decisions of the Constitutional Court. The applicant also claimed that the authorities could not bring any plausible accusation against him at the time of his arrest and therefore Article 5(1) of the Convention had been breached.

The Court used its assessment of facts to stress the importance of the independence of the judiciary: “Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, [the Court has held that it] must be particularly attentive to the protection of members of the judiciary

36 Xhoxhaj v. Albania 15227/19 (ECtHR, 9 February 2021) para 392.
when reviewing the manner in which a detention order was implemented from the standpoint of the Convention." (para 102). The Court also found that all the evidence that was presented in order to justify the arrest of the applicant was gathered many days after the moment he was deprived of his liberty and concluded that the government could not provide sufficient plausible reasons for the measure, violating thus Article 5(1). Furthermore, “these considerations present a particular importance in this case, which is about the arrest of a judge sitting in a high court, namely the Constitutional Court.” 37

2.4. Freedom of Expression

The Strasbourg Court established more than a decade ago that Article 10 can be applicable to members of the judiciary and even created a standard in this respect: “Where the Court has found that the measures complained of were exclusively or principally the result of the exercise by an applicant of his or her freedom of expression, it has taken the view that there was an interference with the right under Article 10 of the Convention 38. In cases where it has, by contrast, considered that the measures were mainly related to the applicant's capacity to perform his/her duties, it found that there had been no interference under Article 10”. 39 In order to apply this criterion, the Court looks at the reasons invoked by the authorities to justify the measures taken against the applicants, but, in general, it is the Government’s task to prove that those measures were taken for other reasons than the exercise of the applicant’s freedom of expression.

Nevertheless, there is still no consensus in the scholarship and among the ECtHR judges themselves regarding the existence of freedom of expression as an individual right of judges and prosecutors. Freedom of expression is an essential pillar of democracy because it ensures the “critical eye” of the society on the actions of the government. Seen from this angle, freedom of expression might appear as more specific to the media and to civil society and less specific to other actors, including civil servants, members of Parliament or members of the judiciary, who are seen as “public officials” able to express themselves only in this capacity and being excluded, as such, from the benefit of the freedom of speech. This may seem logical in a “normal” liberal democracy. In countries with democratic backsliding, however, new actors appeared among critics of the government, especially when it comes to so-called “reforms” of the judiciary which are

37 Alparslan Altan v. Turkey 12778/17 (ECtHR, 16 April 2019) para 148. Baş v. Turkey 66448/17 (ECtHR, 3 March 2020) was a similar case where the Court took the same approach.
38 Kayasu v. Turkey 76292/01 (ECtHR, 13 November 2008), Kudeshkina v. Russia 29492/05 (ECtHR, 26 February 2009), Baka v. Hungary (2016). In Kayasu v. Turkey, for example, the applicant's disciplinary sanctions had been based both on the actual texts drafted by the applicant – some of them in professional capacity as a prosecutor, such as a decision to open a criminal investigation against a general - as well as on the passing of these texts onto the media, both of which were considered to have been connected to the applicant's right to freedom of expression, which included the freedom to communicate opinions and information.
39 Tuleya v. Poland para 516. These cases were: Harabin v. Slovakia (2012), Miroslava Todorova v. Bulgaria 40072/13 (ECtHR, 19 October 2021).
attacks against the judicial independence in disguise. Among these actors are judges and prosecutors, who are traditionally the most “reserved” officials to express any opinion in public. By nature of their profession, judges and prosecutors are extremely cautious in making any public statements, in order not to interfere with their judicial activity.

The situation somehow changes in countries where were adopted legislative “reforms” and other measures directed to undermine the independence of the judiciary and to obstruct the functioning of the judicial system: Hungary, Poland, Romania, Turkey. Members of the judicial professions came forward and started to publicly criticise these attacks. They did that in various forms: silent protests, press articles, academic articles. They did this individually or via professional organizations. They sometimes combined this expression of views with other legal means of defending their independence – including filing preliminary ruling requests to the European Court of Justice.

What did judges and prosecutors criticise, more particularly? In the cases which came before the Strasbourg Court, these objects of criticism were: legislative changes which introduced tools directed to diminish the independence of justice or the anti-corruption measures; legislative changes directed to open the possibility to apply disciplinary sanctions against judges on other reasons than professional or personal misconduct; legislative changes aimed at disguising individual repression against high-ranking judicial officials; disciplinary measures taken against judges because they expressed such opinions in public; other pressures against individual judges meant to undermine their independence. These pressures could be external – made directly or indirectly by the government or political actors or internal – made directly or indirectly by judicial superiors, members of national judicial councils who are close to political milieus (directly or by proxy) or by disciplinary bodies which are not independent.

What were the consequences of these actions of judges and prosecutors? Many of these actions are clearly under the protection of the freedom of speech. Nevertheless, most of these actions led to disciplinary investigations and other pressures against their authors, meant, using the language of the Court, to create also a “chilling effect” vis-a-vis other potential critical voices. That is why, the freedom of expression of judges and prosecutors, although not so obvious for some, like in the case of ordinary citizens, it is all the more important in the economy of the democratic game. In backsliding democracies, judges are not only “mouthpieces of the law”, they can also be contributors to the public debate. The fact that they chose to speak outside their representative organs (which, many times, due to high-level political manipulations, become not so

40 For details on the doctrine of the “chilling effect” applicable also to judges, see Mohor Fajdiga, Saša Zagorc, ‘Freedom or Feardom of Expression of Judges? Exploring the ‘Chilling Effect’ on Judicial Speech” (2023) 19 European Constitutional Law Review 249-270.
representative in reality can contribute to the increase of the trust in the judicial system.

Why should freedom of expression of judges and prosecutors should be recognized as such? In its established case law, the ECtHR made it clear that matters of public interest are always protected by freedom of speech, even when they collide with other rights such as the right to privacy. The independence of the judiciary is a matter of public interest and moreover, it is a fundamental value of a democratic state based on the rule of law principle. That is why speaking about independence of the judiciary and especially about the attacks against it – individual or collective – should be protected by Article 10 of the Convention. Since the Strasbourg Court stressed, in *Bilgen v. Turkey*, that judges must be “loyal only to the rule of law and democracy, not to the holders of the state power”, all the more the conclusion must be that their opinions should be included in the sphere of Article 10: public debate is essential for the functioning of a democratic society. One must not oversee also that in many cases when legislative changes threaten the independence of the judiciary or the functioning of the judicial system (including the prosecutorial system), only judges or prosecutors themselves can express valid opinions from the inside of the system about these dangers.

The first leading case regarding freedom of expression of judges was *Baka v. Hungary* and the judgment was characterised as “a natural evolution of the Strasbourg Court’s previous case law”. Both the Chamber and the Grand Chamber of the Court found that the early termination of the applicant’s mandate as a President of the Supreme Court amounted to a violation of Article 10 of the Convention, because the laws modifying the Constitution were amended in order to produce this effect, after the applicant had expressed serious criticisms against the legislation reforming the judiciary. The Court differentiated the case from the earlier *Harabin v. Slovakia* (2012), where it did not find an interference with freedom of expression: in *Harabin*, the disciplinary procedures against the applicant originated in his professional behaviour and not in his expressed opinions. In *Baka*, on the contrary, the Court found a causal link between the applicant’s exercise of his freedom of expression and the termination of his mandate and therefore, firstly, that Article 10 was applicable to the case. As to the justification of the interference with the freedom of expression, the Court was extremely harsh in affirming that „a State Party cannot legitimately invoke the independence of the judiciary

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41 For details regarding the manipulation of elections to the most recently elected Romanian Superior Council of Magistracy, see Andrea Annamaria Chis, ‘Folosirea (in)adevărată a puterii în sistemul judiciar din România (2017-2023)’ (2023) XX (3) Revista de Științe politice și relații internaționale.
44 *Harabin v. Slovakia* para 151.
in order to justify a measure such as the premature termination of the mandate of a court
president for reasons that had not been established by law and which did not relate to
any grounds of professional incompetence or misconduct.” Such a measure, in the
Court’s view, was a consequence of the previous exercise of the right to freedom of
expression by the applicant, who was the highest office holder in the judiciary, which
means that it did not pursue a “legitimate aim” according to Article 10(2). Like in other
leading cases, the Grand Chamber did not settle for declaring the violation of Article 10
only based on the lack of a legitimate aim. It went further and examined also the
“necessity in a democratic society” of the interference. This gave the Court the
opportunity to bring together the general principles from its case law, related to the
freedom of expression of judges and to remind both the obligation of a certain restraint of
public officials serving in the judiciary and the toxic “chilling effect” that repressive
measures taken against them on the basis of their opinions could have on the other
members of the judiciary wishing to participate in the public debate of matters of public
interest. Therefore, the Grand Chamber concluded that these measures were not
necessary in a democratic society and this, too, amounted to a violation of Article 10.

In Eminağaoğlu v. Turkey, the applicant – a public prosecutor – was subjected to a
disciplinary penalty of forced relocation due to the opinions he expressed on the
functioning of the judicial system and the rule of law. In analysing his claim that his
freedom of expression had been breached, the Court firstly admitted that “his role and
duties included expressing his views on the legislative reforms which were likely to have
an impact on the courts and on judicial independence”.

Then, after examining the sets
of opinions expressed by the applicant, that led to his disciplinary sanction, the Court
admitted that only a part of these were protected by Article 10 in respect of his position
as a member of the judiciary. However, in light of the fact that „the decision-making
process followed in the present case was highly defective and did not afford the
safeguards that were indispensable to the applicant’s status as a judicial officer and as
the chair of an association of judges and prosecutors”, the Court found that Article 10
was violated because the measures taken against the applicant were not accompanied
by effective and adequate safeguards against abuse.

Therefore, the Court is prepared to
accept that not all types of expression or not all opinions are covered by the protection of
Article 10, but in any case, the lack of procedural safeguards against arbitrariness can
lead to a breach of that text.

In the more recent judgment Tuleya v. Poland (2023), the Court had no difficulty in
finding that Article 10 was applicable: there was an obvious link between the disciplinary
inquiries against the applicant – a prominent judge - and his suspension from office and

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46 Eminağaoğlu v. Turkey para 135.
47 Ibid para 152.
his harsh critical opinions against the legislative reforms related to the judicial system in Poland, expressed on TV and in various public meetings.

As for the merits of the case – i.e. the justification of the measures – the Court firstly found that they did not meet the criterion of being prescribed by law, because the law that allowed the disciplinary proceedings, at its turn, did not meet the criteria of clarity and foreseeability. Thus, the said law did not offer sufficient safeguards against arbitrary application. As in many other cases related to members of the judiciary, the Court did not stop its assessment here and went further with the analysis of the compliance with the conditions set forth by the Convention for limiting a right. Although the finding that the measure was not prescribed by law would have exempted the Court for doing so, she examined the measure under the ‘legitimate aim’ condition prescribed by Article 10(2). This analysis allowed the Court to, once again, refer to the rule of law. Firstly, the Court stated that the applicant is one of the “most emblematic representatives of the judicial community in Poland who has steadily defended the rule of law and independence of the judiciary”\(^48\). The measures taken against the applicant for taking such a critical position against the legislative changes were deemed to have a “chilling effect” – i.e. to discourage the applicant and other judges to take similar positions in defence of the rule of law. Therefore, this could not be invoked as a legitimate aim by the Government and the measures failed to meet this criterion, too. In light of these circumstances, the Court decided that there had been a violation of the right to freedom of expression of the applicant.

A striking case concerning a prosecutor was Brisc v. Romania (2019). Surprisingly, the applicability of Article 10 and hence the existence of an interference were not in dispute, so the Court assessed directly the justification of the interference. The latter consisted in disciplinary actions and penalties, including the dismissal from office, of a chief-prosecutor, for issuing a press-release regarding a case of corruption investigated by his office. This time, the Court accepted that the measures taken against the applicant were “prescribed by law” and sought a “legitimate aim” within the meaning of Article 10(2) – i.e. the proper administration of justice. However, the Court found that the way in which the domestic courts applied the standards of limiting the applicant’s right to impart information were “not compatible with the principles embodied in Article 10” and that the domestic authorities could not prove in a relevant and sufficient manner that the measures were “necessary in a democratic society”\(^49\). A violation of Article 10 has thus been found.

Although the Government did not invoke it, the dissenting opinion in Brisc raised the question of the applicability of Article 10 to the “right to impart information” of

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\(^{48}\) Tuleya v. Poland para 544.

\(^{49}\) For the detailed arguments, see, in particular, paras 112, 115 and 121 of the judgment.
magistrates. In fact, the applicant was reprimanded for issuing a press release on a pending investigation, in his capacity as “press officer” of the prosecutor’s office. The dissenting judge Egidius Kuris argued that “the duties of public officials are not the subject of Article 10” and that the case should have been requalified and recommunicated by the Court as an Article 8 case. However, it should be pointed out that the main duties of the applicant were the ones of a prosecutor. Issuing a press release was not one of his regular duties as a “public official”, but a duty related to the right to inform the public, exercised in relation with the press. Thus, this “duty” can also be considered a “right” from the point of view of the content of the information transmitted. The fact that he was investigated and punished for this content is not a mere “duty-related” measure, even if he was not acting in a private capacity. It is a very fine line here between public duties and individual rights, but the Court preferred to treat this from the point of view of Article 10 for more than one reason: to raise an alarm sign on possible pressures against prosecutors; to accelerate the solving of the case, which was pending since 2010. In doing so, it departed, to a certain extent, from its existing case law, but for a justified reason: the applicant was punished for a choice he made - the choice of wording the press release in a certain way, and thus to impart a chosen information with the press and the public. Should the press release not contain certain words, the applicant would not have been sanctioned. That is why I believe that the approach of the majority of the Court was correct.

Another Romanian case in which the issue of the freedom of expression of prosecutors was raised is Kövesi v. Romania (2020). As explained above, this is a high-profile case because it entailed the dismissal of a chief prosecutor, which brings the context is closer to the Baka and Tuleya cases than to Brisc. The applicant was dismissed from her office as chief prosecutor of the National Anticorruption Directorate (DNA) for expressing critical views on the legislative reforms of the judiciary initiated by the Ministry of Justice. In assessing the claim on Article 10, the Court found that “the majority of the reasons put forward by the Minister in the Report for the applicant’s dismissal referred to opinions she had expressed in her professional capacity on various occasions” and that “the applicant’s public statements in connection with the legislative reforms proposed by the Government and the criminal investigations connected to these reforms have been listed as specific reasons for the applicant’s dismissal and have been extensively quoted and commented on twelve pages of the Report”. Therefore, there was an obvious link between the applicant’s exercise of her freedom of expression and the termination of her mandate, which entail the burden of the Government to prove that this measure was justified under Article 10. The Court focused on the “legitimate aim” rather than on the lawfulness of the measure and established that the Government itself did not provide any of such justification for the measure. Therefore, this condition was not fulfilled. Nevertheless, the Court chose to go further and assess, even in the absence of a legitimate aim, the necessity in a democratic society of the measure. The Court especially emphasised the important role of the applicant’s position but, beyond that, it noticed that
the critical remarks made by the applicant regarding the legislative “reforms” were all a matter of public interest - issues related to the functioning and reform of the judicial system and the prosecutor’s competence to investigate corruption offences - and therefore “clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for her freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent state.” In this context, the premature termination of the applicant’s mandate appeared as a particularly severe sanction and could not be reconciled “with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the independence of prosecutors”. That is why the Court concluded that, even if there was a legitimate aim, the measure in question was not necessary in a democratic society and Article 10 was, therefore, violated.

In Panioglu v. Romania (2022), however, although the Court found a certain “chilling effect” determined by the measures taken against the applicant, no violation of Article 10 was decided. This was caused by the manner in which the applicant decided to express her opinions and also by the fact that no actual disciplinary sanction was applied in the case.

The contents of the shared information that led to the reprimand of the applicant in Kozan v. Turkey (2022) was an important aspect that led to the Court’s decision that Article 10 had been violated. Mr. Kozan, a judge, had shared, in a Facebook group formed by judges and other legal professionals, an article that criticised certain decisions of the High Councils of Judges and Prosecutors (HSYK). He faced disciplinary proceedings and received a disciplinary sanction (a reprimand) for sharing that article, as “incompatible with his duty of loyalty to the State and his judicial obligations”. Following the events in July 2016, he was removed from public office and was accused of membership of a terrorist organisation and sentenced to seven years and six months imprisonment. The Strasbourg Court dealt to Mr. Kozan’s complaint against the disciplinary sanction which, in his view, violated his freedom of expression. The Court found that the article shared by the applicant in a private Facebook group was dealing with a topic of public interest to the members of the judiciary, therefore fell within the scope of protected speech. It did not accept the assumption of the Government that judges and prosecutors should not impart any ideas regarding their profession and emphasised the chilling effect that the measures against the applicant had “on the profession as a whole. Furthermore, the Court observed that “the Council of Judges and Prosecutors had not adequately weighed in the balance the applicant’s right to freedom of expression on the one hand and his duty of discretion as judge on the other. It further reiterated that the Council of Judges and Prosecutors was a non-judicial organ and that

50 Kövesi v. Romania para 207.
the proceedings followed before the Chamber and Plenary Assembly did not afford the safeguards of judicial review”, therefore linking the freedom of expression case to the right to an independent tribunal established by law. Therefore, the Court decided that, having regard to the special importance attached to freedom of expression on matters of public interest, the disciplinary sanction imposed on the applicant had not met any pressing social need and, consequently, was not “necessary in a democratic society” within the meaning of Article 10, determining the violation of the said article. A violation of Article 13 was also decided, derived from the lack of an effective remedy against the measure taken against him.

Freedom of expression is a salient fundamental right and its wide protection is essential in a democratic society. Freedom of expression is also an important tool in ensuring the control of the public opinion over the state authorities and therefore a central aspect of the rule of law. The recognition of this right to judges and prosecutors, even when they speak in their official capacity, is, in this context, an essential step in affirming that any pressures against members of the judiciary for their opinions do not fit in the picture of a rule of law-based state. One of the main reasons is that these pressures produce a “chilling effect” on expressing criticisms against the potential abuses of the Government, which is incompatible to a democratic society.

2.5. Not All Rights Should Be Judges’ Rights?

This case law overview would not be complete if it would not also mention the main opinions regarding the existence or non-existence of the rights of judges and in particular of the freedom of speech.

Freedom of expression remains one of the most important rights in a democratic society and that is why the European Court of Human Rights, in its case law, dramatically extended the scope of beneficiaries and the categories of protected opinions. However, there are scholars and Strasbourg judges who disagree(d) with this enlargement effort of the Court towards freedom of speech, more particularly when it comes to judges. They prefer a more restricted sphere of freedom of speech holders, by claiming that judges and prosecutors are representatives of the state power and therefore should not be granted this right when sharing opinions related to their profession.

In the case *Kudeshkina v. Russia* (2009), judges Kovler and Steiner added a dissenting opinion in which they strongly opposed the majority’s view that the applicant could rely on her freedom of expression. They founded their opinion on the fact that “a judge participates directly in the exercise of powers conferred by public law and performs duties designed to safeguard the general interests of the State” and therefore their freedom of expression is limited compared to ordinary citizens. Beyond this general
limitation of the judges freedom of speech, the dissenting judges found that the contents of the applicant’s expression in the case should not fall under the protection of Article 10 because they “are not reconcilable with the status of a judge within the same judicial system, in which she had exercised her profession for 18 years.” This dissenting opinion reflects the “hard view” on freedom of expression of civil servants in general and of judges in particular. In the same case, the dissenting judge Nicolaou would have wanted more detailed information to be included in the applicant’s interviews on judicial corruption: ‘she [the applicant] made no effort to substantiate this factual substratum before expressing value judgments on the extent and the gravity of the situation, which she summarised by saying that “[n]o one can rest assured that his case – whether civil or criminal or administrative – will be resolved in accordance with the law, and not just to please someone.” These are extremely strong words coming from a judge and should not have been made unless the judge was able to back them up, at least to a meaningful extent.’

Another strong dissenting opinion regarding the applicability of Article 10 on these grounds belongs to judge Wojtyczek in Baka v. Hungary case. The dissenting judge based his opinion on the distinction ‘between the private person (the holder of the office) and the State organ in question (the office held)’ and on the fact that ‘An individual is a holder of rights and duties in his or her relationship with the State. A State organ cannot be a holder of rights’. He identified the applicant as a holder of a public office who exercised ‘official speech’ in his public capacity: “The applicant's utterances did not express his viewpoint as a citizen, but the official point of view of an organ of the Hungarian State. He could not and did not invoke the disclaimer that he was expressing only his private views, and not those of the institution he represented.” By reference to the applicant’s dismissal from office as a result of his opinions expressed in public, the dissenting judge affirmed that “there is no human right to preserve public power” and therefore this should not be regarded as a “human rights” case at all.

The scholarship is also interested in expressing reservations or criticisms against the Court’s approach but, generally, these opinions are centred on the quality or position of the applicants and on the idea that, as public officials, they should not have the right, under Article 10, to criticise the other public powers.

3. Lessons from Romania after the Strasbourg Court’s Judgments on Magistrates’ Rights

It is obvious from the events in the CEE countries from the last decade - some of them reflected in the Strasbourg Court’s judgments - that the phenomenon of pressures...
against judges in order to subject them to various interests and therefore diminish their independence is presently still more entrenched in the post-communist judiciaries. This is because it was inherited from the communist period, when the judges individually and the judiciary as a whole were used as a tool of the one-party totalitarian system (especially in criminal repression of the opponents of the regime, but not only). This pattern of “partnership” between the judiciary and politics was maintained after the fall of the dictatorship in Romania and even after the new 1991 Romanian Constitution proclaimed the independence of justice in very solemn terms. This happened mainly in order to create a sort of ‘shield’ meant to protect corrupt politicians, on the one hand, and to maintain the control over a part of the judiciary, on the other hand.

In theory, after the adoption of the 1991 post-communist constitution and even in the process of its drafting, Romanian governments made it clear that they intended to apply for membership of the main European organizations of democratic states – the Council of Europe and the European Communities (now the European Union).

If the admission to the Council of Europe was faster, occurring in October 1993 after a longer monitoring period than Poland, Hungary or Czechoslovakia, the first association agreements between Romania and the European Communities and their member states were concluded earlier that year – in February 1993 – anticipating the accession after a minimum 10-years transition period. In the preamble, Romania expressed its will to strengthen the links with the Communities and accepted “the necessity to continue and finalize, with the assistance of the Community, Romania’s transition towards a new political and economic system, able to respect the rule of law and human rights (…)”.

The process was long and wondrous, but, apart from the permanent struggle to meet the economic indicators, the inserts in the preamble regarding the rule of law and human rights – principles which are common with the Council of Europe conditionalities – remain equally important. Because the economic criteria were also depending on the political ones – especially the fight against corruption (a well-known deterrent of economic development in any country) and independence of the judiciary and also because, even if the accession took place a few years after the end of the firstly presumed “transition period” of 10 years, mentioned in the Agreement, these objectives still were not reached, the European Commission instituted a supervision mechanism, unprecedented in the history of the Communities, by which to continue to ensure that

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54 For details, see Tom Gallagher, Romania and the European Union. How the Weak Vanquished the Strong (Manchester: Manchester University Press, 2009) passim.

Romania does not go astray from the straight path. The Co-operation and Verification Mechanism\(^56\) (hereinafter “CVM”) had as two main goals exactly to supervise the abovementioned aspects - strengthening the anticorruption and ensuring the independence of the judiciary. In the immediate pre-accession period (2003-2007) a series of reforms occurred in these fields: reform of the judicial council (by constitutional amendment, 2003) and reinforcement of the “Euro-model” of judicial self-government; creation of the anti-corruption prosecutorial structure – the National Anticorruption Prosecution Office, later on National Anticorruption Directorate, creation of a National Integrity Agency. The first one was aimed at consolidating the independence of the judiciary from the other branches of power\(^57\), while the second one at a more effective response to corruption seen as a serious threat to democracy and rule of law.

In 2018, an extensive study about the judicial self-government in Romania\(^58\) concluded that the current Superior Council of Magistracy (hereinafter “SCM”) could be seen as the “the lesser evil” compared to the previous systems, but warned against potential dangers still menacing the judiciary, from the outside and from the inside. Meanwhile, all the perils that were mentioned in that study became reality. The pressures against judicial independence - both in the systemic and individual meanings - increased and, even worse, the pressures from within the judiciary became more visible, even in a system which is not praised for its transparency.

Therefore, it can be affirmed that today Romania is crossing a difficult period from the point of view of judicial independence. Although it is entrenched in the Constitution as a “supreme value”, as part of the “rule of law-based state” claimed in Article 1(3)) and as an “eternity clause” in Article 152, judicial independence is under constant and insidious attack both from the inside and from the outside of the judiciary. The matter of the individual rights of judges and prosecutors has become more and more important in this context, as it already has been for several years at the European Court of Human Rights. In a recent article, a former member of the SCM and a former judge for 28 years, currently lecturer at one of the most prestigious law schools in Romania is ‘cataloguing’ almost all the types of pressure and misuse of power in the Romanian judiciary in the last 6 years (2017-2023).\(^59\) This extensive account – unique in the Romanian scholarship so far - is extremely important because it shows how important individual rights of judges are to the “big picture” of the independence of the judiciary and how the insidious ways to undermine those rights are possible, even when the legislation itself seems adequate

\(^{56}\) Established by Decision 2006/928 - 2006/928/EC: Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.


\(^{58}\) Ibid.

\(^{59}\) Andrea Annamaria Chiş, n 40, p. 20
within the parameters of the rule of law. Among the examples given by Chiș in her article, the following are related to the rights of judges:

1. in the second half of 2018, over 50% of the magistrates in Romania (judges and prosecutors) as well as 175 junior magistrates signed an open letter against the new “laws on the judiciary” which seriously undermine the judicial independence. Later on, many of them were affected career-wise, either by blocking their promotion or by disciplinary investigations.

2. the elections for the current SCM were extremely controversial. The judges – members of the SCM are elected by their peers at four levels: first instance courts (local courts), Tribunals (departmental courts), Courts of Appeal and High Court of Cassation and Justice (supreme court of the land). At the first three levels, all elected candidates who were not in a management position (president/vice-president of the court etc.) were contested by other candidates who were in such a position and lost. The complaints were admitted by the SCM and the elections were repeated, with the result of the other candidate winning the place. In one case, at the departmental courts level, after the second round of elections, the president of the SCM made a disciplinary complaint against the candidate who won the first round (and lost the second one in favour of the court president). Although the disciplinary action was dismissed in the end, the pressure exerted against that judge was tremendous and produced a clear “chilling effect” upon other judges at future elections. At the level of the first instance courts, the candidates who lost were subjected to various disciplinary actions and/or their transfer requests were rejected/their promotion was blocked, thus affecting their professional and private lives.

3. the Judicial Inspection (an internal organ of the SCM responsible with investigating disciplinary complaints before their examination by the different sections of the SCM) was very selective in its actions against various magistrates. Especially those magistrates who were very vocal against the 2018 legislative “reform of the judiciary” were subjected to disciplinary actions. Almost a whole section (5 judges out of 9) of the criminal law section of a court of appeal was under disciplinary investigation and then punished by the disciplinary section of the SCM (punishments varying from suspension from office, reduction of the salary with 25% for one year etc.). These judges had previously made a request to revoke one of the SCM members, who participated as a member of the disciplinary committee who punished them! The HCCJ dismissed the SCM decision, but the pressure remained.

4. similar disciplinary actions were filed against judges who sat in criminal cases of high-level corruption.

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60 Idem, p. 21.
61 Ibid, p. 22.
5. a disciplinary action was filed against the first judge who applied the CJEU judgment *AF/R* of 18 May 2021 regarding the primacy of the EU law. Although the judge was not punished in the end, a “subliminal message” was transmitted to all judges who intended to apply that judgment.

6. judges who protested against the reforms from 2018 were excluded from magistracy by the Superior Council of Magistracy for other reasons than their expressed opinions (some of them filed complaints that are pending at the ECtHR). Although the HCCJ reversed most of these decisions after a few years, those magistrates were deprived of their job for a long period of time, deprived of their means of living and were subjected to incredible psychological pressure.

7. the newly elected Superior Council of Magistracy established insidious practices which, although they are lawful, are designed to ensure the control of a few (the “majority”) over the whole activity of the Council, including the decisions on the careers of judges (e.g. transfers and delegation of judges who sit in high-level corruption cases, with a view to prolong the duration of the trial, which could lead to the statute of limitation and thus to the dismissal of the case).

All these problems show that in Romania, although most of the problematic parts of the legislation on the judiciary have been changed in 2022, the rule of law issues for which the CVM was created, as far as independence of justice is concerned, are far from being solved. Although at the European Court of Human Rights, the ‘Romanian’ cases are less numerous and less “landmark” than Hungarian or Polish cases, Romania remains a situation of concern with regard to the independence of the judiciary and the rights of judges, even though, for mostly geopolitical reasons, the CVM has been formally lifted in September 2023.

4. Conclusion. Rights of Judges Cases as Rule of Law Cases

What could be concluded, from the perspective of the rule of law, after analysing these cases? At a closer look, the magnifying lens of the analysis emphasises some patterns or common features of these “rights of judges cases”.

Firstly, all landmark cases come from “peripheral” EU member states – i.e. those states which already experienced, in various degrees, rule of law and democracy backsliding\(^3\) (Poland, Hungary) or structural rule of law deficiencies (Romania) or from non-EU states with serious rule of law and democracy issues (Russia, Ukraine, Turkey). Against this backdrop, the pattern consists in the fact that the rights concerned are infringed in “illiberal” contexts of legislative “reforms” of the judiciary, by which the governments attempted to capture the judiciary by appointing desirable judges in key-posts or in other

\(^3\) For a pivotal study of the concept of ‘rule of law backsliding’, see Laurent Pech, Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU ‘(2017) 19 *Cambridge Yearbook of European Legal Studies* 3-47.
contexts of “blatant political interferences, packing the courts with loyal nominees, hijacking selection procedures or attempting to discredit and delegitimise the courts in the eyes of the public”\textsuperscript{64}. In only one case (\textit{Xhoxha}), the rule of law was invoked by the Court inversely, i.e. as a shield to endorse the measures taken by the state against the applicant.

A second common feature is that the interferences with the freedom of expression of the members of the judiciary are always the trigger point of the other conventional rights violations. The disciplinary sanctions that entail breaches of Article 6 or Article 8 are applied for what judges or prosecutors say or do in order to criticize the governmental attacks against judicial independence.

Thirdly, there is a strong connection between these cases and the general issue of curtailing judicial independence as an effect of these interferences. Moreover, all cases have as a common feature the existence of some kind of political pressure on judges, either by changes of legislation or by individual measures taken against high-ranking judges. The Strasbourg Court seems to have already formed a pattern, through this case law, to express its broader views on rule of law and judicial independence.\textsuperscript{65} Sometimes she does it in a more extensive (and stronger than needed) way, like in \textit{Grzeda} case, where the Court develops a whole ‘doctrine’ on judicial councils, referring to the systemic problems of the Polish system, but without taking into account the specificities of this type of judicial self-government\textsuperscript{66}. However, what the Court overlooks in these cases is that the threats against the judicial independence can also come from within the judiciary. By advocating the almost complete insulation of the judiciary from the other branches of power and from the “outside world”, the Court presumes (wrongly) that the judicial system - in any country, not only in the ones in which these cases originate - is perfectly clean on the inside, which is not. The “hijacking” strategies against the courts or the “crusades” started by governments against them, as Sipulova likes to say\textsuperscript{67}, could not be possible without support from within the system. That is why, although the Court is right to develop the “rights of judges” as important standards of rule of law compliance, it should also bring forward the fact that the respect for these rights is only one indicator and it should be read in connection with other indicators (execution of national judgments, fair trial guarantees, but also execution of its own judgments in the countries concerned). Moreover, the Court should not use these cases in order to give general verdicts on the structural problems of the judiciary in a given jurisdiction. The organisation of the judiciary and the checks and balances with the other powers are sensitive issues across Europe and it certainly do not enjoy consensus from the part of the states parties to the Convention. Therefore, the Court should remain cautious as to

\textsuperscript{64} Sipulova, n 52, p. 154.
\textsuperscript{65} See also Bustos Gisbert, n 41, p. 594.
\textsuperscript{66} Leloup & Kosar, n 21, p. 775.
\textsuperscript{67} Sipulova, n 52, p. 154
setting “general standards” in this respect. Instead, it should extend the rights of judges-centered approach on the rule of law situation in Europe by drawing attention to the violations she finds. In this context, it must be said that the new approach of the European Court on the applicability of Article 6(1) to judges is a positive development, in that it started to have (feeble) positive effects (e.g. the changes in the legislation on the judiciary in Romania, after the Kövesi judgment, which expressly grants the right to complain against dismissal decrees) and it can become an efficient tool against pressures on judges from the inside or from the outside of the judiciary.

This brings us to the fourth common aspect of the cases: they all come from jurisdictions where non-compliance and non-execution of former Strasbourg judgments became a phenomenon.68 Non-implementation of leading judgments is also seen as a threat to European values in general and to rule of law in particular. Moreover, those countries which are also EU member states have been also in the spotlight of the Court of Justice of the European Union for rule of law-related issues.

To the first question that sparked the idea of this article - are rights of judges an adequate criterion to assess the situation of the rule of law in a given jurisdiction? - my answer would be in the affirmative. A second question would follow: can violations of individual rights of judges become threats against independence of the judiciary? Affirmative, again. Why do I choose those answers? Because judges whose rights are violated are judges under pressure, therefore they are not independent; just like judges with privileges (either self-prescribed or prescribed by legislation) are not independent. It is axiomatic that independence of justice includes independence of individual judges and is a salient component of the rule of law. However, these rights of judges should not be considered alone, but in conjunction to other rule of law criteria and surely the Strasbourg Court should not try to make general assumptions drawn from only one jurisdiction, because it risks to enter a sensitive and conflicting zone.

Would this case law of the Strasbourg Court contribute to improving the situation of the rule of law in the respective countries and in Europe in general? What will the states do? Will they resist or comply? Here, the answer is not that straightforward. Although the Court’s judgments are mandatory for the respondent states, by virtue of Articles 1 and 46 of the Convention a lot depends on the political will of the states concerned. The execution of these judgments is a slow process, highly political and outside the grasp of the Court itself. Therefore, the res judicata effect is only one part of the possible solution.

But these rights are not ordinary rights, they are ‘structural’ rights, in that they have a structural impact in the state concerned, “they have the possibility of altering the structure of government”\textsuperscript{69}. That is why the case law on these rights has also the potential of having a \textit{a res interpretata} effect and thus increase the Court’s judgments impact not only in the respondent state, but also in other states. This could be one development, in the future, of this unparalleled body of case law on the rights of judges and the rule of law.

By strongly rooting the rights of judges into the Convention, as ‘structural rights’, but also in the rule of law discourse, the Strasbourg Court made a strong statement on how the states parties should deal with rule of law, in line with one of its recent judgments: “the rule of law is inherent in all the articles of the Convention”\textsuperscript{70}. As a supranational court, she is also the best “equipped to hear and decide cases of judges whose independence has been violated by executive power”\textsuperscript{71}. In the current European context, although its role is primarily to decide individual cases, these “general statements” from such an institution have become a necessity. After all, the principle of the rule of law is enshrined in the Convention’s Preamble as well as in the Statute of the Council of Europe, the founding texts of the Court. The same principle constituted the very foundation of what we call today “European public order”\textsuperscript{72} of which the Court is one of the “guardians” and which includes democracy, freedom, justice, lack of arbitrariness, legal certainty, human rights. That is why the Court’s approach of reinforcing the rights of judges who face political pressures is so important. Courts in general and judges in particular are, in these situations, at both ends of the human rights equation: rights-holders and rights-enforcers. But judges who are not subjected to pressures will certainly be better rights-enforcers than judges who are under threat of being punished for their opinions.

The Strasbourg Court is one of the instances that can draw attention upon these breaches of the Convention and even play a pivotal role in future changes, but, unfortunately, it has no enforcement power of its own judgments. The results are slow and sometimes painful to obtain. A limited number of changes occurred in the legislation of some states, but overall the situation is not very different. The significant changes, after all, depend very much on the willingness of the states to execute the judgments in both dimensions: to remove the violation and to avoid future violations of the kind. Only time will tell if rule of law will have the final word.


\textsuperscript{70} Selahattin Demirtas v. Turkey 14305/17 (ECtHR, 22 December 2020) para 249.

\textsuperscript{71} Sipulova, n 52, p. 170.

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

“Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute’s mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice…. The depicted sculpture…[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts … [represent] the individual states…. [The division] of the figure … into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable…. The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds.”

[transl. by S. Less]

Art in architecture, MPIL, Heidelberg