The Requirement that Tribunals be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust

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Requirement that tribunals be established by law – European Convention on Human Rights – EU Charter of Fundamental Rights – Fair trial – Rule of law – Separation of powers – Public trust

Introduction

Article 6(1) of the European Convention on Human Rights and Article 47(2) of the Charter of Fundamental Rights of the European Union explicitly protect three essential guarantees that constitute what could be described as the 'Holy Trinity' for the protection of the right to a fair trial: a court must be *established by law*, and it must be *independent* and *impartial*. If the existence of these three requirements is no longer questioned, the aspects of the first imperative, as well as its interactions with the principles of independence and impartiality, have recently been at the centre of important judicial discussions at the European Court of Human Rights and the Court of Justice of the European Union. Although the requirement that tribunals be 'established by law' was previously somewhat

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neglected in both the case law and the literature,[1] it has now been put in the spotlight.

This resurgence can be explained by the political developments at work in the European Union. The EU is currently facing a major and unprecedented crisis due to the disintegration of its founding values in some member states, most notably that of the rule of law. This crisis can most clearly be seen in the steady erosion of the independence of several national judicial systems.[2]

Throughout this article, we intend to lift the veil on the substance of the requirement according to which courts must be established by law. To this end, we shall refer to the case law of both the European Court of Human Rights and the Court of Justice of the European Union. We have chosen to base our analysis on the case law of these two courts given the mutually constructive dialogue that has developed regarding this requirement. In our view, this dialogue indeed results in a shared understanding of the requirement to have tribunals established by law between the two European Courts, as will be shown in the first section of this article. Analysing the genesis and use of this requirement in the case law, the second section contends that it could constitute the bedrock of public trust in European judiciaries by sustaining two major principles of our liberal democracies: the rule of law and the separation of powers.

A recent resurgence of a neglected element of the Holy Trinity for the protection of the right to a fair trial?

Over time, the interpretation of the requirements flowing from the imperative to have courts established by law has been increasingly expounded upon in the case law of the European Court of Human Rights. More recently, this imperative has also found its way into the case law of the Court of Justice. A constructive dialogue

[1]L. Pech and D. Kochenov recently regretted the lack of sufficient attention paid to this principle, in 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgements since the Portuguese Judges Case', *SIEPS Report* (2021) p. 168.

[2]On this crisis *see inter alia* F. Marques, 'Rule of law, national judges and the Court of Justice of the European Union: Let's keep it juridical', *European Law Journal* (2021) p. 1; K.L. Scheppele et al., 'EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', *Yearbook of European* Law (2020) p. 3 and L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', *Cambridge Yearbook of European Legal Studies* (2019) p. 1. For the sake of completeness, it should be noted that the composition of the ECJ has also been the subject of significant criticism with regard to respect for the rule of law in the context of the Sharpston saga. In this respect, the Court of Justice has recently confirmed the dismissal of two actions for annulment brought by Ms Eleanor Sharpston (ECJ 16 June 2021, Case C-684/20 P, *Sharpston*, EU:C:2021:486).

was established between the two courts, which led to a shared understanding of the requirement to have tribunals established by law.

The requirement in the European Convention on Human Rights

Along with the requirements according to which, in the field of civil rights and obligations and criminal charges, tribunals must be independent and impartial, Article 6 of the European Convention on Human Rights stipulates that they must be 'established by law'. Long forgotten in favour of the requirements of independence and impartiality,[3] this third constraint was recently put in the spotlight in Strasbourg in a judgment handed down by the Grand Chamber of the European Court of Human Rights.[4] The recent Grand Chamber judgment in *Ástráðsson* does indeed make it clear that the requirement to have courts established by law is autonomous from requirements of independence and impartiality, which also derive from Article 6 of the Convention. In this vein, it is not necessary to show that, in addition to the infringement of the requirement that courts and tribunals must be established by law, the court's independence and impartiality have been compromised in order to conclude that Article 6 has been infringed.[5] While the European Court of Human Rights recognises that there is a very close interrelationship between these requirements and the right to be tried by a court established by law, it clearly asserts that the latter is a *self-standing right*.[6] This is an opportunity for us to look back to its genesis and the evolution of its interpretation in the case law of the European Court of Human Rights.[7]

Tracing back to its origin, it appears that the requirement of establishment by the law of courts was introduced into the Convention to protect litigants from ad hoc courts that could be created by a state in a specific political context and with

[3]In this respect, it is interesting to note that many commentaries on Art. 6(1) of the Convention ignore this requirement and focus on those of independence and impartiality (*see*, for instance, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edn. (Oxford University Press 2017).

[4]ECtHR (GC) 1 December 2020, No. 26374/18, *Guðmundur Andri Ástráðsson* v *Iceland*. This line of case law was later applied in other judgments, *see* ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp zoo* v *Poland* (on this judgment, *see* M. Leloup, 'The ECtHR Steps into the Ring', available at ⟨https://verfassungsblog.de/the-ecthr-steps-into-the-ring/⟩, visited 31 December 2021), and ECtHR 22 July 2021, No. 43447/19, *Reczkowicz* v *Poland*.

[5]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, paras. 231 and 233.

[6]Ibid., para. 231.

[7]The authors have conducted systematic research in the official database of the ECHR, Hudoc, using the following keywords: 'court established by law' 'tribunal previously established by law' and 'tribunal established by law'.

particular political aims.[8] This requirement was thus first and foremost introduced to reflect the principle of equality in judicial matters and to avoid any discrimination before the law.[9] The creation of specialised courts that have a certain stability is of course not in itself prohibited by the Convention,[10] but Article 6(1) precludes the establishment of courts on a one-off basis.[11]

In the 1980s, this requirement was further construed as including an additional dimension aimed this time at defining which authority should be competent to organise and regulate the judiciary. The European Commission of Human Rights,[12] and later the European Court of Human Rights,[13] considered that, in addition to opposing the creation of ad hoc tribunals, the requirement according to which tribunals must be established by law also contained a rule of jurisdiction by reserving to the legislature the power to establish courts and tribunals.

According to Strasbourg case law, 'the object of the term "established by law" in Article 6 of the Convention is to ensure that the judicial organisation [. . .] is regulated by law emanating from *Parliament*'.[14] The requirement of legality in judicial matters has thus been construed in a much stricter manner than that set out in the other provisions of the Convention. In general, the legality requirement is indeed interpreted in a 'flexible' way: with regard to the restrictions made to the rights and freedoms it enshrines, which are also subject to a legality requirement, only the existence of a legal basis that it is sufficiently accessible, clear and predictable is required, regardless of the author of the legal provision. In this sense, the Court affirmed outright that:

[8]J. Velu, 'La notion de "tribunal" et les notions avoisinantes dans la Convention de sauvegarde des droits de l'homme et des libertés fondamentales', in *Liber Amicorum F. Dumon* (Kluwer 1983) p. 1287-1295 and F. Matscher, 'La notion de "tribunal" au sens de la Convention européenne des droits de l'homme', in *Les nouveaux développements du droit à un procès équitable au sens de la CEDH* (Bruylant 1996) p. 29.

[9]In this vein, Art. 146 of the Belgian Constitution explicitly states that 'No court or contentious jurisdiction may be established except by virtue of a law. No commissions or extraordinary courts of any kind may be established'.

[10]European Commission of Human Rights 10 October 1980, No. 8299/78, *X and Y* v *Ireland*.

[11]European Commission of Human Rights 28 March 1963, No. 1216/61, Coll. 11, 1963, X v *Federal Republic of Germany*, p. 7.

[12]European Commission of Human Rights 12 October 1978, No. 7360/76, *Zand* v *Austria*, para. 69 and European Commission of Human Rights 6 December 1989, No. 11879/85, *Rossi* v *France*.

[13]ECtHR 27 October 2009, No. 30323/02, *Pandjikidze and others* v *Géorgia*, para. 103 and ECtHR 22 June 2000, No. 32492/96, *Coëme and others* v *Belgium*.

[14]Emphasis added. *Coëme*, *supra* n. 13, para. 98 and *Zand* v *Austria*, *supra* n. 12, paras. 79 and 80.

> as regards the words 'in accordance with the law' and 'prescribed by law' which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term 'law' in its 'substantive' sense, not its 'formal' one; it has included both 'written law', encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. 'Law' must be understood to include both statutory law and judge-made 'law'. In sum, the 'law' is the provision in force as the competent courts have interpreted it.[15]

In judicial matters, by contrast, the European Court of Human Rights goes further by requiring parliamentary intervention in establishing courts. An analysis of the case law reveals that this interpretation translates imperatives linked to the need to avoid interference by the executive in the judicial organisation, as will be further discussed below.

The recent Grand Chamber's judgment in *Ástráðsson* specifies in that regard the scope of application of the legality requirement: while it was already clear that the 'law' referred to in Article 6 of the Convention is necessary not only for the establishment of a court, but also to regulate its competence and composition,[16] this judgment makes it clear that the appointment proceedings also fall within the ambit of this requirement.[17] However, this does not mean that every detail must be regulated by act of the parliament: specific questions may be delegated to the executive, provided that the basic rules are set out in the legislation.[18]

In addition to requiring the existence of legislation that governs the creation, jurisdiction and composition of courts, and the appointment of their judges, Article 6(1) ECHR logically requires respect for the constraints this legislation prescribes – including of the executive acts implementing the legislation. In the view of the Court, 'a tribunal that is not established in conformity with the intentions of the legislature will necessarily lack the legitimacy required in a democratic society to resolve legal disputes'.[19] Following its classic case law, the Grand Chamber also emphasised that the expression 'established by law' 'comprises not only legislation providing for the establishment and competence of judicial organs, but also any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular'.[20] Article 6(1) of the Convention therefore requires 'the compliance by

[15]ECtHR 14 September 2010, No. 38224/03, *Sanoma Uitgevers NV* v *Pays-Bas*, para. 83.

[16]*Coëme*, *supra* n. 13, para. 98.

[17]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4.

[18]*Zand* v *Austria*, *supra* n. 12, and European Commission of Human Rights 18 December 1980, No. 8603/79, 8722/79, 8723/79, 8729/29, Coll. 22, *Crociani and others* v *Italy* p. 147.

[19]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, para. 211.

[20]Ibid., para. 211.

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that tribunal with the particular rules that govern it and the composition of the bench in each case',[21] 'including, in particular, provisions concerning the independence of the members of a court'.[22] The appointment process is thus clearly encompassed by Article 6(1) of the Convention: it must be defined by law, and a failure to follow the procedure laid down may in itself, subject to certain conditions, result in an infringement of the Convention irrespective of whether the independence of the court has been breached.

The Grand Chamber of the European Court of Human Rights has nevertheless specified that not all breaches of national law amount to an infringement of the right to be tried by a court established by law.[23] Indeed, this requirement must, in the Court's view, be balanced with two other imperatives: the principles of legal certainty and irremovability of judges, which could be undermined if the principle of legality were applied too strictly.[24] To this end, the judgment delivered in *Ástráðsson* develops a three-step test to guide the analysis in each case. First, it is necessary to determine whether there is 'a *manifest* breach of domestic law, in the sense that the breach must be objectively and genuinely identifiable as such'. However, the Court stressed that the absence of such a manifest infringement of domestic rules does not in itself preclude an infringement of the tribunal being established by law, and it is therefore necessary to refer to the two other criteria in order to ascertain whether this requirement is fulfilled.[25] As a second step, any breach must be analysed in the light of the object and purpose of the legality requirement, 'namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers'.[26] This second criterion therefore excludes mere formal irregularities, which have no bearing on the legitimacy of the tribunal itself. On the other hand, manifest breaches that disregard the 'most fundamental rules', notably in the appointment procedure, should be considered as violating Article 6(1) of the ECHR.[27] Finally, as a third step in the reasoning, the 'nature', 'extent' and 'quality' of the control over the appointment process that the national courts may have exercised should be examined.[28] The absence of effective judicial review is, therefore, likely to contribute to a finding of a violation of Article 6(1) of the Convention.

With regard to the appointment proceedings, the European Court of Human Rights has also derived from this requirement, for the first time in the *Ástráðsson*

[21]Ibid., para. 213.
[22]Ibid., para. 226.
[23]Ibid., para. 236.
[24]Ibid., para. 240.
[25]Ibid., para. 245.
[26]Ibid., para. 246.
[27]Ibid.
[28]Ibid., para. 249.

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judgment, constraints surrounding the quality of judicial appointments. Indeed, the Grand Chamber underlined 'the paramount importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed to judicial posts', and that 'the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be'.[29] Referring among other provisions to Principle 10 of the UN Basic Principles on the Independence of the Judiciary, the Court noted that 'such merit-based selection not only ensures the technical capacity of a judicial body to deliver justice as a "tribunal", but it is also crucial in terms of ensuring public confidence in the judiciary and serves as a supplementary guarantee of judges' personal independence'.[30]

Besides constraining the power of the executive, the requirement to have tribunals established by law also limits the power of judges. In its judgment in *Coëme* v *Belgium*, the European Court of Human Rights indeed noted that in countries where the law is codified, the organisation of the judicial system should not 'be left to the discretion of the judicial authorities'.[31] Therefore, 'although this does not mean that the courts do not have some latitude to interpret the relevant national legislation', 'a court that exceeds its jurisdictional powers clearly conferred by law cannot in principle be considered a "court established by law"'.[32] Here, it is no longer so much the independence of judges from the executive power that is protected, but rather 'the predictability of the function of judging, the judges' impartiality and the preservation of the equality of litigants in the face of the possible arbitrariness of the judicial power'.[33]

Following this reasoning, further judgments also restrict the judiciary's organisational autonomy, particularly in the area of the rules governing the allocation of cases between the different chambers composing courts and tribunals. Indeed, in the view of the Court, the law emanating from parliament must itself lay down the rules for the distribution of cases between the different chambers, as well as the objective criteria which could justify a President of a court being led to depart from them.[34] The European Court of Human Rights underlined in its judgment *Miracle Europe* that:

[29] *Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, para. 222 and *Xero Flor w Polsce sp zoo* v *Poland*, *supra* n. 4, para. 224.

[30] *Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, para. 222.

[31] *Coëme*, *supra* n. 13, para. 98.

[32] Translation is ours, *Pandjikidze and others* v *Géorgia*, *supra* n. 13, para. 103 and *Coëme*, *supra* n. 13, para. 105.

[33] Translation is ours, S. Van Drooghenbroeck and J.-F. Van Drooghenbroeck, 'Le principe de la légalité en matière judiciaire', in L. Detroux et al. (eds.), *La légalité, un principe de la démocratie belge en péril* (Larcier 2019) p. 81.

[34] Ibid., p. 81.

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> where the assignment of a case is discretionary in the sense that the modalities thereof are not prescribed by law, that situation puts at risk the appearance of impartiality, by allowing speculation about the influence of political or other forces on the assignee court and the judge in charge, even where the assignment of the case to the specific judge in itself follows transparent criteria.[35]

> As a matter of fact,

> an element of discretion in the allocation or reassignment of cases could be misused as a means of putting pressure on judges by for instance overburdening them with cases or by assigning them only low-profile ones. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others.[36]

The requirement according to which a tribunal must be established by law also has to be respected by Parliament itself. In a case where a national parliament had the power to join proceedings against non-ministers with those against ministers falling within the jurisdiction of the Constitutional Court, the European Commission of Human Rights scrutinised whether this discretionary power complied with Article 6(1) of the Convention. In the case at hand, the Commission observed that the legislation set out the criteria according to which such cases could be joined, while leaving to the parliamentary bodies a discretionary power to decide whether or not to proceed with the joinder. The Commission considered that, limited as such, the power conferred on the parliamentary bodies was not excessive and that the requirement that the court be established by law had not been infringed in this case.[37] This ruling means *a contrario* that full discretionary power to the parliament's bodies would not have been compliant with the Convention: the criteria allowing the joining of proceedings against non-ministers with those against ministers have to be determined *a priori* in the law.

The need for parliament to respect the rules organising the judiciary was also recently confirmed in the *Xero Flor* case concerning the Polish Constitutional Tribunal,[38] this time with regard to the appointment proceedings. The European Court of Human Rights indeed found a breach of Article 6(1) of the Convention because of the unlawful composition of the Constitutional Tribunal resulting from the fact that a judge had been elected by the Sejm (the lower chamber of the Parliament), although that post had already been filled by another judge elected during the preceding term of the Sejm. Relying upon judgments issued by the Constitutional Tribunal itself, observing the violation

[35]ECtHR 12 January 2016, No. 57774/13, *Miracle Europe KFT* v *Hungary*, para. 58.
[36]Ibid.
[37]*Crociani and others* v *Italy*, *supra* n. 18, p. 147.
[38]*Xero Flor w Polsce sp zoo* v *Poland*, *supra* n. 4.

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of the Constitution by this appointment, the European Court of Human Rights considered that there had been a breach of a fundamental rule of the appointment procedure by the Parliament, since those judges should be elected by the Sejm when the seat becomes vacant. A breach of Article 6(1) of the Convention was therefore found.

The requirement in the EU legal order

At the European Union level, the requirement for a court to be established by law is enshrined at three distinct levels in EU primary law. First, this requirement constitutes one aspect of the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter. Indeed, the second paragraph of this provision, which echoes Article 6(1) of the Convention, provides that: 'Everyone is entitled to a fair and public hearing within a reasonable amount of time by an independent and impartial *tribunal previously established by law*'. Second, it is one of the factors that the Court of Justice takes into account to determine whether a body referring to it can be deemed a 'court or tribunal' for the purposes of Article 267 of the TFEU, and thus be entitled to participate in the preliminary ruling procedure.[39] Furthermore, as we shall see, the requirement of a court established by law appears to be protected by Article 19(1)(2) TEU.

It is remarkable that this requirement has barely been discussed in any substantial way in the past case law of the Court of Justice.[40] It is only recently that the requirement has gained prominence in the latter's case law, coinciding with the constitutional backsliding that is sweeping across Europe, and the growing role of the Court of Justice in tackling this issue since the *Portuguese Judges* case.[41] Notably, it is in the judicial saga *Simpson* v *Council* and *HG* v *Commission* that the

[39] *See* by way of example ECJ 16 February 2017, Case C-503/15, *Ramón Margarit Panicello*, EU:C:2017:126, para. 27; ECJ 17 July 2014, Case C-58/13 and C-59/13, *Torresi*, EU:C:2014:2088, para. 17; ECJ 6 October 2015, Case C-203/14, *Consorci Sanitari del Maresme*, EU:C:2015:664, para. 17.

[40] In this vein, *see* M. Leloup, 'The Appointment of Judges and the Right to a Tribunal Established by Law: The ECJ Tightens Its Grip on Issues of Domestic Judicial Organisation: Review Simpson', 57(4) *Common Market Law Review* (2020) p. 1139 at p. 1148. The present authors have conducted systematic research on the official database of the ECJ, Curia, using the following keywords: 'court established by law' 'tribunal previously established by law' and 'tribunal established by law'.

[41] ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117. *See* for example on this landmark case, M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary. ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses', 14(3) *EuConst* (2018) p. 622; A. Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence', 27(1) *Maastricht Journal of European and Comparative Law* (2020) p. 105.

requirement has been brought into the spotlight, although this case was detached from the ongoing rule of law crisis. Since then, a large number of cases concerning this requirement have been brought before the Court of Justice, especially concerning the organisation of the judiciary in Poland and Romania, which will be discussed below.

The background of the *Simpson* saga can be summarised as follows.[42] In December 2013, the Council issued a public call for applications for the appointment of two judges to the Civil Service Tribunal.[43] For some reason, the Council decided not to fill the two posts at that time, while in the meantime the term of a third Civil Service Tribunal's judge expired in August 2015. A few months later, in March 2016, the Council decided to appoint *three* judges instead of *two* drawn from the list of six candidates established following the 2013 call for applications.[44] Two of these three judges were attached to the Second Chamber of the Civil Service Tribunal. In *Simpson* v *Council* and *HG* v *Commission*, Mr Simpson and H.G., both staff members of the EU institutions, lodged an appeal with the General Court against judgments delivered by this specific chamber of the Civil Service Tribunal. Among other things, they argued that the chamber had been improperly constituted and thereby their right to a tribunal established by law had been violated. In two judgments of 19 July 2018, the General Court accepted this line of reasoning and decided that the judgments under appeal had to be set aside in their entirety.[45]

The Simpson judicial saga did not end there, however. Following a request for review by the First Advocate General, the Grand Chamber of the Court of Justice delivered its judgment in the *Simpson and HG* case on 26 March 2020.[46] In its ruling, the latter began by holding that the General Court was correct in finding that the failure to comply with the legal framework imposed by the call for applications of 2013 constituted an irregularity in the appointment procedure.[47] However, it disagreed with the General Court as to the effects of this irregularity on the parties' right to a tribunal previously established by law, leaning

[42]For a detailed account of the facts of the saga, *see* Leloup, *supra* n. 40, p. 1139-62.

[43]Council, Public call for applications for the appointment of judges to the European Civil Service Tribunal, OJ 2013, C 353/11.

[44]Council Decision (EU, Euratom) 2016/454 of 22 March 2016 appointing three judges to the European Union Civil Service Tribunal, OJ 2016, L 79/30.

[45]ECJ 19 July 2018, Case T-646/16 P, *Simpson* v *Council*, EU:T:2018:493; ECJ 19 July 2018, Case T-693/16 P, *HG* v *Commission*, EU:T:2018:492.

[46]ECJ 26 March 2020, Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Erik Simpson and HG* v *Council of the European Union and European Commission*, EU:C:2020:232.

[47]The ECJ specified that the irregularity in this case resulted exclusively from the Council's disregard for the public call for applications of 3 December 2013 and not from an infringement of the requirements under the fourth paragraph of Art. 257 TFEU or Art. 3 of Annex I to the Statute of the Court of Justice of the European Union (*see* ECJ, ibid., para. 68).

significantly on the Chamber judgment of the European Court of Human Rights in *Ástráðsson*.[48] First, the Grand Chamber of the Court of Justice relied on that judgment to deem that the right to be judged by a court established by law encompasses the process of appointment of judges.[49] Second, still drawing on the Strasbourg case law, the Court asserted that a certain threshold of gravity must be reached for an irregularity to amount to a violation of this right.[50] In particular, an irregularity committed during the appointment of judges leads to a violation of this right when:

> that irregularity is of *such a kind and of such gravity* as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.[51]

Applying this principle to the circumstances of the case, the Grand Chamber held that the Council's disregard of the call for applications was not in itself sufficient to establish a violation of the right to a court established by law.[52]

The Simpson saga was rapidly followed by a plethora of cases – including several currently pending – before the Court of Justice where the requirement to have tribunals established by law is one of the main objects of the dispute, if not the sole object. Since April 2021, Advocate General Tanchev has issued several opinions in the context of the judicial reforms undertaken in Poland where this requirement is at the crux of its reasoning.[53] In his Opinion of 6 May 2021 in Case C-791/19, Advocate General Tanchev took the view that the discretionary power of the President of the Disciplinary Chamber of the Supreme Court in Poland to designate the competent disciplinary court of first instance in cases concerning ordinary court judges is contrary to the right to be tried by a court established by law, referring to the European Court of Human Rights' *Miracle Europe* judgment to reach this conclusion.[54] Indeed, according to the Advocate General:

[48]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4.

[49]*Erik Simpson and HG*, *supra* n. 46, para. 74.

[50]Ibid., paras. 71–75.

[51]Ibid., para. 75. Emphasis added.

[52]Ibid., paras. 79–81.

[53]Opinion of AG Tanchev, 15 April 2021 in Case C-487/19, *W.Ż.*, EU:C:2021:289; Opinion of AG Tanchev, 15 April 2021 in Case C-508/19, *M.F.* v *J.M.*, EU:C:2021:290; Opinion of AG Tanchev, 6 May 2021 in Case C-791/19, *Commission* v *Poland*, EU:C:2021:36.

[54]Opinion of AG Tanchev, 6 May 2021, ibid., paras. 101-109.

> the absence of indications in the disputed provisions of the criteria according to which the President of the Disciplinary Chamber is entitled to designate the competent disciplinary court, aside from the court in which the accused judge sits, gives rise to the risk that this discretionary power may be exercised in such a way as to undermine the status of the disciplinary courts as courts established by law.[55]

The Opinion of the Advocate General was followed by the Court of Justice, which ruled that the Polish law which gives the President of the Chamber the discretionary power to designate the disciplinary court of first instance competent in cases concerning judges of ordinary courts, without providing any criteria for designation, does not meet the requirements of the court established by law in the sense of Article 19(1)(2) TEU.[56]

In the same vein, Advocate General Bobek rendered several opinions during the first half of 2021 in cases concerning Romania.[57] Of utmost interest in these cases is the question of whether national rules can offer a 'higher' level of protection of the right to a tribunal established by law than the standards afforded by EU law, in particular when this standard could impair the effectiveness of EU law, in particular the protection of its financial interests. For example, in Case C-357/19, the referring court has asked *inter alia* whether Article 47 of the EU Charter precludes the Romanian Constitutional Court's finding that a judicial panel is not 'established by law' since it included a judge responsible for judicial administration who was not chosen at random, contrary to Romanian law.[58] The underlying question is whether EU law prevents a national court from finding an infringement of the national standard of the requirement of a tribunal established by law, when there is potentially no violation of the EU version of this requirement.[59] According to the Advocate General, relying notably on Article 53 of the Charter, EU law, including Article 47 of the Charter and Article 325 of the TFEU, does not:

> preclude that, in a situation which generally falls within the scope of EU law but which is not fully determined by it, a constitutional court declares, in application of a genuine and reasonable national standard of protection of constitutional rights and on the basis of its interpretation of the applicable national provisions, that judicial panels within the national supreme court have not been established in accordance with the law.[60]

[55]Ibid., para. 107.

[56]ECJ 15 July 2021, Case C-791/19, *Commission* v *Poland*, EU:C:2021:596, paras. 164-177.

[57]Opinion of AG Bobek, 4 March 2021 in Joined Cases C-357/19 and C-547/19, *Euro Box Promotion and Others*, EU:C:2021:170; Opinion of AG Bobek, 4 March 2021 in Joined Cases C-811/19 and C-840/19, *FQ and Others*, EU:C:2021:175.

[58]Opinion of AG Bobek, 4 March 2021 in *Euro Box Promotion and Others*, ibid., para. 133.

[59]Ibid., para. 144 ff.

[60]Ibid., para. 157.

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On 6 October 2021, the Court of Justice delivered an important ruling in the *W.Z.* case. This case arose in the context of a decision to transfer the judge W.Z. from one division of a Polish Regional Court to another division of the same court.[61] W.Z. brought an action against the transfer decision before the Polish National Council of the Judiciary, which ruled that there was no need to adjudicate on that action.[62] Subsequently, he lodged an appeal against this decision before the Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court. At the same time, he also submitted an application for recusal of all judges of this chamber.[63] W.Z.'s appeal against the decision of the National Council of the Judiciary was dismissed as inadmissible by a single judge of the Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court (hereafter: 'the judge concerned').[64] Significantly, the judge concerned had been appointed by the President of Poland on the basis of Resolution No. 338/2018 of the National Council of the Judiciary which proposed candidates to the positions of judges of the Chamber of Extraordinary Control and Public Affairs. This appointment decision was taken despite the fact that the Supreme Administrative Court of Poland had previously suspended this resolution until the Court of Justice ruled on a preliminary question in the *A.B. and Others* case.[65]

In its judgment, the Court of Justice examined, among other things, whether the judge concerned was a tribunal established by law. The Court of Justice recalled its case law, according to which an irregularity in the appointment of judges constitutes a breach of the requirement that a court be established by law, where that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the state could exercise undue discretion undermining the integrity of the outcome of the appointment process, which is the case when what are at issue are *fundamental rules* forming an integral part of the establishment and functioning of that judicial system.[66] Subject to final assessment by the referring court, the Court of Justice judged that the appointment of the judge concerned took place in clear disregard of the *fundamental procedural rules* for the appointment of judges to the Polish Supreme Court.[67] To reach this conclusion, the Court of Justice insisted on the fact that, when the appointment of the judge concerned took place, it could not be ignored that Resolution No. 331/2018

[61]ECJ 6 October 2021, Case C-487/19, *W.Z.*, ECLI:EU:C:2021:798, para. 29.
[62]Ibid., para. 30.
[63]Ibid., para. 31.
[64]Ibid., para. 37.
[65]Ibid., paras. 32-33, 141. ECJ 2 March 2021, Case C-824/18, *A.B. and Others*, ECLI:EU:C:2021:153.
[66]*W.Z.*, *supra* n. 61, para. 131.
[67]Ibid., para. 152.

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proposing the appointment of the judge concerned had been suspended by a final judicial decision by the Supreme Administrative Court of Poland.[68] The Court of Justice also considered that this appointment undermined the effectiveness of EU law since it compromised the authority of the suspension order of the Supreme Administrative Court of Poland, which was to apply until the Court of Justice delivered its ruling in the *A.B. and Others* case.[69] Lastly, the Court of Justice considered that the fact that the judge concerned was not a court established by law implied that the ruling of this judge dismissing W.Z.'s appeal must be null and void.[70] In this respect, the Court of Justice underlined that, in the present case, 'no consideration relating to the principle of legal certainty or the alleged finality of the decision' could prevent the referring court from declaring such an order to be null and void.[71]

An important question which arose in several of the above-mentioned Court of Justice cases on the requirement to have courts established by law was whether this requirement is also covered by Article 19(1)(2) TEU.[72] This provision, which requires the EU member states to safeguard the independence of their courts and tribunals, has a distinctive scope *ratione materiae*. In contrast to the Charter, the second subparagraph of Article 19(1) TEU applies to any national judge who may be called upon to give a ruling on questions concerning the application or interpretation of Union law.[73] In its latest judgments, the Court of Justice has examined in the light of Article 19(1)(2) TEU whether national rules or practices were compatible with the requirement for a court to be established by law, making it clear that this requirement falls within the material scope of Article 19(1)(2) TEU.[74]

This approach seems to us convincing. We have argued elsewhere that Article 19(1)(2) can only come into play in the presence of systemic problems affecting the organisation of justice in a member state. We suggest that Article 19(1)(2) of the TEU should be limited to protecting the *essence* of the principle of effective judicial protection as enshrined in Article 47 of the Charter. This essence should be understood in its 'institutional' meaning, namely Article 19(1)(2) TEU can only apply in the event of a generalised curtailment of judicial protection in a

[68]Ibid., para. 141.

[69]Ibid., paras. 142-143.

[70]Ibid., para. 159.

[71]Ibid., para. 160.

[72]Art. 19(1)(2) of the TEU reads as follows: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

[73]*See* e.g. ECJ 26 March 2020, Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, para. 34 and ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A.K.*, EU:C:2019:575, para. 83.

[74]*Commission* v *Poland*, *supra* n. 56, paras. 164-177; *W.Z.*, *supra* n. 61, paras. 102-161.

member state.[75] The institutional reading defines the essence of a fundamental right in terms of the objective institution that it protects rather than the subjective right of a single individual. It is therefore only affected when the guarantee it enshrines is abrogated, *erga omnes*.[76] The breach of the requirement according to which a tribunal must be established by law would certainly fall within this scope. Indeed, this requirement specifically offers an *institutional* shield to the principle of effective judicial protection. Any infringement of this requirement would by its very nature impact an undefined number of litigants, and, therefore, put at risk the *essence* of the principle of effective judicial protection understood from an institutional point of view. This requirement is also intimately linked to the principle of independence, which has been recognised as part of the essence of the right to effective judicial protection.[77]

A shared understanding between the European Courts in the making

When examining the case law of the two European courts, it can be observed that they develop a shared understanding of the requirement for a court to be established by law, which results from a high degree of mutual influence between these courts. This mutual influence is primarily exemplified by the tendency of the Court of Justice, including of its Advocates General,[78] to rely on Strasbourg case law to develop the contours of this requirement within the meaning of Article 47 of the Charter. Yet, this is perhaps not so surprising in the light of Article 52(3) of the Charter, which contains a principle of 'homogeneity' with the

[75]*See* C. Rizcallah and V. Davio, 'L'article 19 du Traité sur l'Union européenne : sésame de l'Union de droit - Analyse de la jurisprudence récente de la Cour de justice de l'Union européenne relative à l'indépendance des juges nationaux', *Revue trimestrielle des droits de l'homme* (2020) p. 178 ff. We argue that the wider scope of Art. 19(1)(2) TEU than that enjoyed by Art. 47 of the Charter must be offset by a reduction in its substantive scope, notably because of the limitations set out in Art. 51(1) of the Charter. Several conclusions of the Advocates General point in the same direction, and are quoted in this paper. *See* more recently in this vein, Opinion of AG Bobek, 23 September 2020 in Joined Cases C-83/19, C-127/19 and C-195/19, *Forumul Judecătorilor din România*, para. 150 ff; Opinion of AG Bobek, 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa*, para. 130 ff, e.g. para. 144.

[76]S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme: prendre l'idée simple au sérieux* (FUSL 2001) p. 372 and O. Scorcello, 'Preserving the "Essence" of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?', 16(4) *EuConst* (2020) p. 647.

[77]ECJ 25 July 2018, Case C-216/18 PPU. *LM*, EU:C:2018:586, para. 48; *Erik Simpson and HG*, *supra* n. 46, para. 71. *See also* in this vein, Leloup, *supra* n. 40, p. 1154 ff.

[78]*See* e.g. Opinion of AG Bobek, 4 March 2021 in *Euro Box Promotion and Others*, *supra* n. 57, para. 136 ff; Opinion of AG Tanchev, 15 April 2021 in *W.Ż.*, *supra* n. 53, para. 70 ff.

Convention.[79] Indeed, according to the latter provision, the Charter rights shall have the same meaning and scope as those of the corresponding rights guaranteed by the ECHR. Since the first sentence of Article 47(2) of the Charter corresponds to the first sentence of Article 6(1) of the ECHR, its meaning and scope must be similar to those established by the ECHR. The Court of Justice therefore has to ensure that the interpretation that it gives to Article 47(2) of the Charter safeguards a level of protection that does not fall below the level of protection established in Article 6(1) of the ECHR, as interpreted by the European Court of Human Rights.[80]

Interestingly, the process of influence between the two legal orders also goes in the other direction. In *Ástráðsson* for instance, the Grand Chamber discussed at length no fewer than four Court of Justice rulings, from those relating to the *Simpson* saga to Case C-619/18.[81] As has been observed by several authors, the Strasbourg Court underpins its conventional interpretation with heavy recourse to 'external sources' of the most varied pedigrees and essences, where EU law features prominently.[82]

As a result of the intense interaction between the two courts, we can observe the emergence of a shared understanding of the requirement to have courts established by law. In doing so, the two courts act in consort to create a common bulwark against the repeated, and often head on, attacks on judicial powers in Europe.[83] This shared understanding is particularly apparent concerning the scope of the right to be judged by a court established by law, where it is now established that the process of appointing judges is covered by both the Convention and the European Union's versions of this right. This is also reflected in the fact that both courts have held that a certain threshold must be reached for a breach of the rules governing the Judiciary to be a violation of the requirement for a court to be established by law.

While a shared understanding of the right to have a tribunal established by law is emerging between the European Court of Human Rights and the Court of

[79]S. O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg', in M. Bobek and J Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) p. 42. As also remarked by O'Leary, the ECJ often refers unevenly to Art. 52(3) of the Charter in its case law. In this vein, *see* G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20(2) *Maastricht Journal of European and Comparative Law* (2013) p. 168.

[80]*Erik Simpson and HG*, *supra* n. 46, para. 72.

[81]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, paras. 131-140.

[82]*See* e.g. T. Lock, 'The Influence of EU law on Strasbourg Doctrines', *Edinburgh School of Law Research Paper series* (2017) p. 1; O'Leary, *supra* n. 79, p. 37.

[83]*See* O'Leary, *supra* n. 79, p. 62 where the author stresses the need for a common approach between the ECJ and the ECtHR on the rule of law and fundamental rights.

Justice, there remain several uncertainties about the nature of this right, which shows that this right is still in the making. These uncertainties can be seen with regard to two aspects of this right.

The first point of uncertainty relates to the threshold for finding a breach of this right. In the case law of both European courts, there is a common view that non-compliance with domestic law must be flagrant or manifest to constitute a breach of the principle to have courts established by law. In other words, as Advocate General Sharpston observed in *Simpson*, not all irregularities are likely to affect this aspect of the right to a fair trial.[84] This is justified, among other things, by the principles of legal certainty and the irremovability of judges,[85] which could be undermined if the principle of legality were applied too strictly. However, it is not so clear what this threshold entails.

Both in Strasbourg and Luxembourg, several criteria have been used in this respect, but many ambiguities remain at this stage. A first criterion concerns the nature of the domestic rule violated, i.e. that there must be a violation of a rule of a *fundamental nature*. This criterion is not only very prominent in the judgment of the Grand Chamber in *Simpson*,[86] but also features in the *Ástráðsson* case under the second part of the test established by the European Court of Human Rights.[87] Nevertheless, what is the legal weight of this element? Should it be considered that the breach of a rule of a *fundamental nature* has the effect of creating a rebuttable or irrebuttable presumption of violation of the right to a court established by law? Or, conversely, should the breach of a rule of a *fundamental nature* be understood as a *conditio sine qua non*, which, if not fulfilled, means that it is never possible to find a violation of the requirement? Related to this, distinguishing a fundamental rule from a non-fundamental rule seems to be a particularly perilous exercise. Some guidance is given in the case law of the Court of Justice[88] and the opinions of the Advocates General,[89] but the

[84]Opinion of AG Sharpston, 12 September 2019 in Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Simpson and HG*, ECLI:EU:C:2019:977, para. 64.

[85]The latter justification seems more questionable to us. It is indeed strange to use the guarantee of irremovability – directly linked to the protection of the judicial independence – as a justification that could possibly cover an irregularity committed during the appointment process, possibly putting at stake the said independence.

[86]*Erik Simpson and HG*, *supra* n. 46, para. 75.

[87]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, para. 246.

[88]*See* in particular *Erik Simpson and HG*, *supra* n. 46, paras. 79-80 where the ECJ distinguishes the irregularity at stake from that at issue in the decision of the EFTA Court of 14 February 2017, *Pascal Nobile* v *DAS Rechtsschutz-Versicherungs*, which concerns the duration of judges' mandates.

[89]Opinion of AG Sharpston, 12 September 2019 in *Simpson and HG*, *supra* n. 84, para. 107.

question is likely to be a contentious one. A second criterion that has been used by both courts is the intentional nature of the breaches. This criterion was particularly emphasised in the *FV* case.[90] Here again, the question arises as to whether this is a condition for turning an irregularity into a breach of the right to a court established by law.

In our view, both criteria are better understood as one element among others that can be taken into account to establish whether there is an infringement of this right. Indeed, it would be questionable that because the breach of a domestic rule does not concern a fundamental rule or is not deliberate, an infringement to the right to have a tribunal established by law could never occur. By contrast, not all breaches of one of these two types seem to be sufficient in and of themselves to establish a breach of this right. An approach that takes into account a series of elements, as the Court of Justice does with regard to the principle of independence,[91] seems to us more appropriate.

The second point of uncertainty relates to the consequences that should be attached to the infringement of the right to be judged by a tribunal established by law. This is a particularly sensitive issue because it involves balancing this violation against competing interests, including the principle of legal certainty. In the *Ástráðsson* case, the European Court of Human Rights did not address the consequences of the violation[92] and was fiercely criticised by the partly concurring, partly dissenting opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski for this reason.[93] Similarly, in its *Simpson* Grand Chamber judgment, the Court of Justice did not have to rule on this point since no breach of the right to a court established by law had been found. It should be noted that in their recent opinions mentioned above, Advocate General Tanchev and Advocate General Bobek have offered some interesting reflections in this regard. For the former, an infringement of this right must lead to a limitation of the legal effectiveness of the order made by the court which fails to comply with domestic law,[94] namely the order must be set aside or ignored,[95] but this does not go so far as to affect the act of appointment itself.[96] For the latter, arguing in favour of

[90]GC 23 January 2018, Case T-639/16 P, *FV* v *Council of the European Union*, ECLI:EU:T:2018:22, para. 77.

[91]*See* e.g. *A.K.*, *supra* n. 73, para. 142.

[92]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, paras. 289-290.

[93]*Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, partly conc., partly diss. opinion of Judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski, paras. 34-35.

[94]Opinion of AG Tanchev, 15 April 2021 in *W.Ż.*, *supra* n. 53, para. 98.

[95]Ibid., para. 99.

[96]Ibid., para. 101.

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national autonomy and diversity, it is incumbent on national authorities to strike the right balance between considerations relating to the right to a court previously established by law, on the one hand, and the principle of *res judicata*, on the other.[97] In this respect, as already noted above, it is of prime importance to underline that in its *W.Z.* judgment, the Court of Justice has considered that the fact that the judge concerned was not a tribunal established by law had the effect that the ruling of this judge dismissing W.Z.'s appeal must be null and void.

A principle safeguarding the rule of law and the separation of powers, and, ultimately, public trust

Drawing the lessons from the case law of the Court of Justice and the European Court of Human Rights, we can conclude that the requirement to establish courts by law requires: (i) an act of parliament establishing and organising courts and tribunals; and (ii) compliance with all acts – emanating from the legislature or the executive implementing legislative acts – regulating the organisation of the judiciary. Looking at the bigger picture and the current context, these constraints, in our view, safeguard two major principles of liberal constitutionalism: the rule of law, in a context of equality and quality and the separation of powers, in a context of balance and accountability. The requirement that tribunals be 'established by law' therefore safeguards public trust in the judiciaries.

A principle safeguarding the rule of law in a context of equality and quality

Considered as a major principle of liberal constitutional democracies, the *rule of law* is subject to many different definitions, depending on the legal culture and the authors theorising the notion. Indeed, the definitions of the concepts of 'Rule of Law',[98] 'Etat de droit', 'Rechtsstaat'[99] are still much debated.[100]

[97]Opinion of AG Bobek, 4 March 2021 in *Euro Box Promotion and Others*, *supra* n. 57, para. 153.

[98]On the initial use of this notion, *see*, *inter alia*, A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan and Co 1889) p. 114.

[99]R. Von Mohl, *Die polizei-wissenschaft nach den grundsatzen des rechtsstaates* (H. Laupp) p. 1844.

[100]*See*, about these different conceptions, J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?', 21 *Law and Philosophy* (2002) p. 137 and R.H. Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse', 97(1) *Columbia Law Review* (1997) p. 1.

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However, most of the definitions of the rule of law have the common feature of requiring: (i) the predominance of the law as opposed to the influence of arbitrary power;[101] and (ii) the generality of the law.[102] Indeed, these formal requirements are considered as being a *conditio sine qua non* of the rule of law, regardless of whether this principle should also include the protection of substantive rights, such as fundamental rights.[103]

According to L.L. Fuller, the 'internal morality' of the law notably relies upon the existence of general rules, in opposition to ad hoc pronouncements, and on the fact that their terms are complied with.[104] In this sense, the Venice Commission includes legality and non-discrimination and equality before the law among the six constitutive elements of the rule of law.[105] J. Waldron specifies in this respect that the rule of law requires the adoption of states' acts 'in a predictable way, giving us plenty of advance notice by publicising the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so'.[106]

As a matter of fact, the requirement according to which tribunals must be established by law directly contributes to the safeguarding of legality and equality before the law.[107] First, by preventing the establishment of ad hoc tribunals, this requirement protects the equality before the law and prevents arbitrariness. This latter concept refers to a situation where 'the agent [is] in position to choose it or not to choose it, at their pleasure'.[108] By requiring a certain stability in the field of judicial organisation, Article 6(1) of the Convention and Article 47 of the Charter

[101]Dicey, *supra* n. 98, p. 183; L.L. Fuller, *La moralité du droit* (Université Saint-Louis Bruxelles 2017) p. 55; J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) p. 217 and C. Grewe and H. Ruiz Fabri, *Droits constitutionnels européens* (PUF 1995) p. 24.

[102]Dicey, *supra* n. 98, p. 189; Fuller, *supra* n. 101, p. 89; Raz, *supra* n. 101, p. 216; Grewe and Ruiz Fabri, *supra* n. 101, p. 24; T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2005) p. 31.

[103]Two readings of this principle exist in the literature. For the proponents of a formalist reading, the rule of law is limited to requiring compliance with certain forms and procedures. For the proponents of the substantive reading, the rule of law also has a substantive dimension, which includes the protection of fundamental rights. *See*, *inter alia*, R. Dworkin, *A Matter of Principle* (Harvard University Press 2000); P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law* (1997) p. 467.

[104]Fuller, *supra* n. 101, p. 89.

[105]Report CDL-1D(1011)003 of the Venice Commission, 25-26 March 2011 on the rule of law.

[106]J. Waldron, 'The Concept and the Rule of Law', *Georgia Law Review* (2008) p. 1.

[107]L. Pech and D. Kochenov regret, in this sense, a lack of sufficient attention paid to this principle: *see* Pech and Kochenov, *supra* n. 1, p. 168

[108]P. Pettit, *Republicanism : A Theory of Freedom and Government* (Oxford University Press 1997) p. 55.

prevent any arbitrariness in the setting out of courts and tribunals and guarantee an equal treatment for litigants before national courts. As underlined above, this requirement lies at the heart of the rule of law ideal.

Second, the requirement to have tribunals established by law also reinforces the rule of law ideal by acting as a shield against the politicisation of judges and, thus, by ensuring that they act in conformity with the law instead of their political affinities. Indeed, several imperatives have been derived from this requirement in relation to the appointment procedures for judges, aiming to ensure the necessary quality, from a technical and moral point of view, of the profiles chosen to best ensure compliance with the law. As a matter of fact, the requirement of establishment by law requires the definition, by act of Parliament, of the appointment procedure and compliance with it. Both the Charter and the Convention therefore oppose the appointment of judges on an arbitrary basis, which would not be in accordance with a general procedure previously defined by law. The European Court of Human Rights moreover derived from Article 6(1) of the Convention the paramount importance of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – both in terms of technical competence and moral integrity – are appointed to judicial posts, and that 'the higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be'.[109] The explicit requirement of such merit-based selection is, to our knowledge, a novelty in the case law of the Strasbourg Court. Although this does not result in the imposition of a uniform model of recruitment to the judiciary in Europe, the need for a merit-based selection of judges seems to now clearly follow from Article 6(1) of the Convention, and potentially from Article 47 of the Charter given the fact it has to be construed in the light of the Convention. By imposing a quality condition to appointment processes, the requirement to have tribunals established by law thus reinforces the rule of law ideal requiring, as underlined by D. Smilov, that the judiciary should *only* be subject to the law.[110] This principle can only be guaranteed in a context where 'appointments, promotions and demotions' reflect 'the expertise and the professional experience of judges'.[111] The innovative strand of the case law based on the requirement to have tribunals established by law, regarding the quality of judicial appointments, therefore presents an important potential for protecting the rule of law ideal in Europe.

[109] *Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, para. 222 and *Xero Flor w Polsce sp zoo* v *Poland*, *supra* n. 4, para. 240.

[110] D. Smilov, 'The Judiciary: the Least Dangerous Branch?', in M. Rosefeld and A. Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) p. 866.

[111] Ibid., p. 867.

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By requiring legislation to establish and govern courts and tribunals, Article 6(1) of the Convention and Article 47 of the Charter thus translate two requirements at the heart of the rule of law – the predominance and the generality of the law – with a view to ensuring equality and quality in the administration of justice.

A key securing the separation of powers in a context of balance and accountability

Along with the rule of law, the separation of powers also constitutes one of the most important principles of contemporary liberal democracies.[112] The idea behind this principle is to avoid the concentration of powers in the hands of a single body.[113] According to Smilov, it also constitutes – always hand-in-hand with the rule of law – one of the normative foundations legitimating the power of the judicial branch.[114]

The deriving theory of 'checks and balances' is now generally preferred in the contemporary literature to the one pleading for a strict separation of powers.[115] This theory requires 'a partial distribution of functions among the separate powers, such that every organ of the state can execute partial control over the remaining ones through certain legal instruments'.[116] In this framework, 'the reciprocal restraining of state authorities is intended to achieve a relative balance within the state apparatus'.[117] While reciprocal interactions between the executive and legislative branches are tolerated because they are essential for securing a certain efficiency of the state apparatus, a stricter organisational and substantive distinction must be put in place vis-à-vis judicial organs.[118] The judiciary should indeed be 'perceived as the least politicised branch of government'.[119]

In this respect, states in principle retain the competence to organise their internal institutional structures, as well as the relations between them. With regard to EU law, Article 4(2) of the TEU underlines that the Union shall respect 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. The Union moreover lacks

[112]P. Mikuli, 'Separation of Powers', *Max Planck Encyclopedia of Comparative Constitutional Law* (2018).

[113]E. Barendt, 'Separation of Powers and Constitutional Government', *Public Law* (1996) p. 609.

[114]Smilov, *supra* n. 110, p. 862.

[115]*See*, for a recent analysis of the undermining of checks and balances in EU member states, A. von Bogdandy, 'Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States', 57(3) *Common Market Law Review* (2020) p. 705.

[116]Mikuli, *supra* n. 112.

[117]Ibid.

[118]Ibid.

[119]Ibid. *See also*, on the role of the judiciary and the legislative and the executive from a Polish perspective, M. Gersdorf and M. Pilich, 'Judges and Representatives of the People: A Polish Perspective', 16(3) *EuConst* (2020) p. 345.

competences to regulate directly matters linked to the organisation of member states' branches of power. With respect to the European Convention on Human Rights, the Strasbourg Court considers in the same vein that 'neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction'.[120]

If the principle of separation of powers will thus by no means be used and enforced 'in the abstract' by the Court of Justice or the European Court of Human Rights,[121] it could incidentally be protected by guarantees flowing from the fundamental rights they protect on a concrete basis – and this is shown by the recent case law. In this respect, it seems that the requirement according to which tribunals must be established by law constitutes one of the grounds echoing this institutional principle. It could, therefore, be used as a protective tool in contexts where liberal democracy is disrupted.

First of all, and maybe most importantly, the interpretation according to which 'the law', in Article 6(1) of the Convention and Article 47 of the Charter, refers to an act of the Parliament, is meant to safeguard judicial independence from illegitimate interference by the executive.[122] As underlined by the European Court of Human Rights, 'the object of the term "established by law" in Article 6.1 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament"'.[123] It therefore directly echoes the principle of separation of powers and the theory of checks and balances, which prevent any

[120]ECtHR (GC) 6 May 2003, No. 39651/98, 39343/98, 46664/99 et al, *Kleyn and Others* v *the Netherlands (No 6)*, para. 193 and ECtHR (GC) 6 November 2018, No. 55391/13, 57728/13 and 74041/13, *Ramos Nunes de Carvalho e Sá* v *Portugal*, para. 146.

[121]A. Tsampi, 'Separation of Powers and the Right to a Fair Trial Under Article 6 ECHR', in L.A. Sicilianos, *Fair Trial: Regional and International Perspectives* (Anthémis 2020) p. 697; ECtHR 22 June 2004, No. 47221/99, *Pabla Ky* v *Finland*, para. 35; Opinion of Advocate General Hogan, 17 December 2020, in Case C-896/19, *Repubblika* v *Il Prim Ministru*, para. 54 and *Guðmundur Andri Ástráðsson* v *Iceland*, *supra* n. 4, para. 215.

[122]ECtHR 21 January 2010, No. 4313/04, *Gorguiladzé* v *Georgia*, para. 69; ECtHR 27 January 2010, No. 30323/02, *Pandjikidzé* v *Georgia*, para. 105; *FV* v *Council*, *supra* n. 90, para. 68; at the level of the EU, *see* e.g. Opinion of AG Bobek, 4 March 2021 in *Euro Box Promotion and Others*, *supra* n. 57, para. 137. *See also* in this vein, L. Pech, 'Dealing With "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG', *Reconnect, Working Paper No 8* (2020). *See also* P. Filipek, 'Only a Court Established by Law Can Be an Independent Court: The ECJ's Independence Test as an Incomplete Tool to Assess the Lawfulness of Domestic Courts', *Verfassingsblog*, 23 January 2020, available at ⟨https://verfassungsblog.de/only-a-court-established-by-law-can-be-an-independent-court/⟩, visited 28 December 2021.

[123]Emphasis added. *Coëme*, *supra* n. 13, para. 98.

disproportionate intrusion by one branch into another. The requirement according to which tribunals must be established by law indeed embeds a protection for the judiciary vis-à-vis the executive, but also vis-à-vis the legislative. The European Commission for Human Rights[124] and, more recently, the European Court of Human Rights, have indeed also relied upon this requirement in order to scrutinise the compatibility of an influence exercised by the parliament on the judiciary. In the *Xero Flor* judgment, a breach of Article 6(1) of the Convention was found, due to the non-respect of the appointment proceedings of constitutional judges by the Polish Parliament.[125]

As we have seen, the requirement to have tribunals established by law also opposes the judiciary itself exceeding its powers. In this sense, this requirement also contributes to the principle of separation of powers and the underlying checks and balances principle, by reinforcing the judicial branch's accountability. It is indeed generally assumed that 'the principle of judicial independence should always be balanced against the principle of accountability of the judicial branch'.[126] As underlined by European Court of Human Rights Judge G. Yudkivska 'judicial independence does not amount to free will', and it requires 'a comprehensive understanding of the responsibilities undertaken before society – a judge's impartiality, competence and high moral qualities must be entrusted by the people'.[127] The requirement of accountability implies that judges act only within the scope of the competences assigned to them by law, which is a requirement directly embedded within the right to have tribunal established by law. In line with this, relying upon Article 6(1) of the Convention, the European Court of Human Rights stressed that the 'organisation of the judicial system and jurisdiction in criminal cases cannot be left to the discretion of the judicial authorities'.[128] In EU law, Advocate General Tanchev underlined similarly that the requirement that a tribunal must be established by law seeks to ensure that the organisation of the judicial system is based on rules emanating from the legislative branch and so is neither dependent on the discretion of the executive branch nor on that of the *judicial authorities* themselves.[129] The requirement that tribunals must be established by law thus not only protects the judiciary from assaults committed by the executive, it also limits the possible existence of a '*Gouvernement des juges*' – a government by judges, which can sometimes be feared.

[124] *Crociani and others* v *Italy*, *supra* n. 18, p. 147.

[125] *Xero Flor w Polsce sp zoo* v *Poland*, *supra* n. 4.

[126] Smilov, *supra* n. 110, p. 861.

[127] G. Yudkivska, 'Between Scylla and Charybdis – Judicial Independence and Accountability in the Populist Era', in Sicilianos, *supra* n 121, p. 757-760.

[128] *Coëme*, *supra* n. 13, para. 107.

[129] Opinion of AG Tanchev, 15 April 2021 in *W.Ż.*, *supra* n. 53, para. 69.

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The requirement to have tribunals established by law thus constitutes a fundamental ground for protecting the balance between the different branches of powers from a holistic perspective. In this sense it has the potential to constitute a key protecting each branch of powers in a context of balance and accountability and, thereby, to participate in the realisation of the ideal of liberal democracy.

Conclusion

In its 2017-2018 report, the European Network of Councils of the Judiciary stressed the importance of public trust in European judiciaries.[130] It stated that 'the judiciary is not in competition with other branches of power, but it is fundamental that trust is established and that there is a recognition of its independence in the way it functions'. Yet, 'trust cannot be demanded, it must be earned in a way the judiciary functions together with all other participants in the process'.

This paper argued that the requirement according to which tribunals must be established by law has the potential to constitute the bedrock of this trust. The latter could indeed only be envisaged in a context where the rule of law and a system of checks and balances between the different branches of powers is ensured. Yet, it appears to us that the requirement to have a tribunal established by law embeds four crucial imperatives able to sustain the principles underlying our liberal democracies: equality; quality; balance; and accountability.

By preventing the creation of ad hoc tribunals, this requirement guarantees the *equality* of litigants before the law. It also requires a *qualitative* system of recruitment of judges, limiting the risk of politisation and ensuring their submission to the law. Thereby, the rule of law principle finds a concrete echo in Articles 6(1) of the Convention, 47 of the Charter and in 19(1)(2) of the TEU.

Moreover, the requirement to have tribunal established by law also cements requirements in terms of institutional *balance* and *accountability*. While the institutional organisation of the different branches of powers at the domestic level as well as their interactions is a matter of state sovereignty,[131] the requirement to have tribunals established by law nevertheless imposes respect for a certain balance. Indeed, it first protects the independence of the judiciary by opposing disproportionate interference by the executive and legislative powers in its organisation. However, this requirement has a wider scope than solely the protection

[130]ENCJ report on Public Confidence and the Image of Justice, report 2017-2018 on Communication by and from the Judiciary, available at ⟨https://www.encj.eu/index.php/node/480⟩, visited 28 December 2021.

[131]*Ramos Nunes de Carvalho e Sá* v *Portugal*, *supra* n. 120, para. 144.

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of judicial independence, since it also constitutes a limit on the judges' room for manoeuvre. Indeed, it requires judges to act within the limits of the powers vested in them.

The requirement according to which tribunals must be established by law therefore presents, in our view, an important potential for safeguarding our liberal democracies: in addition to preventing disproportionate intrusions from the executive in the judiciary, it constitutes a basis for protecting a genuine balance between the different branches of power. By requiring a merit-based process of recruitment, it also sustains the professional ethics of the community of lawyers, guaranteeing in turn a certain peer accountability.[132] The recent resurgence of this requirement before the courts in Luxembourg and Strasbourg is therefore a step forward in the protection of the rule of law and liberal democracies in Europe.

[132]Smilov, *supra* n. 110, p. 861.

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