

# Rule of Law and Judicial Independence

European Court of Human Rights Case-Law Overview

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# Introduction

“The ghost of an authoritarian state stands at the door of your home. It will not knock on the door. It will come in uninvited. And it will stay a long time.”

Prof. Mirosław Wyrzykowski

# Rule of Law - Venice Commission

According to the Venice Commission Rule of Law check-list, the rule of law encompasses several key elements:

- (1) legality, which involves a transparent, accountable, and democratic process for lawmaking,
- (2) legal certainty,
- (3) the prohibition of arbitrariness,
- (4) access to justice through independent and impartial courts, including the judicial review of administrative actions,
- (5) respect for human rights,
- (6) and non-discrimination and equality before the law.

# Vienna Convention Principle

Under the Vienna Convention on the Law of Treaties, a State cannot invoke its domestic law, including the Constitution, as justification for its failure to respect its international-law commitments.

# Judicial Independence

**Judicial independence is a prerequisite for the rule of law. Judges can uphold the rule of law and give effect to the Convention only if domestic law does not deprive them of the guarantees required under the Convention, particularly those concerning their individual independence and impartiality.**

*ECtHR, Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020, § 239*

**Tribunal established by law**

What makes a judge a judge?

When is a court still a court?

Judicial independence - objective and subjective aspects.

# Case Law

In **Guðmundur Andri Ástráðsson v. Iceland [GC]**, the applicant had been denied his right to a tribunal established by law due to the participation of a judge whose **appointment was tainted by serious irregularities**.

In **Reczkowicz v. Poland**, the procedure for appointing judges in the context of a reorganization of the judicial system had been subject to **undue influence on the part of the legislative and executive powers**, and that this was a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of the relevant formation of the Supreme Court (newly established disciplinary chamber of the Supreme Court).

# Case Law

A fundamental irregularity was likewise found in **Dolińska-Ficek and Ozimek v. Poland**, (thus, newly established chamber for extraordinary review and public affairs of the Supreme Court was not a tribunal established by law).

The same applies to the Civil Chamber of the Supreme Court (ECtHR, **Advance Pharma sp. z o.o. v. Poland**) and the Constitutional Court (Xero Flor w Polsce sp. z o.o. v. Poland).

See **pilot judgment ECtHR, Wałęsa v. Poland**, no. 50849/21, 23 November 2023, covering 492 cases on the Court's docket (of which 202 were communicated) concerning judicial reform in Poland.).

# Access to Court

It is not absolute; it may give rise to limitations. These cannot restrict access to the individual in such a way or to such an extent that the very substance of the right is affected. Furthermore, they are compatible with Article 6 § 1 only if they pursue a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim pursued.

Requirement of procedural fairness in cases concerning the dismissal of judges, and in particular the intervention of an authority independent of the executive and legislative powers for any decision affecting the termination of the mandate of a judge

ECtHR, **Zubac v. Croatia** [GC], no. 40160 /12, 5 April 2018, **Baka v. Hungary** [GC] and **Kövesi v. Romania**, no. 3594/19, 5 May 2020, § 156, with regard to prosecutors.

# Case: Paluda v. Slovakia

In case Paluda v. Slovakia the judge's suspension was imposed by the Judicial Council - a body that was not of a judicial character and did not provide the institutional and procedural guarantees inherent in Article 6 § 1 - within the context of disciplinary proceedings the Judicial Council had instituted.

The applicant was not heard in respect of either the suspension or the underlying disciplinary charges. The applicant had no access to proceedings before a tribunal within the meaning of Article 6 § 1 to challenge a suspension that had placed him for two years in the situation of being unable to exercise his judicial mandate and having one-half of his salary withheld, while at the same time being unable to exercise any other gainful activity.

# Case: Broda and Bojara v. Poland

The national legal framework applicable to the applicants' removal did not clarify the conditions in which the heads of a court could be removed from office, by way of exception to the principle that a judge should be guaranteed security of tenure during his or her term of office.

In addition, almost all the powers in such matters were concentrated in the hands of the representative of the executive, and the National Council of the Judiciary, in particular, was excluded from the process. The Court further noted that the applicants had not been heard or informed of the reasons for the ministerial decisions. Lastly, there had been no review of those removal decisions by a body that was independent of the Ministry of Justice.

# Judicial Freedom of Expression I

Judges can engage in activities related to the law, the legal system, and the administration of justice. Such expressions are less restricted because an independent judiciary is in the public interest, vital for a democratic and pluralistic society. **Judges should be able to express concerns or criticisms about government bills and be knowledgeable about issues related to the separation of powers, especially if it exposes irregularities in public affairs.** Expressing views and criticisms on legislative reforms related to the functioning of the judicial system, the status of the National Council of Judiciary (NCJ), the independence and irremovability of judges, and the lowering of the retirement age for judges is in the public interest.

*ECtHR, Guja v. Moldova, no. 14277/04, ECtHR, Previti v. Italy (dec.), no. 45291/06, 8 ECtHR, Baka v. Hungary [GC]*

# Judicial Freedom of Expression II

A judge or prosecutor may participate in public debates related to the broader justice system, particularly during a rule of law crisis. During such times, it is crucial for judges to have the freedom to openly discuss threats to judicial independence. Judges' criticisms of controversial judicial reforms in these circumstances could discourage politicians from implementing such reforms or at least force them to explain their actions to the public. Furthermore, judges' perspectives can provide valuable insights to citizens.

8 ECtHR, *Żurek v. Poland*, § 222

# Judicial Freedom of Expression III

In case **Wille v. Liechtenstein** [GC], 28396/95 the Court considered that, whenever the right of freedom of expression of the high-ranking judge was at issue, the “duties and responsibilities” referred to in Article 10 § 2 assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of judiciary are likely to be called in question. The applicant’s lecture, since it dealt with matters of constitutional law and more specifically with the issue of whether one of the sovereigns of the State was subject to the jurisdiction of a constitutional court, inevitably had political implications. However, in the Court’s view, this element alone should not have prevented the applicant from making any statement on this matter.

# Freedom of Expression - Disciplinary Cases

In **Guz v. Poland** no. 965/12 , concerning the conviction of a judge and imposition of a warning for the disciplinary offence of undermining the dignity of the office of a judge, after commenting on an assessment report made by another judge in the context of a promotion procedure, the Court found a violation of Article 10 of the Convention.

In case **Kozan v. Turkey** no. 16695/19, 1 March 2022. (dismissal for sharing on a Facebook closed group only for judges an article criticizing the High Council of Judges and Prosecutors for closing disciplinary proceedings against magistrates) the Court found the violation of Article 10.

Also In case **Miroslava Todorova v. Bulgaria** no. 40072/13, 19 October 2021. (disciplinary proceedings against the head of the judicial association that had criticized the action of the National Judiciary Council (CSM) concerning certain appointments of court presidents, as well as the government's policy in judicial matters).

# Case: Tuleya v. Poland

In case **Tuleya v. Poland** nos. 21181/19, 51751/20, 6 July 2023 (five sets of preliminary inquiries, criminal proceedings and waiver of immunity of a judge who publicly criticized the government's judicial reforms).

There were grounds to believe, given the general context, that the **lifting of Mr. Tuleya's immunity was a disguised sanction for his expressing criticism of successive judicial reform.** The measures taken by the authorities could be characterized as a strategy aimed at intimidating (or even silencing) him for his views. Such measures had to have discouraged not only Mr Tuleya but also other judges from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.