DIALOGUE BETWEEN JUDGES 2023

"Judges preserving democracy through the protection of human rights"

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Dialogue between judges 2023

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Proceedings of the Seminar
27 January 2023

"Judges preserving democracy through the protection of human rights"

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Solemn Hearing on the occasion of the opening of the judicial year

Síofra O'Leary

President of the European Court of Human Rights

WELCOME SPEECH

Presidents of Constitutional and Supreme Courts, Distinguished speakers, Colleagues, Friends,

Firstly, a very warm welcome to this year's Judicial Seminar which, after the changed rhythm imposed by the pandemic, has returned to its traditional January slot.

It is a privilege and an honour, as President of the Court, to launch this afternoon's programme.

Let me express my thanks to this year's Organising Committee: Judges Ivana Jelić, the Chair, Armen Harutyunyan, María Elósegui, Raffaele Sabato and Saadet Yuksel. A lot of work has gone into the preparation of today's Seminar, including the Background Paper, and I would like our colleagues to know that their investment is fully appreciated by all today.

Thanks are also due to the Registry team: Patrick Titiun, Rachael Kondak, Valerie Schwartz and Tatiana Kirsanova.

The participation of so many senior judicial figures is extremely encouraging; a sign of your support for the Court and for our common European project when such support is most needed.

I would particularly like to welcome our guests from Ukraine, including President Kniaziev from the Supreme Court.

In December last I was due to participate in an online conference organized by the Supreme Court of Ukraine when our proceedings were stopped due to a bombing raid on Kyiv. Against the odds, courts in Ukraine continue to operate in extremely challenging circumstances.

The conference went ahead last week, further testimony to Ukrainian resilience. During my intervention, I underlined the need for great democratic resilience at national and European level if we wish to effectively defend the values which the Council of Europe and this Court reflect. Our societies know only too well the signs of economic downturn and economic recession but many voters are less attuned to identifying some of the tell-tale signs of democratic recession – from restrictions on civil society, the corrosive effects of corruption and rule of law backsliding to use of the soft power of the media to counter democratic norms.[1] Between 1975 and 2006, the world witnessed a steady expansion of democracies and accompanying freedoms.

1 See L. Diamond, "Facing Up to the Democratic Recession", *Journal of Democracy Volume 26, Number 1 January 2015.*

Since that decade we see signs of incipient decline, not just in transitional democracies – of which the Council of Europe is home to many – but also in the functioning and self-confidence of established and previously rich democracies.

The European Convention on Human Rights seeks to safeguard effective political democracy – which constitutes a fundamental element of the "European public order"[2] – and is the only model of government which the Convention recognises.

The tragic events in Ukraine, the expulsion of Russia from the Council of Europe, the crippling of dissent and civil society in that former Member State and the forces which gave rise to these events, help us to keep sight of what happens when democracies break down and what form that slow or rapid process can take.

That is why the role judges play in safeguarding core civil and political rights, such as the ones our speakers will address this afternoon – freedom of expression, freedom of association and assembly and electoral rights – is crucial. We must play our part – within the limits imposed by our judicial role – in ensuring, in the words of Stanford Professor Larry Diamond, that a democratic recession does not become a democratic depression.

I do not wish to take up any more of your time for these opening remarks as I am as keen as you are to hear our speakers. I now have the pleasure to hand over the floor to my colleague, Judge Jelić, who will introduce the Seminar and the speakers on behalf of the Organising Committee.

I wish you all a very productive and fruitful afternoon of discussions.

2 *Ždanoka v. Latvia* [GC], no. 58278/00, § 98, ECHR 2006-IV.

Ivana Jelić

Chair of the Organising Committee of the Judicial Seminar 2023

Distinguished guests and speakers, dear colleagues and friends,

Let me greet you warmly on behalf of the Organising Committee of the Judicial Seminar 2023. It is wonderful to see you physically present in the Court and back in our old time slot.

If I had to summarise the role of the judiciary in protecting democracy in just two words, I would say it is about guaranteeing pluralism. The fundamental question asked in connection with this seminar's topic is just how effective citizens' involvement in State policy is reflected in the enjoyment of their rights, and vice versa. Most of the time, providing an answer involves looking at whether the State measure subject to our scrutiny curtails pluralism.

Guaranteeing pluralism within a society generally rests on three fundamental elements. Guaranteeing the freedom of expression protected by Article 10 forms the foundation for the other two, which are the existence of political institutions that reflect that diversity of opinion, and equal treatment of all citizens before the law.

- The protection afforded by Article 10 often entails enhanced supervision by the Court of measures restricting debate on matters of general interest, which is especially conducive to diversity of opinion within a State (see, for instance, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, ECHR 2015). The Court's supervision makes it possible to abolish direct or indirect measures that have a chilling effect on freedom of expression. It extends to, among other areas, the policies entailing invasive surveillance or regulation of the Internet that are an increasing feature of contemporary public policy (see *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021, and *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015).
- The judges' role in protecting democracy does not stop at the protection of freedom of expression. Individuals ought to be given the tools to take part actively and in a practical manner in the democratic process through channels created by law. Ensuring the relevance of citizens' voices in the political life of the State requires both a right to freely establish a political organisation and effective electoral rights.

– Interference with the freedom of assembly enshrined in Article 11 can take many forms, and the Court has had the opportunity to look at criminal-law and funding policies that have a direct or indirect chilling effect on the exercise of this right (see *Ecodefence and Others v. Russia*, nos. 9988/13 and 60 others, 14 June 2022, and *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, 15 November 2018). Furthermore, judges are faced with the difficult task of defining the tipping-point at which an association of citizens no longer serves democracy. Guided by the principle of pluralism, which requires a high degree of tolerance from the State, the Court has consistently found dissolution to be justified only if the organisation concerned has called for the use of force against democratic institutions and there

is concrete evidence of such use of violence (compare *Vona v. Hungary*, no. 35943/10, 9 November 2013, concerning the dissolution of an association targeting a national minority and calling for paramilitary parading, *AND Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, ECHR 2006-XI).

– The electoral rights enshrined in Article 3 of the Additional Protocol are a "characteristic principle of democracy" (to quote *Bakirdzi and E.C. v. Hungary*, nos. 49636/14 and 65678/14, 10 November 2022). Judges again have a special role to play, as access to effective judicial review has been found to be necessary to the organisation of fair elections (see *Mugemangango v. Belgium* [GC], no. 310/15, 10 July 2020). I won't deal here in detail with the Court's case-law, but it is worth noting the greater focus to be placed on minorities' voting rights. The Court very recently had the opportunity to clarify its approach to the matter, in the case of *Bakirdzi and E.C.* (cited above). The diversity of national minorities in Europe and the disparate approaches taken by member States' constitutions is challenging. While the Convention does not require positive discrimination in favour of minorities, States do take measures to ensure representativeness that can be beneficial but also sometimes counterproductive. International judges, with their cross-jurisdictional and comparative perspective, have a key role to play in addressing this issue.

In sum, pluralism can only be guaranteed if its guarantor reflects pluralism in its internal structure. Backsliding on pluralism within the judiciary should be of the utmost concern, including for international judges, who have the tools to help their domestic counterparts facing arbitrary disciplinary mechanisms (see *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022). These tools include the domestic courts' ability to refer a question to the ECHR (Article 1 of Protocol No. 16) and at EU level (Article 267 of the Treaty on the Functioning of the European Union), but also individual applications to the Court itself from judges facing such proceedings.

We are all aware that reduced judicial pluralism puts society's pluralism and tolerance at risk of irreparable harm.

Distinguished guests, dear all, I believe that the theme of today's Judicial Seminar and the four topics that we have chosen will provide you with ample food for thought, resulting in rich discussion.

At the end of my address, I would like to warmly thank the members of the Organising Committee: Judges Armen Harutyunyan, María Elósegui, Raffaele Sabato and Saadet Yüksel, as well as our two moderators, Judges Alena Poláčková and Ioannis Ktistakis. On behalf of them and of myself, I would like to thank the Registry members for their excellent cooperation and support – in particular Mr Patrick Titiun, Ms Rachael Kondak and assistants Valérie Schwartz, Loredana Bianchi and Tatiana Kirsanova, as well as the interpreters.

Thank you for your attention!

Miguel Poaires Maduro

Professor,

European University Institute

There are serious concerns about the state of democracy in Europe and around the world. The Secretary General of the Council of Europe has spoken of democratic decline. Many consider democracy today to be under threat. What, in those circumstances, is the role of judges and courts, in particular transnational courts? That is the question you have asked me here to discuss.

Safeguarding democracy has always been central to the role of judges. This is particularly so of courts tasked with enforcing and protecting a constitution or human rights. It is true that constitutionalism and the protection of human rights have sometimes been cast as a counterweight to democracy. Viewed through that lens, constitutionalism means placing limits on political action – limits to which the powers that be, including democratically elected powers, must adhere if they are to safeguard human rights. It is a perspective that continues to exert considerable influence over the way the constitutional and human rights role of judges is presented. Thus the role of constitutional courts and courts with a human rights remit is routinely thought of as one of protecting fundamental human rights against abuses of the democratic process. To my mind, however, this way of seeing things perpetuates an incomplete, blinkered view of democracy, constitutionalism and fundamental rights. And in so doing it perpetuates an incomplete view of the role of the courts themselves.

Such a view rests, first, on a reductive conception of democracy as majority rule. Democracy and the very idea of self government are premised on the equal dignity of all citizens. This presupposes not only an equal say for all of them in the political process, but also a requirement that that process give equal consideration to all of their interests (so as to factor in the various and unequal ways they may be affected by political decisions). In order to safeguard those two aspects of democracy, far more is needed than a guarantee of free elections. Elections must also be held in such a way that all points of view may be expressed and tested against one another. And citizens must, as far as possible, be able to make their political choices on the basis of rational and genuine epistemic and cognitive processes. Without rationality, without an insistence on truth, there is no such thing as true democracy. Absent those two elements, the choices expressed by the citizenry are distorted. What sets democracy apart from other political processes is that, under democracy, truth emerges from the representation of a plurality of views. It is not dictated from on high. We should add that a broadened conception of democracy also requires checks and balances and the safeguarding of fundamental rights, so as to guard against the risk that an occasional majority may ensconce itself in power or abuse its power by threatening the interests of a minority, thereby disregarding the democratic injunction to take account of the interests of all citizens in equal measure.

This conception of democracy has gradually come to predominate, both among authors writing on the subject and in the decisions of the courts. It contemplates human rights and the rule of law as inextricably bound up with democracy (or even as an integral part of it), and it is the conception usually

referred to as liberal democracy. It calls for free and fair elections, the safeguarding of fundamental rights, the separation of powers, an independent justice system and the guarantee of a number of general legal principles such as certainty, clarity, transparency and effective protection by the courts.

This connection between democracy and human rights is acknowledged in the preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms that fundamental freedoms are best maintained by an effective political democracy. It is also recognised in the judgments of the European Court of Human Rights. Witness the Court's dictum that the Convention "was designed to maintain and promote the ideals and values of a democratic society", a point it took even further by stating that "[d]emocracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it".[1]

This signifies, on the one hand, that without democracy there can be no effective protection of human rights, as both the effective recognition of many of those rights and the political institutions with the requisite culture to uphold them will be lacking. On the other hand it also means that, without human rights, there can be no true democracy. It is a fact, as I have already said, that the epistemic, cognitive and deliberative conditions that must be in place to have a genuine democracy are predicated on the safeguarding of certain human rights. If those rights are not protected, democracy cannot exist. Likewise, equal political dignity for all citizens – the crux of democracy – requires equal consideration of their interests, even where that entails imposing certain limits on the political process.

From this perspective, the connection between democracy and the human rights jurisprudence of the courts becomes manifest. It goes to more than just political rights, or to checks and balances, both of which the courts generally protect. And yet, those checks and balances are the main focus of discussion when it comes to the role of the courts in safeguarding democracy.

The judgments of the European Court of Human Rights are particularly illustrative in this regard. The Court's case law protects rights such as freedom of expression and freedom of association – the building blocks of the free and open space for discussion which every democracy must have. The Court has made clear that the protection of those rights, understood in terms of their relationship to democracy, encompasses far more than the mere guarantee of free expression; at issue are the promotion of media pluralism and the representation of a variety of political views, and, to take the point further still, the preservation of a rich and diverse civil society.[2] It follows from the Court's judgments that protecting democracy requires much more than protecting political expression and political parties. It entails protecting other forms of speech and association, in so far as they are an essential part of the public space in a true democracy. Moreover, the Court has shown itself to be attentive to the quality and integrity of public speech. So it is, for example, when the Court protects the independence and integrity of journalists and the public media or considers the risks of disinformation, particularly in the context of the new digital space.

In applying Article 3 of Protocol No. 1, the Court also protects electoral democracy. This includes the right to vote and the right to stand for election. But, to protect those rights, it is necessary, too, to protect the democratic character of the institutions and processes on which they rely. Doing so involves a host of thorny issues, from scrutiny of election procedures to the protection of political actors, including individual members of the legislature.

As reflected in many States' constitutions and made clear by your Court, democracy is not a "suicide pact". Democracy is well and truly entitled to defend itself against anti democratic forces. In this regard it seems to me that the approach taken by the European Court of Human Rights to "militant democracy" is precisely akin to that of national constitutional courts. To attract the censure of the law, it is not enough for social movements or political parties to expound and disseminate anti democratic ideas. They must

1 *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Reports of Judgments and Decisions 1998-I.

2 See, in particular, *Ecodefence and Others v. Russia*, 14 June 2022.

also pose an actual threat to democracy by actively working to undermine it or by advocating violence as a means of putting their ideas into practice. Nor is there a need to wait for such organisations to seize power before taking protective action. A "sufficiently imminent" risk, in the words of the Court, is both necessary and sufficient.[3]

Unlike the European Court of Human Rights, the Court of Justice of the European Union is not a human rights court. Gradually, however, it has turned its attention to questions of human rights and democracy. This is due primarily to two, seemingly contradictory changes. The first change has helped to circumscribe the powers of the EU, whereas the second has helped to expand them. The first change originates with the advent of a supervisory jurisdiction over the EU institutions in matters of fundamental rights. When particular powers were being transferred from national to EU level, a need was identified for that transfer to be accompanied by mechanisms of fundamental rights review comparable to those in place in the legal orders of the member States. This is the familiar history – albeit one that sometimes comes in for criticism – of the "judicial" introduction of fundamental rights into the jurisprudence of the Court of Justice following a dialogue with national constitutional courts. The outcome was the recognition and inclusion of those rights in the Treaties, and, subsequently, the adoption of the Charter of Fundamental Rights of the European Union. The European Court of Human Rights and its judgments played a prominent role in this change by serving as a vital tool for determining the nature and content of the constitutional traditions common to EU member States. Those traditions have since formed the basis for the development of fundamental rights in the EU.

The other major change regarding fundamental rights in the European Union is more recent and probably more controversial. It has developed, by fits and starts, out of the application of other rules of EU law, such as the four freedoms, in so far as those rules are capable of raising fundamental rights issues, some of which are deeply connected to the democracy problem. I will cite a few examples. In one case, a public broadcasting monopoly was challenged both as a restriction on the freedom to provide services in the EU and on the ground that it could be seen as an obstacle to freedom of expression. In another, the lack of media pluralism in a member State was challenged under the rules of EU law relating to competition safeguards and media market access in that State. In a third case, the EU legislation against age discrimination was relied on to challenge a national law aimed at enabling the exercise of greater control over the judiciary in a member State. These indirect applications of EU fundamental rights to democratic problems have gradually been supplemented by rules geared to meet those problems head on, some of which have been enacted under the EU's competences. One example, in the field of fundamental rights, is the EU's anti discrimination legislation. Also of note is the recent regulation tying the release of EU funds to compliance with rule of law standards, or the draft EU legislation on media pluralism and freedom. This change has been accompanied by treaty developments, not least the introduction of Article 7, which establishes a political mechanism for monitoring and sanctioning member States' breaches of the values enshrined in Article 2 TEU, such as democracy, the rule of law and the protection of human rights. But as I said, that Article provides for a political mechanism, which has proved toothless in the face of mounting challenges to those values from certain member States.

Against this backdrop, the European Commission and other parties have explored other remedies, so as to bring the potential fundamental rights breaches and rule of law violations observed in certain member States before the Court of Justice. I do not have time to give a detailed account of the debate that has ensued both in political circles and in the legal community.

The question whether EU fundamental rights may be used to review the actions of member States is often cast as one of the "incorporation" of EU fundamental rights into the municipal legal orders. The operative word calls to mind the process whereby the United States Supreme Court "incorporated"

3 Judgment in *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], ECHR 2003-II.

the Bill of Rights (a part of the US Constitution[4] that originally applied only to the Federal government) into the "due process" clause, which was binding on the individual US states. This had the effect of making the Bill of Rights applicable to the states and their internal affairs. EU law has yet to witness this kind of full incorporation. The Court of Justice has been willing to extend the reach of EU fundamental rights to the actions of member States, but only in so far as those actions fall within the scope of EU law, in the sense that a State is applying or derogating from that law[5].

More recently, though, in a line of cases on the independence of the judiciary, the Court of Justice has relied on a treaty Article whose application is not subject to the limits placed on the application of EU fundamental rights by Article 51 of the Charter. In response to the concerns raised about the rule of law, it made use of Article 19(1) TEU, which requires it to ensure that, in the interpretation and application of the Treaties, the law is observed. The CJEU accordingly held that Article 19 was a provision "which [gave] concrete expression to the value of the rule of law stated in Article 2 TEU" and ensured mutual trust between member States, in particular as regards the shared values on which the EU was founded. It furthermore held that "[t]he very existence of effective judicial review designed to ensure compliance with EU law [was] of the essence of the rule of law". This entails respect for the right to a fair hearing, which in turn – echoing what has been decided by the European Court of Human Rights – requires an independent judiciary.

In my view there is nothing surprising about these decisions. As a matter of fact, in my capacity as Advocate General of the Court of Justice, I advanced a similar line of reasoning in the case of *Centro Europa 7*. I stated there that a review aimed at ascertaining whether a member State provided the necessary level of fundamental rights protection to satisfy its obligations as a member of the Union "*flow[ed] logically from the nature of the process of European integration [and] serve[d] to guarantee that the basic conditions [were] in place for the proper functioning of the EU legal order and for the effective exercise of many of the rights granted to European citizens.*"

I believe the same approach should be extended to other areas, particularly to issues of democracy. Consider the requirement in Article 10 TEU that the EU be founded on representative democracy, or that laid down in Article 14 TEU that members of the European Parliament are to be elected by direct universal suffrage in a free and secret ballot. The preservation of free and fair elections and of a Parliament elected and operating on democratic principles presupposes the fulfilment of certain conditions that must be secured within all the member States themselves. The distinction between the two planes – as to whether the conditions are met in respect of European democracy and elections on the one hand and in respect of national elections and democracy on the other – has become untenable. It is plainly only a matter of time before the Court of Justice is called upon to decide whether those conditions are met in a member State where the outcome of an election to the European Parliament is at stake.

The upshot is that the Court of Justice of the European Union will gradually have to take on a role in protecting democracy in the member States. But how the Court meets that challenge will depend on the particularities of its own jurisprudence – not that of the European Court of Human Rights. The supervision to be exercised by the Court of Justice over matters of national democracy will have to be concerned with protecting European democracy and the EU legal order. This calls for developing a more "systemic" approach – otherwise put, one where the question for the Court of Justice is whether the case before it poses a systemic problem that may concern the EU as a whole. This sets the stage for possible convergence and complementarity between the Court of Justice and the European Court of Human Rights. In order to appreciate this point in full, it is important to clarify the raisons d'être of these two courts in the European sphere.

4 The Bill of Rights consists of the first ten amendments to the US Constitution.

5 See *Wachauf v. Germany*, C-5/88, 13 July 1988, ECR 2609, and *Elliniki Radiophonia Tileorassi AE v. Dimotik*i Etairia Pliroforissis and Sotirios Kouvelas, C-260/89, 18 June 1991, ECR I-2925.

There are three reasons why a transnational court may be vested with a particular role in protecting national democracy (and fundamental rights within the State).

The first reason, paradoxically, is purely internal to States themselves. It is to add an external layer of constitutional supervision at a level "above" that of the national constitution. This additional layer of supervision represents a form of collective self-discipline instituted by the member States in the light of their past experience, which teaches that domestic constitutional mechanisms have not always proved effective at protecting democracy and fundamental rights.

A second reason is the political and moral externalities which one State's democratic breaches and human rights violations may generate for other States. To be sure, the concept of "political and moral externalities" is controversial, not least because the international community is not ad idem as far as the concept is concerned. However, when the member States themselves undertake to share a single economic and political space (which may be embodied in a treaty such as the European Convention or the EU Treaties), it seems to me to be fair to say that such an undertaking rests on the principle that they share certain common fundamental values, and that a breach of those values throws the common enterprise into doubt.

There is a third reason, particularly relevant to the European Union. The member States of the EU have entered into a form of integration which renders them so interdependent that violations of the rule of law, democracy or fundamental rights by one of them may have repercussions for all the other member States, in the sense that either those other States will be obliged by the cooperation mechanisms inherent in integration to give effect to the decisions taken by a member State in breach of those values, or breaches of those values by one or more member States will taint the actions of the EU itself, affecting them from that point onwards. In other words, the problems of respect for fundamental rights and democratic principles facing one member State become problems of respect for fundamental rights and democracy for the European Union itself.

That, I think, accounts for the latest developments in the case law of the Court of Justice of the European Union.

Whereas the role of the European Court of Human Rights in this regard is predicated largely on the first two reasons I mentioned, that of the Court of Justice finds its basis mainly in the third. This accounts for the differences in jurisdiction and in the approaches favoured by the two courts, in particular the more systemic (and less haphazard) nature of the supervision exercised by the Court of Justice. On balance, the two roles are not at odds. There is no major difference, substantively speaking, in the analysis of the problems posed. Furthermore, the broader purview of the European Court of Human Rights, and its jurisprudence, will be extremely valuable to the Court of Justice as it looks from a systemic perspective at the democratic problems that befall the member States of the EU. The two courts should see themselves as complementary and not at all in competition.

Indeed, the problems they are facing are common to both courts. But what makes the challenges now being levelled at democracy so hard to tackle is that they also involve a challenge to the role of judges themselves (and transnational judges in particular) under democracy.

These challenges are fed by the growing dissatisfaction with democratic government being voiced, if opinion polls are any indication, by citizens throughout Europe. Underlying that dissatisfaction, in reality, are two factors: (1) the fact that people no longer feel represented by the political class; and (2) the fact that growth rates in authoritarian States, coupled with the economic stagnation and rising social inequality seen in many democracies, have discredited the idea that democracy and socio-economic progress go hand in hand.

These two factors can in turn be linked to three ongoing transformations in the political landscape.

The first is a growing asymmetry between the public policy space, which is increasingly immersed in transnational interdependencies, and the political space, which remains deeply national.

The second is a transformation in the ways and means of conducting politics, arising out of the digital revolution. This is changing how information is constructed and disseminated, how political preferences are formed and how deliberation happens in the public space.

The third is a transformation in the timescale of politics, as it becomes increasingly short termist.

I do not have time here to go into the details of this political transformation, but there is no doubt that it is having a profound effect on the deliberative, epistemological and cognitive underpinnings of democracy.

This transformation is bringing forth new democratic challenges to which the courts must respond; but, at the same time, it is placing the conditions for their ability to do so under threat.

The most obvious challenge comes from the forces of populism and their proto authoritarian conception of power. This challenge does not just entail a proliferation of human rights litigation. Much of that litigation arises out of a decay of the dominant democratic culture and a systemic "capture" of democratic institutions by power. But the courts are ill equipped to deal with institutional issues going to the framework of democracy. They are probably also less effective because the solutions they can provide are seldom systemic in character. And, as recent events in Europe show, courts may themselves fall victim to such "capture" and democratic backsliding. At the same time, in such a context, intervention by the courts becomes all the more necessary and is in many cases the only possible alternative. This applies in particular to transnational courts, which may turn out to be a last resort as democratic challenges take root in a political culture that is sliding away from democracy. Not to mention that the courts are placed in an all the more difficult position by the populist representation of judges as members of a disconnected elite hostile to the democratic will of the sovereign people. It follows that courts must show that they are capable of developing not only the judicial avenues for prompting democratic change but also a form of legal argument that is persuasive outside the legal community, to the political community at large.

A second challenge looms regardless of the rise of populism. Democracy is increasingly fragmented and polarised – a particularly problematic state for democracy because it makes it hard for it to fulfil, in a way that everyone accepts, its function of reconciling and arbitrating between the interests of various social groups and citizens. As democracy founders, the role of the courts as a rationalising force in politics is thrown into relief. What is sometimes referred to as the "judicialisation of politics" or "government by judges" is in fact the consequence of an implicit delegation of the political sphere to the judiciary, whereby certain political disagreements are translated into legal arguments to be adjudicated on by judges reasoning from universally accepted principles.

The conferral of this role on judges arises out of an understanding of democratic constitutionalism in which the judicial role is not merely one of supervising politics or entrenching certain values against the course that politics might ordinarily take. Instead it is, in fact, to make politics possible and productive. What is sought is not merely to keep disagreement in check, but also to authorise, regulate and resolve disagreement. This conception of democratic constitutionalism carries with it far reaching consequences for the role of judges. Under it, their function is to shape and frame the search for meaning in the political community, rather than to reveal the meaning stored in previously enacted rules.

The third challenge stems from the new nature of the public sphere. As the virtual public sphere expands and becomes hegemonic, it will increasingly fall to judges to ensure freedom of speech and pluralism, thereby helping to protect the integrity and the quality of the public sphere and public speech. That is not a new role, as your Court is well aware, having dealt with cases such as *Delfi*, *Høiness* and *Magyar Jeti*. But it is one that is certain to grow in importance and – more fundamentally still – it will be increasingly bound up with those forms of transnational power which escape the scrutiny of national democracies

but exert decisive influence over the shape of politics and public policy. I am referring to social networks but also to other forms of transnational private power, such as the prominent and longstanding role of sports federations.

Because they are transnational, these forms of power are immune to democratic or judicial scrutiny at the national level. The European Court of Human Rights and the Court of Justice of the EU alike have rightly shown that the apparent limits on the applicability of the Convention or certain rules of EU law to private power are not a conclusive bar to judicial intervention. However, these courts have yet to fully appreciate the democratic problems currently posed by the existence and operation of private power. In this regard I see an opportunity for them, for it is here that they can make up for the role that national democracies are no longer able to fulfil.

With these three challenges come two sets of consequences for judges. First, they will necessarily have to take part in configuring and devising the political space. Second, willingly or not, they will be placed at the centre of many a political conflict. And this presents a paradox. As I pointed out, the political centrality of the courts is a product of politics, not a result of the courts' own actions. But – and herein lies the paradox – that phenomenon of centrality makes their decisions all the more contentious. The only way out of this paradox is to revise our conception of the role of judges in a democratic polity. The courts must change the nature of their own legal reasoning and the understanding of the role they play in exercising their supervisory jurisdiction.

Susanne Baer

Judge, Federal Constitutional Court of Germany

To open the judicial year at the European Court of Human Rights in 2023 with a conversation about judges preserving democracy through the protection of human rights is wise, and needed. It is also an honour for those tasked to provide an impulse to start this conversation, and I am grateful to Judge Jelić and her colleagues for inviting me.

On a broader scale, this is a timely call to reconsider the basics of what this is all about – courts protecting fundamental human rights as an indispensable ingredient of democracy. This is because there are challenges out there to be taken into account, and because these challenges have an often subtle and sometimes overt impact on this Court's intensity of review – and that of other courts with the mandate to protect democracy through the protection of human rights – and on our understanding of subsidiarity, margins of appreciation, and deference.

Therefore I will address some challenges that affect freedom of expression as a specific – yet not the only – fundamental human right. I will also suggest revisiting the task this Court has been charged with, in answering the call from people who need help, because this is who we work for. And I will suggest that this is not a time for deference, but a time for courage in the light of the pressure, attacks and destruction we face, with their underlying intention of in fact destroying any democracy worthy of that label. First, then, what are the challenges to freedom of expression, to courts, and to democracy? Second, and as illustrated by a particular case, how should we respond?

CHALLENGES TO FREEDOM OF EXPRESSION

Freedom of expression is a classic yet complicated fundamental human right. The classic constellation is where authorities censor private contributions to a public discussion; as when States censor popstars discussing the Bible (see *Rabczewska [Doda] v. Poland*[1]). This is not something of the past but is becoming more complicated by the minute. If there is a right that most needs evolutive interpretation, it may well be this one, for several reasons.

First, expression is highly dependent upon the means of communication, and that is, today, rapidly changing hardware and software. In the past, expression may have meant shouting "fire" in a crowded theatre, or a bumper sticker with a famous author's quote that "soldiers are murderers"[2]. But today, expression

1 ECHR, 15 September 2022, *Rabczewska [Doda] v. Poland*, 8257/13.

2 This refers to canonical decisions in the U.S. (*Schenck v. United States*, 249 U.S. 47 <1919>) and Germany, regarding Kurt Tucholsky´s phrase from 1931, in 1995 (BVerfGE 93, 266).

is digital, global, fast. In addition, there are scary options to manipulate, falsify, lie and misrepresent. And maybe the most dangerous thing of all for democracy: the context has changed. We have lost a shared public space to fractions and bubbles, with less and less quality media. There are challenges all over.

Then, and intensified as it is by the technology, we see hate speech: fast, global, widespread. It may be directed against Muslims by former journalists who are now prominent politicians (*Zemmour v. France*[3]), or may target homosexuals (*Valaitis v. Lithuania*[4]), or mobilise conflicts over history, including the question that Germans are quite familiar with: the denial of genocide. It is particularly complicated, and rightly controversial (*Perinçek v. Switzerland*[5]). This is already challenging indeed.

Clearly, every ruling in such cases contributes to our ability to live together peacefully, in mutual respect. As such, freedom of expression rulings are democracy rulings per se. This is the Republican function of freedom of expression, including speech, the press and media. It has been emphasised by many courts around the world, and has become widely accepted. Freedom of expression and democracy are inextricably bound together.

But that is not all there is. I am afraid that in the judicial years to come, even more effort will be needed to properly address these challenges, and to clearly communicate the scope and the limits of free speech and the other fundamental human rights, to strengthen and defend democracy. This is because there are additional and even more fundamental challenges out there.

CHALLENGES TO COURTS

In 2023 one more fundamental challenge to human rights, and to democracy, is the pressure, attacks and destruction of courts as institutions, and of judges as individuals, and thus, of meaningful human rights protection as such. This is nothing new, but it is intensifying, there is now a lot of power, as in money, organisation and influence, behind it, and there is a strategy. Thus we have to react now. Such pressure also comes in many forms, with varying effects. In fact, it often starts with formal and rather boring details, but eventually undermines it all. This is now a key concern of the Venice Commission. And it is the original task of this Court.

Pierre-Henri Teitgen addressed the Consultative Assembly of the Council of Europe in 1949 by saying: "Democracies do not become Nazi countries in one day. … It is necessary to intervene before it is too late."

At the ceremony for the opening of the judicial year in 2022, Dunja Mijatović, the Council of Europe's Commissioner for Human Rights said: "It is perhaps not an exaggeration to say that the need for this system today is as pressing as it was when it was established more than seventy years ago."

And former U.S. Foreign Minister Madeleine Albright, born in Prague, fleeing from the Nazis, but with grandparents murdered in the Holocaust, reminded us that Mussolini's political strategy was to pluck a chicken one feather at a time, so that each squawk will be heard separately "and the whole process is kept as quiet as possible".[6]

Regarding courts, one feather is funding, another feather procedure, another feather discipline, then the salary, composition, president´s authority, case-load, rules of filing, jurisdiction, and so forth. To destroy independent courts with real power, autocrats thus pluck on funding, in that they cut back or stop funding the court. Or they ignore one ruling, then more, denounce decisions, discredit judges,

3 ECHR, 20 December 2022, *Zemmour v. France*, 63539/19.

4 ECHR, 17 January 2023, *Valaitis v. Lithuania*, 39375/19, following ECHR, 14 January 2020, *Beizaras and Levickas v. Lithuania*, 41288/15, on the right to effective remedies for victims of discrimination.

5 A Turkish politician denying the Armenian genocide in Switzerland, see ECHR [GC] 15 October 2015, *Perinçek v. Switzerland*, 27510/08.

6 Fascism: A warning, with Bill Woodward, 2018.

change the age of retirement[7], the selection process or criteria, the salary, or support and protection for the bench[8]. Or they change the rules of procedure. They modify doctrine, procedural or substantive, or the ethos of the task. Small squeaks, but serious damage.

In Strasbourg, you know what some of this looks like. In the UK, this has informed stiff resistance to "Europe"[9], and it still fuels policy initiatives. In Hungary, Poland and Turkey, people do know what happens when courts are "reformed" into "tribunals" that do not deserve the label any more. In Israel, lawyers and the people take to the streets these days, to prevent that, and defend their court[10]. Now how are we to address these challenges? How should we react to more or less subtle attempts to get us out of the way?

For courts, this is a very specific challenge indeed.

To start with, it is important to note that pressure and attacks on courts as institutions are in fact attacks on democracy. But what makes it complicated these days is that they attack democracy worthy of the label in the very name of democracy, and the rule of law in the name of the rule of law, and freedom of expression in the name of fundamental rights – just their own version thereof, which in fact amounts to none.

Certainly, democracy comes in various forms, with varying systems of elections, distribution of power, and arrangements of checks and balances. But in too many places, things are now called a "democracy" or democratic, or freedom of expression, or free media, when they are not. There is an urgent need these days to clarify that democracy is not unlimited majoritarianism[11], but produces fairly elected and peacefully changing majorities in systems of checks and balances. Also, democracy is no autocratic "illiberalism"[12], but limited power to, as the United Nations put it, respect, protect and fulfil fundamental human rights[13]. Moreover, democracy empowers no parliament fully on its own, but installs independent courts with the fine-tuned power of judicial review, and recognises the "mobile" (as former Justice Renate Jaeger called it) formed by national, transnational and international institutions. And freedom of expression is not a licence to manipulate, or spread hatred, incite intolerance and violence, or privilege powerful speech, but a human right to allow for peoples' voices to be heard.

Instead, democracy worthy of the label then needs freedom of expression, as an equal right, in respect of dignity. And it needs courts to protect that. This is why courts are, for autocrats, not a good idea. For unlimited majoritarians, respect for minorities is nice, but not necessary. For illiberals, some may speak, but not all equally. And in fake democracies, independent courts are simply in the way. The task then is to distinguish the fake from the real, and to protect the latter. But the challenge is to counter the pressure, attacks and destruction.

7 ECHR, *Baka v. Hungary*, 23 June 2016, 20261/12. There, timing was crucial, with a late ruling meaning fait accompli.

8 There is an urgent necessity in the Council of Europe to install solid protection mechanisms for the judges of the ECHR, but this is not yet in place.

9 The campaign for the UK to leave the EU (Brexit) relied, in part, on criticism of the ECHR, which may signify that one goal was to get rid of human rights judicial review, thus not only the jurisdiction of the CJEU.

10 Minister of Justice Yariv Levin proposed a reform law to allow a majority in parliament to overrule Supreme Court decisions, which in fact allows government to freely choose whether to accept judicial review or not. See Gross, Aeyal: The Populist Constitutional Revolution in Israel: Towards A Constitutional Crisis, VerfBlog, 2023/1/19, https://verfassungsblog.de

11 For further discussion, see Sajó, András, and Renáta Uitz. The Constitution of Freedom: an introduction to legal constitutionalism. OUP 2017.

12 The proposal of an "illiberal democracy" is attributed to Hungarian President Orban. Conceptually, this is a contradiction in terms. This is illustrated by the work of the [Venice] European Commission for Democracy Through Law, following a substantive notion of the rule of law, including the protection of fundamental human rights.

13 The framework is designed to extend the reach of human rights to private entities, in that States are not only bound by human rights themselves, but are also obliged to ensure the private actor's respect for human rights.

A PARADOX

However, this situation amounts to a paradox. On the one hand, the cases are very many and very complicated, and it may be wise for courts to hold back, wait, abstain from intervention. Even more so, for courts under pressure, and specifically for human rights courts, it may seem plausible to withdraw, leave wider margins of appreciation, emphasise limited supervisory power, and subsidiarity, defer on principle. And when struggles around democracy heighten the risk that courts might lose their standing, it may also seem wise to stand back.

Yet on the other hand, it is exactly now, exactly in this situation, that courts are needed. They are needed because the world is getting more complicated by the minute, and specifically, the public, speech, expression. Courts are needed precisely because they are under pressure and face attacks. And courts are needed because there is a script out there for their destruction – people are plucking the feathers. It is the independent courts with the power of judicial review that are the only ones with the formal mandate to stop autocrats, empower the opposition, save individuals, open public space, and thus save democracy. Therefore, courts must take a stand – said Teitgen, said Albright – before it is too late. Courts are, specifically regarding freedom of expression, the institutional device to make sure democracy works. And yes it is a paradox: tempting to defer – but high time to intervene, to act. But I am sure this Court is well equipped to handle that.

CASE BY WAY OF ILLUSTRATION

There may be many cases to illustrate the point. I have picked a recent German one.[14] Some may think it is about the right to privacy, or reputational interests. But in fact it is a case about democracy, via human rights, as freedom of expression. However, it is somewhat exceptional, because German courts regularly take the value of free speech for a functioning democracy into account, as well as the personal interests in privacy and reputation. It also exemplifies some of the newer questions that arise in the area.

This case started in 2016, when a blog published a picture and a quote of a prominent female politician with the heading: "K thinks sex with children is ok, if there is no violence involved." In fact, she never said that. But some words were taken from a debate in parliament, when the politician insisted on violence as the key factor of abuse. And she is a prominent member of a party committed to fundamental human rights. The politician sued for omission and non-pecuniary damage. The owner of the blog posted this and the original quote again, and got even more attention – which is the whole point in the blogosphere. Posts are more likely to trend if they are aggressive – and even better if they sexualise women. This is what happened here.

The politician now also sued the provider for subscriber data – unsuccessfully, because the Civil Court dismissed her case: Yes, the post was polemical, exaggerated and sexist. But she had provoked it with her statements in parliament, and the comments all related to this. The court implied that someone who stepped into the public light knew what they were doing. Now, the politician lodged an appeal, and was mostly unsuccessful again. The Higher Court said that these were libellous comments, yet not insults, rather a discussion. Again, as the ruling implied, she had participated in public debate and was a politician after all.

She lodged a fundamental rights complaint.

It is a case brought by a politician – not the classic private individual against the State. Does she have standing to start with? A suit brought against a private company – not classic State censorship. Is this a human rights case at all? A world of heated and polarising discussions around cancelling, political correctness and the like. Is it not wise then, for a court, to stay out of it, to leave wide margins of appreciation

14 German Federal Constitutional Court, Order of the Second Chamber of the First Senate, 19 December 2021 - 1 BvR 1073/20 - (Künast ruling). The Chamber applies established standards developed by the First Senate of the Court.

and leeway on various levels of proportionality, if all doctrinally fine? And maybe most important, finally, we, as human and fundamental rights courts, do only supervise. There are decisions from civil courts well versed in such matters which discuss fundamental rights. Why intervene? Do we know better? Or should we – in line with the ongoing criticism of courts interfering with politics, courts going too far, being overly activist, possibly acting ultra vires – leave it to the locals, to them?

Now what?

Confronted with such a case, there seem to be so many reasons for a court not to intervene. But taking our task seriously, and taking the challenges to freedom of expression and democracy into account, there are better and more reasons to act.

MARKETPLACES OF IDEAS NEED RULES

First, there is a prominent theory as to the prioritising of deference. It is not the only theory out there, but it is a prominent and influential one, associated with John Milton, John Stuart Mill, Thomas Jefferson, as well as a famous dissent by Justice Holmes in Abrams, a SCOTUS decision in 1919[15], one that gained the majority in the case of *Brandenburg v. Ohio* in 1969[16]. But in fact, the theory combines a specific image of the private individual with an analogy relating to the economic idea of a free market, to create a marketplace of ideas. But today, we know better.

We know that the individual is not purely rational, or interested in profit, so he or she moves in much more than markets. We know that people oscillate between private and public roles. We also know that the praise of a totally unregulated "free" market is left for a radical few, while regulation is now the accepted necessity to make markets work. There is also no one marketplace, but many arenas, spheres, levels, means, forms and effects of communication. And market actors are clearly not equal, and law is needed to take power into proper account. So what does that mean?

In the blogosphere case, the ruling explains that there is an original meaning of freedom of expression, to protect criticism of persons in power, that still matters. Yet the ruling also emphasises that the world has changed. Therefore, one cannot accept verbal abuse or hate speech, neither vis-à-vis private individuals nor *vis-à-vis* officials or politicians. Thus, limits to expression also apply to statements concerning public figures and officials. Otherwise, democracy suffers. So the Court added: "In particular when information is disseminated via social media, the effective protection of the personality rights of politicians and officials is also in the public interest, which can reinforce the weight of these rights in the balancing of interests. People will only be willing to engage in public life and participate in State and society if sufficient protection of their personality rights is guaranteed."

Here, the civil courts were corrected, relief was granted. And this is just one case, while the Strasbourg jurisprudence offers many more, like *000 Memo v. Russia*[17]. Despite some challenges in legal opinion, it illustrates why there is, more often than not, no reason to defer, but a good reason to step in.

COURTS AND COMPLEXITY

Second, there is a general, albeit weak, point sometimes made to motivate a court to defer on principle: that things are simply too complex. Specifically, the law of freedom of expression has been refined over a long period, with the complex media law we have today, and all kinds of difficult distinctions – this is all very demanding, and a lot of work.

15 *Abrams v. US*, 50 U.S. 616, 630 (1919).

16 395 U.S. 444 (1969). Brandenburg was a Ku Klux Klan Leader, engaged in racist and antisemitic terrorism in the 1960s, now protected by a law limited to punishing "imminent lawless action".

17 The case (2840/10) decided in 2022 is important because it addresses a SLAPP constellation (Strategic Litigation Against Public Participation), in which rights are abused, in litigation to silence critics, to destroy rights.

But this is also no reason to abstain.

Law is the tool for handling complexity, by reducing it. Judges and court chambers or offices are professionals, trained for complicated cases. More importantly, they have been elected and sworn in to perform the task, with rules to protect independence, because so much power is entrusted to a judge. With this in mind, the job is designed not to defer, but to act.

SLIPPERY SLOPES

Third, and more dangerous still, there is the argument that human rights are very demanding already so one should not go too far. Not every concern is a human right, you know! Do not get on a slippery slope, and do not feed a rights inflation! And there are many versions of this warning. Opposition to "activists" going too far has played a role in British criticism of the ECHR as well as in the context of Russia´s withdrawal, and it informs governments who oppose rulings in areas labelled "culturally specific", "tradition" or "identity", typically to the detriment of women, and all sexualised and racialised others.

The baseline is to suggest that courageous rulings – prominently rulings based on the evolutive approach that sees the Convention as a living instrument[18] – put human rights as such, and put this Court, at risk.

The assumption is that if courts ask too much from governments, from legislatures, or from regular courts, they may not comply. And this concern is in fact a classic one, since courts have "neither the purse not the sword". But a concern is a reason to act wisely, not a reason to shy away. The word is power. It has, even without formal implementation significant effect on the ground. The recent report on rulings on Russia are impressive proof: they matter, to people.

Then there is the distinction between law in the books and law in action (to use the realist´s distinction – Roscoe Pound in 1910 and Karl Llewellyn in 1930). There are, on the books, indeed a lot of fundamental human rights these days. But is this a rights inflation? Certainly not. What really matters is the difference between the promise and its delivery, between the moral idea and even political commitment and the adjudicated reality. In Strasbourg, this is the difference between 1950, when the Convention was passed, the book, and 1959 and 1998, when the Court was installed and access granted, the action.

Protecting human rights in democracies, this action is called constitutionalism. It is not limited to nation-states, but, in post-Westphalian arrangements of legal pluralism, it is a name for the institutionalised protection of fundamental human rights[19]. The key institutions are courts. It is courts that make the difference between book and action. Because of this central function, there is no general reason to defer. Indeed, and facing the challenges today, it is quite the contrary. To make human rights a reality on the ground, for people who need them, courts need to step in. And specifically, as an international human rights court, Strasbourg has been, and needs to remain, right there.

Put differently, human rights are no reality without courageous courts. On the books, human rights are nice, value statements, rhetorical concessions, grand aspirations. But anyone in power, getting there by more or less democratic means, and performing a fake democracy, with a meaningless rule of law, and captured courts, may choose what to do with them. It is only with independent courts that human rights become real for people not in power, as law. When courts defer, in dubio on principle, there is thus too much to lose.

18 Since ECHR, 25 April 1978, *Tyrer v. the United Kingdom* 5856/72.

19 For comparative analyses and cases see Norman Dorsen et al. Comparative constitutionalism: cases and materials. 4th ed. West 2021.

ACT WISELY

Fourth, there is another general point that is often made to make courts defer. It says: "Be wise – do not provoke your critics any further!"[20] And indeed, when courts face pressure, attacks and varying methods of destruction, is it not wise to step back a bit? Or in the case of politicians, political speech, the blogosphere, as this is messy, and courts do have problems already, should they not stay out? Or in cases around media regulation: should there be wide margins to deal with pluralism?

I urge you to answer no. Because this is the paradox again: the more pressure there is on the courts, the more the courts are needed by the people. The attacks – powerful, strategised[21], one feather at a time – are meant to weaken, erode, and destroy. For humans, it is then wise to run. But for courts, it is a call to action. Remember Teitgen: before it is too late, and Albright: the feather plucked from the chicken, so the squeak is not too loud, but disastrous in the end.

In fact, the pressure and the attacks are exactly meant to make you, as judges, withdraw, stand back, leave room. Yet that room is the space of unlimited power, without judicial review. And that power is, in Europe today, too often an autocratic power of a few greedy populists[22] performing as "us", as "the people", exclusive, elitist, unequal, unfair. You are in their way. And people will suffer when you get out of it. Whenever we defer, people who really need human rights may lose the address they can turn to. It is people who are left without protection[23]. Or, as Commissioner Mijatovic said, the Convention is, often, a "life-saving instrument". Thus the paradox: when under pressure, it is then you are needed most.

THE COUNTER-AUTHORITARIAN DIFFICULTY

Now finally, what about the "counter-majoritarian difficulty" (using the phrase from US theorist Alexander Bickel)? In the past, that was the difficulty of courts that disagreed with a democratic majority. And indeed, this is a challenge. But the context has changed.

In working democracies, when courts supervise and eventually stop majorities that are elected freely and equally, thus fully legitimate, review should be handled with great care. Critics should be taken seriously. But when democracies are not well, or have already become legalistic autocracies, whose leaders pose as majority, fake democratic procedures, and skilfully manipulate the public, there is no counter-majoritarian difficulty, but a counter-authoritarian task. In such fake democracies, parliament and regular courts do actually address human rights, in rhetoric, but they abuse the very idea. It is precisely then that independent courts, and often human rights courts, are the last resort to stop such authorities willing to use all means to get rid of anyone in their way. And courts are needed, early on.

This is what courts have been entrusted with, to move from promises in books to action that people need, in a democracy. In a complicated freedom of expression case: apply established doctrine, recognise margins of appreciation and leeway for competent actors, if they are really legitimate. But this is no time for non-intervention. Certainly, such cases raise complex questions, charged with intense emotions, of high symbolic significance, and are very contextual. But that is no reason to defer, rather to provide guidance. And yes, many regular courts and legislatures and governments know there is a right to freedom of expression and do consider it. But this is not enough. It is not rhetoric and certainly not fake performance that counts, but the substance that matters.

20 Note that some human rights are subject to protest, refusal or change themselves, namely substantive equality, specifically for women, homo-, trans- and intersexual individuals, as well as for religious and racialised minorities, and as fundamental rights for foreigners, specifically for refugees, as well as, in some contexts, people in prison.

21 In Europe, Hungary serves as the blueprint of this transition to autocracy. See Sajó, András. Ruling by Cheating: Governance in Illiberal Democracy. CUP 2021.

22 Scheppele, Kim Lane. «The opportunism of populists and the defense of constitutional liberalism.» German Law Journal 20.3 (2019) 314.

23 Baer, Susanne. «Who cares? A defence of judicial review.» Journal of the British Academy 8 (2020): 75-104.

In the blogosphere case, the court clarified that politicians have standing, and may claim individual human rights even when acting in politics. It stated that fundamental human rights affect private companies, since courts of law allow or limit their doings – which is called, in German, "Drittwirkung". And it is well known in Strasbourg that rights guaranteed against State power have an effect on private actors too[24]. And no doubt civil courts are well versed in such matters, but fundamental rights supervision must control their decisions in substance nonetheless. Because what a constitutional court, or a human rights court, knows better is fundamental human rights. Thus more than procedural review, but rather substantive supervision. Because the people need you.

These days, the use of rights may turn into abuse, and the pretence of democracy may in fact destroy it. This means that narrowing the scope of protection may take protection away, and expansive tolerance of limitations leaves power unchecked. Therefore, government speech needs to be checked carefully, and public State-sponsored media may open space for informed debate, or reduce that space to one voice only. In some countries, as the Venice Commission notes with growing concern, even courts have been turned into devices to shed a legitimating light on autocratic government,[25] so that merely procedural review would in fact be complicit in its denial. Thus it is for the court to provide guidance, and define what needs to be taken into account or does not matter. This Court is the address people turn to, asking for help, even in countries where no formal implementation is in sight[26]. It is the institution to provide that guidance, so that regular courts can do their job, and so that legislatures can turn their human rights commitments into realities. People need you. Democracy does, too.

24 ECHR, *X and Y v. The Netherlands,* 8978/80, 1985-

25 The Venice Commission reported on Kirgizstan CDL-AD(2007)045, Ukraine CDL-AD(2010)044, (2020)038 und (2021)028, Moldavia CDL-AD(2019)012, and Romania CDL-AD(2018)017 and 021.

26 I.e., thousands of Russians sought justice, with around 17,000 cases still pending when Russia was expelled from/left the Strasbourg system. Even without formal implementation, citizens perceive ECHR rulings as symbolic support, thus having a significant effect on the ground. See OSCE Report on Russia's Legal and Administrative Practice in Light of its OSCE Human Dimension Commitments, 22 September 2022, ODIHR.GAL/58/22 Rev.1.

Mirjana Lazarova Trajkovska

Judge,
Supreme Court of North Macedonia

The right to freedom of peaceful assembly and to freedom of association is not only one of the moving forces of modern democratic society, but – and perhaps more fundamentally – of living in society with others who are similar to or different from us. In this perspective, I am in agreement with the famous French diplomat and sociologist Alexis de Tocqueville, when he said that the human spirit and the art of association are fundamental not only to democracy but to progress in all other areas of human life.[1] Therefore, we need to contribute not only to the protection of freedom of association but also to the perfection of the legal aspects of the art of association and assembly.

This is even more relevant in times like the past few years when, owing to the COVID-19 pandemic, a number of protective measures were introduced which in one way or another put at risk this fundamental precondition of human existence in democratic and civilised societies. We have experienced different forms of restrictions such as closures and restrictions of public and private meetings. Various social distancing policies prevented gatherings with others, not only expressive but also private and intimate ones. Social gatherings were either banned completely or limited by the number of people. Many political, sports, cultural, religious, or other events across Europe and the world were cancelled. We accepted and adopted alternative forms of communication, expression, and association, most of all through online meetings. Yet, people are social beings, and they need to gather both publicly and privately for social, political, cultural, humanitarian or any other reason.

In this regard, I intend to point out here some of the key contributions of the Court to the perfection of the art of association and assembly as one of the fundamental rights protected by the Convention, recognising that participation in the democratic process is, to a large extent, achieved through belonging to associations in which citizens can integrate with each other and achieve common objectives collectively.[2]

The Court has established that the right to freedom of association and assembly does not, however, protect intentionally violent protests or gatherings. For example, the Court found no violation in the case of *Ayoub and Others v. France,* concerning the dissolution of a paramilitary-type far-right association following violence and public-order disturbances by its members.[3]

The aims of the right to freedom of peaceful assembly and to freedom of association with others include protecting the freedom to form and express opinions and securing a public forum for debate and the open expression of protest.[4] The Court has attached importance to the fact that those taking part in a gathering are seeking not only to express their opinion, but to do so together with like-minded others.[5]

1 Alexis de Tocqueville; Democracy in America (Edited and translated by Harvey C. Mansfield and Delba Winthrop and with an Introduction by Harvey C. Mansfield and Delba Winthrop) ©2000.

2 *Kudrevičius and Others v. Lithuania*, GC judgment of 15 October 2015, no. 37553/05, § 91.

3 *Ayoub and Others v. France*, judgment of 8 October 2020, applications nos. 77400/14, 34532/15 and 34550/15.

4 *Éva Molnár v. Hungary*, judgment of 07 October 2008, application no. 10346/05, § 42.

5 *Novikova and Others v. Russia*, judgment of 26 April 2016, applications nos. 25501/07 57569/11 80153/12 5790/13 35015/13.

In *Ekrem Can and Others v. Turkey*, the protest at the courthouse – where the applicants had opened a banner, chanted slogans and thrown leaflets, thereby disrupting an essential public service – namely the orderly administration of justice – was examined under Article 11 considered in light of Article 10. The Court noted that the applicants' complaint concerned not only the fact that they had been prevented from making a statement, but – more predominantly – the police's intervention resulting in their forcible removal from the premises.[6] The right to express opinions under Article 11 recognises the power of expressing such opinions collectively. In the *Primov and Others v. Russia* judgment, the Court attached importance to the fact that those participating in an assembly were seeking not only to express their opinion, but to do so together with others.[7]

The right to freedom of peaceful assembly comprises negative and positive obligations on the part of the Contracting State.[8] A positive obligation to secure the effective enjoyment of freedom of assembly is of particular importance for persons belonging to minorities, because they are more vulnerable to victimisation.[9] The Court has affirmed that, in addition to political parties, gatherings and associations which seek to protect cultural or spiritual heritage, pursue socio-economic aims, proclaim or teach religion, seek an ethnic identity, or assert a minority consciousness, are also important to the proper functioning of democracy.[10]

In *Navalnyy v. Russia*, where a political activist was repeatedly arrested and prosecuted for administrative offences related to the unlawfulness of public gatherings, the Court found a violation on Article 11 and, on the basis of Article 46 paragraph 2, requested the respondent State to take general measures to ensure that the legislative framework governing the exercise of the right to freedom of peaceful assembly did not represent a hidden obstacle to that freedom.[11] In a case that differed from the above, *Makarashvili and Others v. Georgia*, the Court applied a more restrictive approach by emphasising that those organising and participating in demonstrations, as actors in the democratic process, should respect the rules governing that process by complying with the regulations in force. [12]

The question then arises as to where the line should be drawn for permitted interferences with the right to freedom of association and assembly when it comes to the measures taken by States? In the Chamber judgement *Communauté genevoise d'action syndicale v. Switzerland* it was not disputed by either party that the prohibition on public meetings constituted an interference with the right to freedom of association.[13] The Court has previously upheld significant restrictions on public gatherings where the aim was to protect public safety or to preserve public order and did not find a breach of Article 11 where a gathering had been dispersed to protect the health and safety of those participating.[14] However, these restrictions did not relate to general bans on gatherings, they were targeted to containing the particular risk posed by the demonstrations in question.[15]

6 *Ekrem Can and Others v. Turkey*, judgment of 08 March 2022, application no. 10613/10 §§ 68-91.

7 *Primov and Others v. Russia*, judgment of 12 June 2014, application no. 17391/06, § 91.

8 *Djavit An v. Turkey*, judgment of 20 February 2003, application no. 20652/92 § 57.

9 *Bączkowski and Others v. Poland*, judgment of 03 May 2007,application no. 1543/06 § 64.

10 *Centre of Societies for Krishna Consciousness in Russia*, judgment of 23 November 2021, application no. 37477/11 § 46 and *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, judgment of 03 May 2007, application no. 71156/01 §§ 143-144.

11 *Navalnyy v. Russia*, judgment of 15 November 2018, applications nos. 29580/12 and 4 others.

12 *Makarashvili and Others v. Georgia*, judgment of 01 September 2022, application nos. 23158/20, 31365/20, 32525/20. The case is waiting for decision based on the pending request for referral to the Grand Chamber.

13 *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 42 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

14 *Cisse v. France*, judgment of 9 April 2002, application no. 51346/99.

15 *Christians against Racism and Fascism v. the United Kingdom*, admissibility decision of 16 July 1980, application no. 8440/78.

Throughout the pandemic, citizens were highly creative, and they engaged in alternative forms of assembly and protest. Whilst protests should rarely be banned because of the substance of the message which participants wish to convey, the purpose of a demonstration may also be relevant to the proportionality assessment. The *Black Lives Matter* protests during the pandemic exemplify this, a positive obligation of a State to secure the effective enjoyment of freedom of assembly being of particular importance for persons belonging to minorities, who are more vulnerable to victimisation. [16] The aim of these protests was to elevate the voices of ethnic minorities more at risk of discrimination because of their minority status. Further, in restricting a demonstration, States must consider the harm caused by not permitting a demonstration to take place and conclude that the benefits of restricting an assembly outweigh that harm.

The gravity of enforcement measures and the nature and severity of any sanctions for participation in a gathering or demonstration must also be considered in a proportionality assessment.[17] In a number of cases where demonstrators had engaged in acts of violence, the Court held that while the demonstrations were within the scope of Article 11, the interferences were justified for the prevention of disorder or crime and for the protection of the rights of others.[18] In *Christian Democratic People's Party v. Moldova*, the Court underlined that the burden of proving violent intentions on the part of the assembly organisers lay with the authorities.[19]

In addition to these more general remarks on the right to freedom of association and assembly, I would like to point out some specific aspects of this universal right when it applies to the freedom of association and assembly of judges. As a professional category but also as public servants, judges are also members of associations, and they have a crucial right to assemble and demonstrate. A 2012 Council of Europe Recommendation on judges' independence, efficiency, and responsibilities, provides that, "Judges may engage in activities outside their official functions" and that "judges should be free to form and join professional organisations whose objectives are to safeguard not only their independence, and to promote the rule of law but also to protect and develop their interests as citizens and human beings".[20]

In line with this, in *Maestri v. Italy* the Court found a violation of Article 11 in relation to the imposition of a disciplinary sanction on a judge on account of his membership of the Freemasons.[21] The interference had not been foreseeable and had therefore not been "prescribed by law".

In *Miroslava Todorova v .Bulgaria*,[22] following her public statements in her role as head of an association of judges, the applicant, who was a judge, was subjected to disciplinary proceedings based on alleged inefficiency and performance issues. The predominant purpose of the disciplinary proceedings against the applicant and of the sanctions imposed on her had not been to ensure compliance with the time-limits for concluding cases, but rather to penalise and intimidate the applicant on account of her criticism.[23] The effect of these measures was to cause a "chilling effect" on the exercise of freedom of expression by other judges wishing to participate in the public debate on issues related to the administration of justice. This effect, "...which works to the detriment of society, is also a factor that concerns the proportionality of the sanction or punitive measure imposed..."[24]

16 *Bączkowski and Others v. Poland*, judgment of 3 May 2007, application no. 1543/06, § 64.

17 *Kudrevičius and Others v. Lithuania* [GC], 2015, § 92.

18 *Osmani and Others v. "the former Yugoslav Republic of Macedonia"* (dec.) from 11 October 2001 application no. 50841/99.

19 *Christian Democratic People's Party v. Moldova* (no. 2), judgment from 02 February 2010, application no. 25196/04, § 23.

20 CoE Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Para 21.

21 *Maestri v. Italy*, GC judgment from 17 February 2004, application no.39748/98.

22 *Miroslava Todorova v. Bulgaria*, application no.40072/13, judgment of 19 October 2021.

23 See ICJ and Judges for Judges, Judicial Independence, and Accountability in Bulgaria : The Case of Judge Miroslava Todorova (2017), pp. 2-3 and 16; "Bulgaria: ICJ raises concern at dismissal of Judge Todorova" (August 27, 2012), https://www.icj.org/bulgaria-icj-raises-concern-at-dismissal-of-judge-todorova/

24 *Baka v. Hungary*, judgment of 23 June 2016, application no. 20261/12 §§ 162-,67.

As such, in the short time impaired to me I have attempted to demonstrate some of the many facets and domains in which the Court has crafted the right to freedom of association. Indeed, throughout its case-law the Court has defined and sculpted the right to freedom of association and demonstration, it has carefully framed the scope of Contracting States' permitted interferences with these rights, seeking to balance the latter against the rights of others. This exercise by the Court consistently takes account of the circumstances, the context, and the aims towards which the freedom of association and assembly is used: whether this is in an extraordinary context such as the Pandemic or through casual acts of the democratic process, whether done by ordinary democratic actors or particular professional categories such as that of judges.

Dear colleagues,

Let me conclude by stressing that the right to freedom of association and assembly is a crucial element for any democratic society. The right to freedom of association is linked with all human activities – political parties, unions, non-governmental organisations, cultural or any form of association. It covers voluntary organisations, groups and entities with or without legal personality. States have a positive obligation to ensure that people are free to form and participate in associations of any type and to engage independently in any legal and lawful activity.

We are now faced with a post-pandemic period, but also a time of war where peace is under attack both in Europe and in the world, a period of serious economic and energy crisis that threatens the very basis of our civilised societies. Our successes in protecting and furthering the right to freedom of association and assembly prevent our more and more polarised societies – and more and more confronted nations – from sliding into a new barbarianism.

Pierre Nihoul

President,
Constitutional Court of Belgium

INTRODUCTION

Article 3 of Protocol No. 1 to the European Convention on Human Rights guarantees the right to free elections. That Article thus enshrines a basic principle of the genuinely democratic political system on which the Convention is based, as a result of which this provision is of central importance in the Convention system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987). The same is true of the Belgian constitutional system in which the right to vote is described as "the fundamental political right of representative democracy" (Constitutional Court, no. 9/89 of 27 April 1989)[1]. The right to free elections can therefore be seen as a fundamental element of democracy.

The European Court of Human Rights and the Belgian Constitutional Court have derived substantive guarantees from this right. Furthermore, supervision of respect for the right has logically obliged those courts to take a stance on fundamental democratic choices, whereas the judges who make up those courts are, in any event, not elected. For example, the European Court of Human Rights has had to deal with matters of fundamental political importance for States, such as the independence referendums in Scotland[2] and Catalonia[3] or the restriction of the electoral rights of persons suspected of being members of ETA[4], the Mafia[5] or former members of the KGB[6]. Accordingly, the above-mentioned courts are careful to strike a fine balance between the recognition of substantive guarantees and the margin of appreciation that must be afforded to States. In this paper I will outline the case-law on the right to free elections and show how it contributes to the preservation of democracy. With that in mind, I will first examine the way in which this right is guaranteed in the Convention system (I), and then focus on the Belgian Constitutional Court, which ensures its observance at domestic level (II).

I. CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Article 3 of Protocol No. 1 provides that States "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

1 The Constitutional Court has since reiterated that finding in many cases. The dtSearch database shows 22 judgments containing this statement. See in particular judgments nos. 72/2014, 134/2013, 86/2012, 81/2012, 22/2012, 151/2007, 149/2007, 138/2007, 133/2006, 90/2006, 78/2005, 103/2004, 96/2004, 73/2003, 36/2003, 35/2003, 30/2003, 25/2002, 76/94, 26/90, 18/90 and 9/89.

2 ECHR, *Moohan and Gillon v. the United Kingdom* decision of 13 June 2017.

3 ECHR, *Forcadell I Lluis and Others v. the United Kingdom* decision of 7 May 2019.

4 ECHR, *Etxeberria and Others v. the United Kingdom* judgment of 30 June 2009.

5 ECHR, *Labita v. Italy judgment* [GC] of 6 April 2000.

6 *Adamsons v. Latvia* judgment of 24 June 2008.

The European Court of Human Rights has been at pains to clarify the scope of this provision, in particular the contours of the concept of "elections" – which does not, in principle, include referendums (see *Moohan and Gillon v. the United Kingdom*, decision of 13 June 2017) – and the term "legislature", which refers to a national body which, within the constitutional structure of the State concerned, exercises a legislative function. Normally Article 3 does not therefore concern municipal, provincial, regional or presidential elections, except where the relevant elected bodies are vested with such a function, even if only in part (see in particular, concerning provincial elections, the decision in *Repetto Visentini v. Italy* of 9 March 2021 and, concerning presidential elections, the decision in *Boškoski v. the former Yugoslav Republic of Macedonia*, 2 September 2004)[7].

Moreover, the European Court of Human Rights considers that States enjoy "a wide margin of appreciation when it comes to determination of the type of ballot through which the free expression of the opinion of the people in the choice of the legislature is mediated" and that Article 3 of Additional Protocol No. 1 "does not give create any 'obligation to introduce a specific system' such as proportional representation or majority voting with one or two ballots" (*Yumak and Sadak v. Turkey*, § 110, 8 July 2008).

In addition, it must be noted that, on a textual level, Article 3 of Protocol No. 1 differs from the other Convention provisions in that it does not enshrine a right but imposes a formal obligation on the member States. However, the European Court of Human Rights has also attributed a substantive scope to this provision, considering that it entails individual rights: the right to vote, which is the "active" part, and the right to stand for election, which is the "passive" part.

Like most other rights enshrined in the Convention system, these are not absolute. In its effort to strike a careful balance between the recognition of substantive guarantees and national sovereignty, the Court accepts the existence of implied limitations on these rights (which are themselves implicit). In the absence of a textual basis, the Court does not use the criteria of necessity and pressing social need underlying Articles 8 to 11 of the Convention. In order to determine whether the restriction on the right to vote and to stand for election is admissible, the Court ascertains whether there has been arbitrary treatment, a violation of the principle of proportionality or an interference with the free expression of the people (see the *Mathieu-Mohin and Clerfayt v. Belgium* judgment of 2 March 1987). The States therefore have a margin of appreciation in this sphere, depending in particular on the context.

The Court further considers that the passive limb of Article 3 of Protocol No. 1 may be framed more strictly than its active limb. Where an individual is deprived of the right to stand for election, it is above all necessary to verify that the domestic disqualification proceedings were not arbitrary (see the *Ždanoka v. Latvia* [GC] judgment of 16 March 2006, and the *Melnychenko v. Ukraine* judgment of 19 October 2004). It accepts that a concern to protect the democratic order and ensure the proper functioning of public authorities may justify such a measure (see the *Miniscalco v. Italy* judgment of 17 June 2021). Conversely, the Court carries out a particularly careful analysis of cases where a person has been deprived of the right to vote, which as a rule entails a relatively thorough examination of the proportionality requirement. In the event of placement under guardianship on grounds of disability, in the context of a criminal investigation or even in the case of persons imprisoned following a criminal conviction, it has specified that the disqualification should not be automatic but should rather take into consideration the individual situation of the person concerned, where appropriate through recourse to a court (see, on criminal investigations, the *Labita v. Italy* [GC] judgment of 6 April 2000; on guardianship, the *Alajos Kiss v. Hungary* judgment of 20 May 2010; on prisoners, *Hirst v. the United Kingdom* judgment (no. 2) [GC] of 6 October 2005). The Court also considers that Article 3 of Protocol No. 1 does not allow, in principle, for certain individuals or groups to be deprived of the right to participate in the political life of the country where prevented from being appointed as members of the legislature (see the *Aziz v. Cyprus* judgment of 22 June 2004). Conversely,

7 The Constitutional Court also held that "Article 3 does not apply to municipal elections, since municipal elections do not concern the 'choice of legislature' within the meaning of that provision" (no. 86/2012, B.8).

a disqualification for certain specific offences, for a duration that is adapted to the sentence imposed and with the possibility of regaining the right to vote, appears compatible with Article 3 (see the *Scoppola v. Italy (no. 3)* [GC] judgment of 22 May 2012).

The Court has also had occasion to rule on restrictions of a lesser degree of interference than the outright deprivation of electoral rights. Here too, it seeks to recognise a greater margin of manoeuvre for States as regards the right to stand for election. It has, for example, approved the requirement of a deposit to avoid frivolous candidatures, provided that its amount remains proportionate and does not constitute an obstacle to those who genuinely wish to take part in the elections or to the emergence of new political tendencies (see *Soukhovetski v. Ukraine* judgment of 28 March 2006). The Court has also endorsed the use of an electoral threshold of 5% in order to avoid an excessive fragmentation of the political landscape, finding that this percentage was proportionate (see the *Partija "Jaunie Demokrāti"* and *Partija "Mūsu Zeme" v. Latvia* decision of 29 November 2007). In examining proportionality, it is necessary to take account of the specific context of each State, and this has led the Court, in particular, not to find fault with an electoral threshold of 10%, while finding that it more generally appeared to be incompatible with the requirements of the Council of Europe (see the *Yumak and Sadak v. Turkey* judgment [GC] of 8 July 2008).

Given the importance of Article 3 of Protocol No. 1, measures restricting the right to stand for election must be accompanied by sufficient procedural safeguards and must have a foreseeable legal basis (see the *Adamsons v. Latvia* judgment of 24 June 2008; and the *Etxeberria and Others v. Spain* judgment of 30 June 2009).

As regards restrictions on the right to vote, the Court takes particular account of the difficulties faced by certain vulnerable persons. Thus, it is for the States to take appropriate measures to enable persons with a physical disability to exercise their right to vote effectively and to have access to polling stations (see the *Toplak and Mrak v. Slovenia* judgment of 26 October 2021). On the basis of the margin of appreciation afforded to the States, the Court also allows the right to vote to be conditional upon a residence-related requirement in order to ensure that overseas voters still have a connection with their country of origin (see in particular *Shindler v. the United Kingdom* judgment of 7 May 2013).

As the above examples suggest, the substantive safeguards must also be examined in terms of the relevant point in time. In order for the rights derived from Article 3 to be effective, they cannot relate solely to the time of the vote. As regards, in particular, the right to stand as a candidate in elections, the protection of Article 3 covers the period from the election campaign to electoral disputes and right up to the exercise of elected office.

In the period prior to an election, the election campaign certainly provides fertile ground for the intersection between the right to free elections and the freedom of expression enshrined in Article 10 of the Convention. The Court considers that these rights are interdependent and mutually reinforcing, bearing in mind that freedom of expression constitutes one of the conditions ensuring the free expression of the opinion of the people in the choice of the legislature (see the *Bowman v. the United Kingdom* judgment of 18 February 1998). Many disputes relating to election campaigns are therefore dealt with by the Court through the prism of Article 10, particularly in the context of the television advertising by political parties (see the *TV Vest AS & Rogaland Pensjonistparti v. Norway* judgment of 11 December 2008) or insults uttered during televised debates (see the *Vitrenko and Others v. Ukraine* judgment of 16 December 2008). As regards the allocation of broadcasting time in the run-up to an election, the Court has found that, as a rule, Article 10 does not confer a right on political parties to be given a certain amount of airtime in the media (see *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, decision of 29 November 2007).

In the period following an election, the European Court of Human Rights considers that the protection of Article 3 extends to electoral disputes, i.e. disputes concerning the counting of ballot papers and the validation of the result (see in particular the *Kovach v. Ukraine* judgment of 7 February 2008). Certain positive obligations cast on States in this context include the establishment of a system for the effective examination of individual complaints and appeals, thus maintaining public confidence in the authorities responsible for organising the election (see in particular the *Namat Aliyev v. Azerbaijan* judgment of 8 April 2010). This limb of Article 3 of Protocol No. 1 constitutes an important democratic safeguard, since the possibility of an effective remedy by which to challenge the election result relates to a political right and cannot therefore be examined under Article 6 of the Convention (see the *Pierre Bloch v. France* judgment of 21 October 1997). Such disputes therefore fall exclusively within the ambit of Article 3.

II. CASE-LAW OF THE BELGIAN CONSTITUTIONAL COURT

Although electoral rights are not as such enshrined in Title II of the Belgian Constitution, which deals with fundamental rights, the political rights referred to in Article 8 of the Constitution are considered to be "based on the citizen's right to take part in the exercise of sovereignty" and "concern the right to participate, as a voter or as a candidate, in elections to the deliberative assemblies". Furthermore, Articles 33, 42, 61 and 74 of the Constitution, in Title III, on "Powers", specify the arrangements for elections to the House of Representatives and the Senate and "establish the principle of representative democracy, according to which powers emanate from the Nation and members of both houses represent the Nation and not only those who elected them" (no. 130/2016, B.11.2. and 3).

Formally speaking, the latter provisions are not subject to review by the Constitutional Court, which, in matters of fundamental rights, has jurisdiction only in respect of the rights set out in Title II. Nevertheless, the court has, over time, extended its jurisdiction to electoral rights by combining the provisions under its supervision, and in particular the principle of equality and non-discrimination, with the constitutional provisions from which they are derived, but also with Article 3 of Protocol No. 1. It is now well established that the rights to vote and to stand for election form an integral part of the constitutional corpus.

As regards the admissibility of applications for annulment, the Constitutional Court considers that these rights are of fundamental importance, with the result that the interest requirement for lodging a direct application with the court has been considerably relaxed, to the extent of virtually allowing an actio popularis where a violation of such rights is alleged. It has thus consistently held that "every voter or candidate can demonstrate the interest required to seek the annulment of provisions which may adversely affect his or her vote or candidature"[8].

As to the content of its decisions, in its role as guardian of electoral rights, the Constitutional Court is logically called upon to rule on important political choices. Like the European Court of Human Rights, it is careful in such cases to take into account the particular context of the Belgian State in the given circumstances and to allow the legislature a wide margin of manoeuvre. Two types of argument are relied upon in this context. First, the court has pointed out that certain provisions challenged before it in electoral matters "form part of the general institutional system of the Belgian State, which seeks to achieve a balance between the various communities and regions of the Kingdom" (see in particular judgment no. 36/2003 of 27 March 2003) and that, in this context, it is not for the court to "substitute its own assessment for that of the legislature" and "it does not have control over all the problems with which [the legislature] is confronted in order to maintain peace in the community" (judgment no. 73/2003 of 26 May 2003). Secondly, the Court has also pointed out that the legislature's decision to opt for "certain special arrangements" concerning the choice available to voters, or the allocation of seats in parts of Belgium where there are linguistic or community difficulties, in fact originated in or stemmed from the choice of the constitutional assembly

8 See in particular judgments nos. 72/2014, 134/2013, 131/2006, 85/2006, 103/2004, 96/2004, 73/2003, 36/2003, 35/2003, 30/2003 and 76/94.

itself. However, the court is not competent to rule on a difference in treatment or on the limitation of a fundamental right resulting from a choice made by the constitutional assembly itself (nos. 72/2014, B.14; 81/2015, B.12; 161/2015, B.12).

Although they constitute a fundamental political right of representative democracy and the rule of law and are of crucial importance for establishing and maintaining the foundations of democracy, electoral rights are not absolute and may be subject to restrictions provided that they pursue a legitimate aim and are proportionate to that aim (nos. 169/2015 and 134/2013). The Court has ruled on certain restrictions on the right to vote or to stand for election.

The setting of an electoral threshold has been the subject of a significant number of leading decisions. Relatively consistently, the Constitutional Court has held that "in order to comply with the requirements of Article 3 of Protocol No. 1 ..., elections may be held either under the system of proportional representation or under a majority system. Even if elections are held under a strictly proportional representation system, the phenomenon of 'lost votes' cannot be avoided. Just as Article 3 does not imply that the allocation of seats must be a precise reflection of the number of votes cast, it does not in principle preclude the setting of an electoral threshold in order to limit any fragmentation of the representative body" (see in particular judgment no. 78/2005 of 27 April 2005; judgment no. 73/2003 of 26 May 2003; judgment no. 30/2003 of 26 February 2003). The court seems to afford the legislature some discretion in this area. It takes the view that "an electoral threshold, however high, is merely an arrangement or criterion for modulating the system of proportional representation. An electoral threshold thus helps to address the legitimate concern of avoiding fragmentation of the political landscape by fostering the formation of sufficiently coherent political groups within the representative bodies ... An electoral threshold admittedly makes it more difficult for small parties to obtain a seat. Major parties may possibly obtain a larger number of seats than if there were no electoral threshold. However, such a difference in treatment between small and large parties does not constitute discrimination resulting from the introduction of a statutory electoral threshold, but a consequence of the choice of voters" (judgment no. 96/2004 of 26 May 2004).

Another restriction: the right to vote does not mean that there is a right to cast a blank vote. For the purposes of free and democratic elections, it suffices that voters can cast their votes without coercion, so that they can vote as they wish. However, voters are required to observe the voting procedure strictly (see ECHR, 11 January 2007, Case of *Russian Conservative Party of Entrepreneurs and Others v. Russia*, § 73). The nullity of a ballot paper is merely the penalty applicable to an invalid vote (nos. 134/2013, B.12.3 and 4).

In other areas, the Constitutional Court's scrutiny is more thorough and the legislature's freedom narrower. For example, the court declared unconstitutional a provision of the Electoral Code which suspended the right to vote for most criminals sentenced to more than four months' imprisonment. The automatic nature of the suspension, the absence of a specific decision by a court, and the possibility that the duration of the suspension might be much longer than the execution of the sentence, led to the conclusion that the measure was disproportionate and constituted an unjustified interference with the right to elect and be elected under Article 3 of Protocol No. 1 (judgment no. 187/2005 of 14 December 2005). The legislature then reworked its text by replacing the system with a mechanism whereby suspension became optional and the court could, if appropriate, attach such a measure to the conviction. In an action brought against the transitional provision accompanying that reform, the court took account of the findings of the European Court of Human Rights in this area, ultimately validating the law submitted to it (judgment no. 80/2010 of 1 July 2010).

Article 3 of Protocol No. 1 is not, however, the sole benchmark for the Constitutional Court in this area. Three scenarios can be mentioned.

First scenario: The Constitutional Court sometimes finds Article 3 of Protocol No. 1 inapplicable, especially in the context of local elections – that is, local and provincial elections in Belgium – since such elections do not concern the "choice of the legislature" within the meaning of Protocol No. 1 (see in particular judgment no. 149/2007 of 5 December 2007; judgment no. 22/2012 of 16 February 2012). In such cases, the court may nevertheless examine the proportionality of the measure from the standpoint of the principle of equality and non-discrimination (judgment no. 138/2007 of 14 November 2007; judgment no. 35/2003 of 25 March 2003). On that basis, the court annulled a statutory provision governing local elections (judgment no. 149/2007 of 5 December 2007), thus showing, by way of a fundamental democratic guarantee, that it is possible to go further than the confines of the Article 3 wording. Conversely, it may also happen that the court does not go so far and discontinues its review after finding Article 3 inapplicable, without examining the complaint solely from the standpoint of equality and non-discrimination (judgment no. 86/2012 of 28 June 2012; judgment no. 22/2012 of 16 February 2012).

Second scenario: irrespective of the applicability of Article 3, the rights to elect and to be elected must in any event, under Article 14 of the European Convention on Human Rights and Articles 10 and 11 of the Constitution, be guaranteed without discrimination. Thus, the Constitutional Court has twice examined under this principle the distribution of seats among constituencies in the context of the Belgian proportional representation system (no. 149/2007 of 5 December 2007; no. 169/2015 of 26 November 2015). After noting that each setting of constituency boundaries led to differences in the natural electoral threshold, the level of which was inversely proportional to the number of seats to be filled and therefore also to the population of the constituency, the court emphasised that such differences had to remain within reasonable limits. While it could be accepted that a constituency with four seats was compatible with the system of proportional representation, this was not the case for constituencies with only two or three seats and where the electoral threshold was, for this reason, unreasonably high.

Third scenario: the Constitutional Court examines certain issues directly related to the right to free elections by relying not on Article 3 of Protocol No. 1 but rather on other fundamental rights. It thus annulled a legislative provision prohibiting all forms of advertising by political parties in the media organised by the French Community, on the ground that the prohibition was absolute in scope and did not allow for exceptions during election campaigns, thus entailing a violation of the freedom of expression enshrined in Article 19 of the Belgian Constitution and Article 10 of the Convention (judgment no. 161/2010 of 22 December 2010). Another topic discussed was the thorny issue of liberticidal parties. The Court found that a legislative provision allowing a political party to be deprived of public funds in the event of hostility to rights and freedoms did not infringe the principles of equality and non-discrimination or that of freedom of expression, by relying, inter alia, on Article 17 of the Convention, which allows abuses of freedom of expression by individuals and groups to be excluded from the sphere of Convention protection (judgment no. 10/2001 of 7 February 2001).

CONCLUSION

It can be seen from the foregoing analysis that the Belgian Constitutional Court has been keen to incorporate the guarantees of Article 3 of Protocol No. 1 into its own case-law. There is, however, one obstacle to such incorporation: in the *Mugemangango v. Belgium* [GC] judgment of 10 July 2020, the European Court of Human Rights held that the Belgian system for verifying credentials following parliamentary elections, which was entrusted to the legislative assemblies themselves, infringed Article 3, on the ground that that procedure did not provide sufficient procedural safeguards against arbitrariness, while specifying that parliamentary autonomy could only be validly exercised in compliance with the rule of law. The procedure for verifying the credentials of members of legislative assemblies is undoubtedly a shortcoming of the Belgian electoral system in the light of the Convention guarantees. The difficulty at the domestic level lies in the fact that this mechanism is enshrined in the Constitution itself as regards election to the legislative houses. Since it is not for the Constitutional Court to review constitutional provisions, its contribution to the democratic system on this point under the Convention appears limited. Several proposals to amend the Constitution have nevertheless been tabled with a view to establishing independent judicial review of the validity of elections. One of the solutions envisaged would be to entrust this particular competence to the Constitutional Court (see in particular Doc. parl., Chamber, 2021-2022, no. 55-2708/01).

SOLEMN HEARING OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR

Síofra O'Leary

President of the European Court of Human Rights

Presidents of the Constitutional Courts and Supreme Courts, President of the Ministers' Deputies, Deputy Secretary General of the Council of Europe, Secretary General of the Parliamentary Assembly, Commissioner for Human Rights, Excellencies, Ladies and gentlemen,

I should like to thank you, personally and on behalf of all of my colleagues, for honouring us with your presence at this solemn hearing to mark the opening of the judicial year at the European Court of Human Rights.

By your presence, you demonstrate not only your commitment to our Court, but also, in this tragic period that Europe is living through, your commitment to the European mechanism for the protection of human rights. As we seek, together and collectively, to safeguard democracy and the rule of law and to protect human rights, your presence each year at this event goes well beyond the ceremonial.

Today I am speaking on this occasion for the first time. While I am very conscious of the honour that has been bestowed upon me, I feel above all the heavy responsibility that is entailed by this office, namely that of bequeathing the Convention edifice intact to future generations.

Fortunately, it is a responsibility that I share with judges of high quality and great dedication, and I take this opportunity to thank both my colleagues and the members of the Registry who support us in carrying out our judicial work.

Historians looking back on 2022 will have available a wealth of terms to describe the times that we are living though. The concept of "Zeitenwende" used by the German Chancellor strikes me as very apt – a change of era; the end of an era.

In 2022 we experienced the aftershocks of the pandemic and witnessed disputed but perceptible environmental damage, an energy crisis and the return of inflation – not forgetting the fears always raised by migratory phenomena and the frequently anarchical development of social media.

However, the major and tragic event of 2022 was the return of what had seemed unthinkable: once again a war on the European continent between two member States of the Council of Europe, and the expulsion of the Russian Federation.

Given the origins of the Convention and the objectives it pursues, the European Court of Human Rights could not escape this cataclysm.

As you know, Russia was expelled from the Council of Europe on 16 March 2022.[1]

1 Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies).

The Court, sitting in plenary session, immediately adopted a resolution whereby it remained competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred up to 16 September 2022.[2]

This so-called «residual» jurisdiction of the Court derives from Article 58 of the Convention.

There are currently 16,800 cases against the Russian Federation pending before the Court.

Since Russia's expulsion, various judicial formations of the Court have continued to process Russian cases and several important judgments have been delivered. I am thinking, for example, of the Grand Chamber judgment in Fedotova and Others, delivered a week ago, finding a violation of Article 8 on account of the absence of any possibility under Russian law to obtain formal recognition of a same-sex relationship.[3]

The Court will continue to deal with Russian applications over the coming months. In line with the impact strategy, the processing of these cases will be differentiated, taking into account the importance of the legal issues in issue and whether there exists a well-established case-law applicable in the given area.

I should like to stress that there are currently eight pending inter-State cases concerning Russia. Processing of these cases remains a top priority for the Court, as demonstrated by the admissibility decision delivered two days ago in the case of *Ukraine and the Netherlands v. Russia*. Reiterating the essential character of the Convention as a constitutional instrument of European public order, the Grand Chamber emphasised that: "the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and "to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law'".[4]

More than anything, the Court's exercise of its residual jurisdiction reflects the fact that a State cannot take advantage of its expulsion from the Council of Europe to avoid responsibility for violations of the Convention. This is all the more vital given that some of the cases in question are of great significance in terms of Russia's responsibility under international law.

Despite the challenges posed in 2022, the Court sought to fulfil its mission faithfully, and ruled on 39,570 applications, of which 4,168 gave rise to a judgment.

There are now 74,650 applications pending before the Court, compared to around 70,000 a year ago. Approximately 10,000 applications are related to ongoing conflicts, a situation which is also reflected in the 19 inter-State applications now before the Court.

As in previous years, three-quarters of the pending cases concern five States. First, Türkiye, with 20,300 applications, followed by the Russian Federation, Ukraine (10,600), Romania (5,900) and Italy (3,700).

Several of my predecessors have emphasised the need for greater awareness by the authorities of the lack of resources available to the Court. In view of the role we are called upon to play and the situation I have just described, I have no choice but to do the same.

Throughout the Interlaken reform process and even beyond, the Court has worked relentlessly to improve its efficiency. It will continue to do so [under my presidency].

2 Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights.

3 *Fedotova and Others v. Russia*, nos. 40792/10 and 2 others, 13 July 2021.

4 *Ukraine and the Netherlands v. Russia*, no. 8019/16, 43800/14 and 28525/20, § 385, 25 January 2023.

In terms of organisation, however, there is no leeway for further improvement. We as a Court are currently dealing with multiple complex inter-State cases, while simultaneously processing tens of thousands of individual applications lodged in some 40 languages. Case management depends not only on the judges, but on the availability of experienced lawyers capable of mastering these languages and who are familiar with the legal systems of 46 member States.

Political support for the Council of Europe's values and for the Convention system itself will no doubt be at the heart of the 4th Summit in Reykjavik in May.

However, this support must imperatively be translated into the provision of appropriate material resources and more sustainable funding to further the implementation of a Convention which, for over 70 years, has contributed to stability, security and peace in Europe.

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Ladies and Gentlemen,

Given the theme of this afternoon's judicial seminar, it is natural that questions relating to the consolidation of democracy and means to counter democratic backsliding feature in my intervention this evening.

Much ink has rightly been devoted in recent years to the European Convention's rule of law guarantees and to the frontal challenges to judicial independence which Europe has been witnessing. In contrast, a misplaced complacency may have installed itself in certain States over the last decades regarding the Convention's success in supporting and preserving democracy itself.

However, in recent years our Court has witnessed first-hand efforts to dismantle democracy, the only political model envisaged by the Convention. Democratic backsliding, aptly described as "death by a thousand cuts", takes many different forms, from the adoption of measures to undermine the judiciary, muzzle the press, stifle political pluralism, dispense with institutional checks and balances, to the elimination of political competition or the turning of a blind eye to curruption.

Had it been forgotten that the maintenance and further realisation of human rights and fundamental freedoms are best ensured by an effective political democracy, underpinned by the rule of law, and by a common understanding and observance of human rights? If so, the tragic events unfolding in Ukraine since February last, and the forces which gave rise to those events, have surely reminded us of the importance of what our forebearers fought so hard for.

Democracy, just like human rights and the rule of law, is not acquired once and for all. It must be fought for every day.

Through its protection of key civil and political rights the Convention plays a vital role in ensuring that the elements we need for a peaceful society – democracy, tolerance and pluralism – are in place. Constant vigilance is required to ensure that they are not dismantled. The European Convention is a product, in the words of one of my predecessors, Luzius Wildhaber, of "idealistic realism". It is anchored in the belief that democratic regimes, respectful of fundamental rights, do not go to war with one another, such that it is not an issue of purely domestic jurisdiction whether democracies relapse into dictatorships.[5] The purpose of the Convention, according to those who drafted it, was to ensure that Council of Europe States are democratic and that they remain so.

In its recent case-law on freedom of expression, long been regarded as the lifeblood of democracy, the Court has been sensitive to the form, nature and quality of information received by voters, present and future.

5 Luzius Wildhaber, 'Rethinking the European Court of Human Rights' in Jonas Christoffersen and Mikael Rask Madsen (eds), The European Court of Human Rights between Law and Politics (Oxford University Press 2011), pp. 204-230.

I am particularly struck by an extract from a recent German case on Article 10, in which the Court emphasised: "the enormous importance, from a public-policy perspective, of teaching and educating children, in a credible manner, about freedom, democracy, human rights and the rule of law".[6]

In dangerous times, when the values hitherto taken for granted in post-war Europe are increasingly challenged, it is on the young and their future that we must concentrate.

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In keeping with tradition, I will mention some cases from the last year which are emblematic, at this turning point in history, of the essential role played by the Convention.

In the first case, *H.F. and Others v. France*, delivered by the Grand Chamber on 14 September 2022, the applicants applied unsuccessfully at national level for emergency repatriation of their daughters and grandchildren, held in camps in north-eastern Syria.[7]

The Court emphasised that Article 3 § 2 of Protocol No. 4 does not give rise to a general right to repatriation.

However, the right to enter national territory may give rise to a positive obligation on the part of the State where the refusal to take any steps would lead to the national concerned being placed in a situation comparable, de facto, to that of an exile.

A refusal to repatriate must be accompanied by appropriate safeguards. This presupposes a review mechanism before an independent body – not necessarily of a judicial nature – which makes it possible to verify that the reasons for the contested decision are free of arbitrariness. Applicants must be able to acquaint themselves, albeit summarily, with the grounds relied upon and it must be possible to verify that the best interests of any children involved have been taken into account.

Given the absence of a formal decision and the refusal of the domestic courts to entertain jurisdiction, the Court found a violation of Article 3 § 2 of Protocol No. 4 to the Convention.

The second judgment I wish to mention is *NIT S.R.L. v. the Republic of Moldova*, delivered by the Grand Chamber in April 2022.[8] The case concerned the freedom of expression of a television channel which, following elections, became a platform for criticism of the new government. It was sanctioned for serious and repeated breaches of the legal obligation to ensure political balance and pluralism. Its broadcasting licence was eventually revoked. Before the Court, the company relied on Article 10 and on Article 1 of Protocol No. 1 to the Convention. The Court found no violation of either provision in the particular circumstances of the case.

The case raised novel issues relating to the internal dimension of media pluralism, the openness of discourse in European democracies and the right balance to be struck between safeguarding political pluralism in the media and respecting editorial freedom.

When States, such as Moldova, opt for a regulatory model requiring internal pluralism, designed to guarantee balanced political coverage, this falls within their margin of appreciation and often reflects their political culture and the historical development of their broadcasting sector. Article 10 does not impose a particular model of internal pluralism as long as overall programme diversity in the sector as a whole is guaranteed at national level. The role of the Court is to ensure that the effects of the regulatory regime a State choses are compatible with the guarantees afforded by Article 10 and the scrutiny it exercises will be more or less strict scrutiny depending on the degree of restriction on editorial freedom which the model chosen entails.

6 *Godenau v. Germany,* no. 80450/17, § 54, 29 November 2022.
7 *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, 14 September 2022.
8 *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, 5 April 2022.

The existence of procedural safeguards was considered of particular importance by the Court when it came to the revocation of a broadcasting licence as in this case, so too was the role of the regulatory authority, whose independence has to be verified given the delicate and complex nature of that role.

The NIT judgment reminds us that media freedom and pluralism are enablers of the rule of law and democratic accountability. It showcases the important role played by the Council of Europe, setting standards regarding responsible journalism, media pluralism and the essential independence of regulatory authorities in this field.

Altogether the Grand Chamber adopted nine judgments in 2022, including one within the context of infringement proceedings under Article 46 § 4 of the Convention.[9] Moreover, three advisory opinions were handed down following requests made by the Lithuanian Supreme Administrative Court,[10] the Armenian Court of Cassation[11] and the French Council of State.[12] A seventh request for an advisory opinion, this time from the Finnish Supreme Court, is pending.[13]

While the judgments of the Grand Chamber may attract the greatest attention, the judgments delivered by Chambers of seven judges, in line with our "impact strategy", increasingly concern important and complex legal and societal questions. As you know the strategy seeks to ensure rapid identification and expeditious processing of such cases.

This is well-illustrated in a series of four judgments handed down in 2022 in relation to the rule of law crisis in Poland: [*Grzęda, Advance Pharma, Żurek* and *Juszczyszyn*,[14]] only one of which hails from the Grand Chamber.

At issue in both *Grzęda* and *Żurek* was the unjustifiable limitation of the applicants' access to court to challenge the premature termination of their terms of office as members of the National Council of the Judiciary (NCJ), while both were serving judges. Finding Article 6 § 1 both applicable and violated, the Court emphasised that where judicial councils are established, States must ensure their independence from the executive and legislative powers in order to safeguard the integrity of the judicial appointment process. The fundamental change in the manner of electing the NCJ's judicial members, considered jointly with the early termination of the mandate of previous judicial members like the applicant judges, meant that its independence was no longer guaranteed.

In *Żurek* the Chamber also found a violation of Article 10 of the Convention as a result of a series of measures applied to the applicant, who was a spokesperson of the NCJ and critic of the judicial reforms. According to the Court:

"the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat".[15]

9 *Kavala v. Türkiye* (infringement proceedings) [GC], no. 28749/18, 11 July 2022.

10 Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings [GC], request no. P16-2020-002, Lithuanian Supreme Administrative Court, 8 April 2022.

11 Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture [GC], request no. P16-2021-001, Armenian Court of Cassation, 26 April 2022.

12 Advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date [GC], request no. P16-2021-002, French Conseil d'État, 13 July 2022.

13 The European Court of Human Rights has accepted a request (no. P16-2022-001) for an advisory opinion under Protocol No. 16 to the Convention received from the Supreme Court of Finland on 10 October 2022. In its request, the Supreme Court of Finland has asked the ECHR to provide an advisory opinion on the procedural rights of a biological mother in proceedings concerning the adoption of her adult child.

14 *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022; *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022; *Żurek v. Poland*, no. 39650/18, 16 June 2022; *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022.

15 *Żurek v. Poland,* no. 39650/18, § 222, 16 June 2022.

These cases are noteworthy for a number of reasons. Firstly, the Court stressed that in the light of the principles of subsidiarity and shared responsibility, the Contracting Parties' obligation to ensure judicial independence is crucially important for the Convention system itself. The latter cannot function properly without independent judges. Secondly, all Contracting Parties must abide by rule of law standards and respect their obligations under international law, including those voluntarily undertaken when they ratified the Convention. Domestic law, including national constitutions, cannot be invoked as justification for failure to respect those obligations. Finally, these judgments, in which the Court referred extensively to the parallel rule of law jurisprudence of the Court of Justice of the European Union reflect further the synergy between the two European courts in defence of judicial independence and the values which underpin the Convention.

In *Ecodefence and Others v. Russia*, the final judgment I will reference, the applicants were non-governmental organisations involved in civil-society issues who were placed on a register of so-called "foreign agents" funded by "foreign sources".[16] This resulted in the imposition of administrative fines, financial expenditure and severe restrictions on their activities. One organisation, Memorial, joint winner of the Nobel Peace Prize in 2022, was liquidated, declared illegal and forcibly dissolved the same year.

In a judgment delivered in June 2022 the Court found a violation of Article 11, interpreted in the light of Article 10 of the Convention, due to key concepts in the Foreign Agents Act which fell short of the Convention's foreseeability requirement. In addition, judicial review had failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive by the law.

In *Ecodefence* the Court emphasised that: "the democratic process is an ongoing one which needs to be continuously supported by free and pluralistic public debate and carried forward by many actors of civil society".[17]

The impugned Russian regulation reflected the notion that external scrutiny of matters relating to human rights and the rule of law was suspect and a potential threat to national interests. The Court, in response, emphasised that the rights of all persons within the legal space of the Convention are a matter of concern to all member States of the Council of Europe.

Ladies and Gentlemen,

The *Ecodefence* judgment also reminds us that by virtue of Article 34 of the Convention, Contracting States undertake to refrain from hindering the effective exercise of the right of individual application. That right is the cornerstone of the Convention system. In *Ecodefence* and in three other cases decided in 2022, the Court has found respondent States' disregard of interim measures to be in violation of their Article 34 obligations.

In view of the vital role played by interim measures in the Convention system, it should be a cause of grave concern that some Contracting States are prepared to flout international rule of law requirements in this manner.

Finally, as regards this case, like any court worth its salt, we too must be open and self-critical. This Court took too long to decide the Ecodefence case; a fact which underlines the need to consolidate the impact strategy and the expeditious handling of key cases which I referred to previously, a fact which also underlines the need for us to have the resources to do so.

Before turning to our guest of honour, let me remind you that today is the international day of commemoration in the memory of victims of the Holocaust.

16 *Ecodefence and Others v. Russia*, nos. 9988/13 and 60 others, 14 June 2022.

17 ibid, § 139.

Let us not forget why the Convention was conceived.

Let us not forget what, through the work of this Court and your work as national judges, the Convention has achieved.

And let us not forget what remains to be done.

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Ladies and gentlemen,

This is the first time that a leading Italian figure has honoured us by delivering the traditional speech at the start of our Solemn Hearing.

A leading figure indeed, as Silvana Sciarra has been a judge at the Italian Constitutional Court since 2014 – a court she has presided over since last September.

Ms Sciarra, President of the Constitutional Court,

Our professional paths, devoted to European law and the construction of a Europe of rights and freedoms, have crossed on several occasions.

You are an acknowledged specialist in labour law and have trained generations of students at the University Institute in Florence – students who enthusiastically welcomed your recent election as President.

While social rights are your preferred field, you have long been passionate about human rights, and have written extensively on the rule of law and pluralism. These subjects, which are at the heart of our mission, are more topical than ever.

We are therefore looking forward to hearing from you, and it is with great pleasure that I invite you to take the floor.

Silvana Sciarra

President of the Constitutional Court of Italy

"RECOURSE" TO AND "DISCOURSE" ON THE EUROPEAN CONVENTION: AN ASSET FOR DEMOCRACIES

President of the European Court of Human Rights, Distinguished Judges, Excellencies, Ladies and Gentlemen,

I am deeply honoured to speak at this solemn ceremony in front of a distinguished audience, following President O'Leary's most inspiring presentation. It is wonderful that our personal and professional lives can cross paths again, on this formal occasion.

It is an honour for the Italian Constitutional Court, which I represent, and I hope that the message that will be shared – through my voice – with judges acting in diverse capacities, will provide opportunities for enhanced mutual learning and for closer cooperation.

"Cooperation" is indeed a key word, and so is the notion of common interests.

The message I intend to offer to this distinguished audience is that, in such a context of cooperation, constitutional courts occupy a privileged position in supporting democracies and in promoting the integration of common standards, whenever human rights are at stake. They do so because they bear a distinctive responsibility, inherent in constitutional adjudication.

In particular, in recent times, issues of independence of the judiciary have been threatening the symmetry of the international legal order as a whole, regarded as it is as the combination of constitutional and convention law, often intertwined with regional standards, above all the standards of the European Union ("EU").

Independence rests, among other criteria, upon the coherence and transparency of legal arguments, which are best exemplified through the selection of precedents.

Let me underline another key word: "symmetry".

It is an utmost responsibility for constitutional courts to strike the right balance among all the parameters to be taken into account and to achieve an overall equilibrium within national legal systems.

Their institutional standing in all countries makes them bearers of both pluralism and democratic values.

In the late 1990s, innovative proposals to foster the integration of legal standards were aired in academic circles – among them the European University Institute –, triggered by Opinion 2/94 rendered by the Court of Justice of the European Union ("CJEU") on accession of the European Communities to the European Convention on Human Rights ("European Convention")[1].

1 CJEU, 28 March 1996, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140.

The proposals circulating in those years were based on the analysis of existing competences in various fields; they aimed at empowering all European institutions to enforce human rights policies[2].

An alleged lacuna in such policies made recourse to the European Convention a crucial instrument in a wider process of constitution-building. Hence, recourse to the European Convention would have implied an expansion of competences.

As we all know, no European constitution saw the light of day in spite of all the efforts made.

However, wider expectations had been created. One may argue that courts later acquired an even stronger visibility in the transition towards a discourse on the European Convention.

Here comes the linguistic "escamotage" I am going to use in my presentation.

I say "discourse on" as a follow-up to "recourse to" the European Convention, to exemplify the steps forward that must be taken in order to magnify the democratisation of national legal systems and to proceed towards closer cooperation among international institutions and consequently among courts.

For example – and I hope you will appreciate this touch of national pride rather than self-referentiality – in 2007 the Italian Constitutional Court delivered the so-called "twin judgments" on the role of the European Convention as an "interposed parameter" in constitutional adjudication. The Court underlined the "special nature" of the Convention, different from any other international treaty, which had given rise to a "system for the uniform protection of fundamental rights"[3]. In addition, the Court emphasised that the obligations assumed by Italy by signing and ratifying the European Convention implied that the Strasbourg Court was recognised as having a "pre-eminent interpretative role", helping to clarify the international law obligations assumed by the signatory States in that particular area[4].

Recourse to the European Convention, in the Italian as in other national legal systems, sets in motion cooperation among courts, which then develops into a discourse on the European Convention, namely a less fragmented interpretation of international standards by domestic courts.

References to Protocol No. 16 and to advisory opinions on questions of principle[5] confirm that discourses on the European Convention can be developed in different ways and in different fields. All such sources converge on a unitary notion of democracy.

Cooperation among courts crosses, in fact, the reactions of other institutions and spreads democratic principles, making them coherent both inside and outside domestic legal systems. In that light, it has been maintained that, despite their non-binding character, such opinions substantially "irradiate" general effects[6].

The non-binding and preventive nature of this instrument – born also with the aim of reducing the number of complaints lodged with the European Court of Human Rights ("ECHR")[7] – adds a stronger accent to the discursiveness of interpretations offered by national courts. Protocol No. 16 clarifies that only courts designated as "the highest" by the contracting parties may seek "advisory opinions on questions

2 See P. Alston, J.H.H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights*, in P. Alston (ed.), The EU and Human Rights, Oxford, 1999, p. 659-723.

3 Italian Constitutional Court, Judgment No. 349/2007, point 6.2. of the conclusions on points of law.

4 Italian Constitutional Court, Judgment No. 348/2007, point 4.6. of the conclusions on points of law.

5 Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Article 1(1).

6 A. Tancredi, I pareri resi dalla Corte europea dei diritti dell'uomo ai sensi del Protocollo n. 16 nella recente giurisprudenza costituzionale, in A. Annoni, S. Forlati, P. Franzina (ed.), Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno, Naples, 2021, pp. 589-612, p. 593. In the same vein, see R. RUOPPO, La funzione consultiva introdotta dal protocollo 16, in Diritto delle successioni e della famiglia, 2022, pp. 1223-1251, p. 1242 ff.

7 *ECHR, Reflection Paper on the proposal to extend the Court's advisory jurisdiction*, March 2012, para. 14, available at https://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf.

of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (Article 1 § 1) and that the procedure may only originate in pending cases (Article 1 § 2)[8].

This is yet another confirmation of the responsibilities undertaken by courts, which are required to show consistency in their own legal arguments.

The novelty lies in an interpretation of subsidiarity ending up in complementarity and shared responsibilities, rather than in considering the ECHR a court of last resort.

The first Opinion, delivered in response to a reference from the French Court of Cassation[9], gave rise to interesting responses, due to its erga omnes partes effect, well beyond the State in which it originated.

The Opinion concerned the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

Most notably, the ECHR advised the national court to consider that the child's right to respect for private life within the meaning of Article 8 of the Convention "requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother'", and that "the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births …". Another means, such as adoption of the child by the intended mother, may be used, in accordance with the child's best interests.

The Italian Constitutional Court has quoted the Opinion in a few judgments, albeit with different emphasis[10]. It is worth recalling that Italy has not ratified the Protocol[11].

The Italian Court of Cassation made a reference to the same Opinion both in an order raising a question of constitutionality[12] and in a recent landmark decision, which came as a response to a Constitutional Court ruling of inadmissibility in a case dealing with the child of a same-sex couple born through surrogacy[13].

In this ruling, the Court of Cassation quoted, among others, the ECHR's judgment in *D.B. and Others v. Switzerland*, delivered on 22 November 2022 and not final as of today, to support the tenet that, whatever the parents' behaviour, the best interests of the child should become a component of the notion of international public order . The notion of public order, "traditionally conceived as merely preclusive and oppositional", should rather pursue a positive function: new parent-child relationships should enter the international scene[14].

This meaningful step forward implies that a "uniform value" should be applied for the assessment of the best interests of the child[15].

8 ECHR, *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention*, 18 September 2017, available at https://echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

9 ECHR (Grand Chamber), 10 April 2019, Request no. P16-2018-001, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6380464-8364383%22]}.

10 See Tancredi (n 6), p. 589-594.

11 With regard to the debate on the ratification of the Protocol, see, inter alia, R. Sabato, *Riflessioni sulla ratifica dei protocolli n. 15 e 16 della CEDU, in Sistema Penale*, 16 December 2019; and B. Nascimbene, *La mancata ratifica del Protocollo n. 16. Rinvio consultivo e rinvio pregiudiziale a confronto*, in Giustizia Insieme, 29 January 2021.

12 Italian Supreme Court of Cassation (First Civil Law Section), Order No. 8325/2020.

13 Italian Supreme Court of Cassation (Joint Civil Law Sections), Judgment No. 38162/2022.

14 Judgment No. 38162/2022 (n 13), para. 19.

15 *Ibid*. The translation into English is mine.

The examples quoted here – in which both the Constitutional Court and the Court of Cassation have referred to the same ECHR Advisory Opinion – is nothing but a confirmation that Protocol No. 16 is already regarded as an influential instrument in the context of international human rights law. And it is so in a most delicate field, with regard to the best interests of the child[16].

Opinions enter the legal discourse as res interpretata and acquire a legal standing – not merely a factual, persuasive or moral one – within the broader spectrum of convention case-law[17].

This original approach – I call it an example of law in action – deserves to be underlined when courts, such as the Italian courts I have just mentioned, refer to Advisory Opinions while operating in a country that has not ratified Protocol No. 16.

There is a profound reason for this: a discourse on the protection of human rights necessarily entails a broad generalisation of all interests at stake and a relevance for all States parties to the Convention. Article 43 § 2 of the Convention mentions – and this point should be recalled – "a serious issue of general importance", which is to be decided by the Grand Chamber.

Circulation of standards brings courts closer to each other and enhances evolving interpretations of the law. In a similar way, albeit with different legal consequences, preliminary references, as in Article 267 TFEU, have strengthened the European "community of courts"[18] and have fostered the concretisation of common values.

Let me take another example.

On issues related to assisted suicide, which have very sensitive ethical implications, there is some convergence between the Italian[19] and the Austrian Constitutional Courts[20] – as the references to the ECHR's rulings prove[21] –, which display coherence in their legal arguments, strengthening the authority of constitutional adjudication[22].

Let me now move on to what I suggest should be referred to as an interconnection – recalled in the words of President O'Leary in her most thought-provoking speech today[23] – between the Court of Justice of the EU and the ECHR, on cases dealing with disciplinary measures addressed to judges, potentially entailing serious consequences for those on whom they are imposed.

The Polish cases – despite not being the only ones, as we heard in the "Judicial Seminar" held earlier[24], before this solemn hearing – have proved to be crucial in the case-law of both courts.

In an action brought by the Commission against Poland under Article 258 TFEU for failure to fulfil obligations, the CJEU Grand Chamber specifies that even the "mere prospect" for judges to be the addressees of disciplinary measures issued by a body whose independence is not guaranteed may

16 *Ibid*.

17 See Tancredi (n 6), p. 606, with references to relevant scholarship on the theme.

18 C. Kilpatrick, *Community or Communities of Courts in European Integration? Sex Equality Dialogues between UK Courts and the ECJ*, in European Law Journal, 1998, p. 121-147.

19 Italian Constitutional Court, Judgment No. 242/2019.

20 *Verfassungsgerichtshof,* Judgment No. G 139/2019-71, decided on 11 December 2020, which postponed the entry into force of the repeal of the law declared unconstitutional until 31 December 2021.

21 ECHR (Fourth Section), 29 April 2002, Application No. 2346/02, *Pretty v. United Kingdom*; ECHR (First Section), 20 January 2011, Application No 31322/07, *Haas v. Switzerland*.

22 Reflection Paper (n 7), paras. 7-8; Tancredi (n 6), p. 605-606.

23 President O'Leary's speech is available at https://echr.coe.int/Documents/Speech_20230127_OLeary_JY_ENG.pdf.

24 ECHR (Fourth Section), 19 October 2021, Application No. 40072/13, *Miroslava Todorova v. Bulgaria*, where the Strasbourg Court unanimously found a violation of the applicant's freedom of expression (Article 10) and of the Convention's rules governing restrictions on rights (Article 18) in relation to the disciplinary proceedings initiated against the applicant – president of the National Association of Judges – following criticism of the work of the Bulgarian Supreme Judicial Council and the Bulgarian executive, cited by M. Lazarova Trajkovska, Judges preserving democracy through the protection of human rights. Freedom of Assembly and Association and Democracy, available at https://echr.coe.int/Documents/Speech_20230127_Lazarova_Trajkovska_JY_ENG.pdf.

affect their own independence. In support of its argument, the Court of Justice quotes the ECHR's case-law (ECHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, and ECHR, 9 March 2021, *Eminağaoğlu v. Turkey*)[25].

The CJEU recalls Article 19 TEU, which, in the words of the Court itself, gives concrete expression to the rule of law, a value enshrined in Article 2 TEU and a condition for enjoying the rights deriving from EU membership.

The CJEU goes as far as affirming that the combination of various reforms adopted by the Polish legislature has brought about a "structural breakdown which no longer makes it possible to preserve the appearance of independence and impartiality of justice"[26].

This decision was delivered on 15 July 2021.

In May 2021 – not much earlier – the ECHR held in *Xero Flor v. Poland* that the presence of a judge elected by the new Parliament in 2015 – one of the so-called "judge doublers" – was in breach of Article 6 of the European Convention, namely of the right to be heard by a tribunal established by law[27].

The case was initiated by a complaint to the Polish Constitutional Court, perceived by the complainant as a non-independent body. Following the above-mentioned decision, two press releases were issued by the Constitutional Court itself and by the Polish Ministry of Justice that "attacked" the ECHR for lacking competence in the administration of justice and becoming a threat to Poland's sovereignty[28].

The monumental rulings produced by both Courts are enriched with references to objective criteria on how to measure the independence of the judiciary. These criteria are the outcome of reflection and investigation carried out by national and international bodies, above all the Council of Europe[29] and the European Commission[30], with thorough evaluations included in State reports. They take into consideration various standards, for example the ways of financing the judicial system, the functioning of independent self-governing bodies, and even communication with the media.

A solid contribution to building up the notion of independence is offered by the CJEU.

The leading case is Wilson, which goes back as far as 2006, where several judgments of the ECHR are quoted (*Campbell and Fell v. United Kingdom*; *De Cubber v. Belgium*; *Incal v. Turkey*)[31].

In this judgment, the CJEU elucidated certain criteria. Objectivity within the proceedings has to do with the composition of the body, the appointment of judges, the length of service and the grounds provided for abstention. Any "reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it" should be dismissed[32]. This was the aim of the CJEU in that judgment, which was followed by a consistent stream of more recent decisions[33], further clarifying the notion of independence in connection with the case-law of the Strasbourg Court.

25 CJEU, 15 July 2021, Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, para. 83.

26 *Ibid*., para. 64.

27 ECHR (First Section), 7 May 2021, Application No. 4907/18, *Xero Flor w Polsce sp. z o.o. v. Poland*.

28 *TrybunałKonstytucyjny*, 24 November 2021, causa K 6/21, at https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11711-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny; *Ministerstwo Sprawiedliwości*, 25 November 2021, Press release entitled "The European Court of Human Rights cannot judge the legality of the election of Polish judges", at https://www.gov.pl/web/sprawiedliwosc/europejski-trybunal-praw-czlowieka-nie-moze-oceniac-legalnosci-wyboru-polskich-sedziow.

29 Council of Europe, *Report by the Secretary General of the Council of Europe on «State of democracy, human rights and the rule of law: A democratic renewal for Europe»*, Strasbourg, May 2021.

30 European Commission, 2022 Rule of Law Report: *The rule of law situation in the European Union*, COM(2022) 500 final.

31 CJEU, 19 September 2006, Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 51.

32 *Ibid*., paras. 49-53, at 53.

33 This line of case-law was inaugurated by the CJEU, 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.

I move on now to some concluding remarks.

I have suggested that domestic courts, including constitutional courts, offer an evolving interpretation of the European Convention, which has been strengthened by the operation of Protocol No. 16. This has happened even in most sensitive fields of law involving ethical issues. I have employed the best interests of the child as an example.

I have also maintained that in all such cases recourse to the European Convention develops into a discourse on the European Convention.

I have used this linguistic escamotage to suggest that domestic courts must be protagonists in consolidating a unitary vision of human rights law.

This is an asset for democracies.

In the post-war period, the search for peace inspired those who took responsibility for paving the way, left empty by armies, with norms. The expression "constituent body" is used to describe the ritual accompanying the entering of law into the field previously dominated by conflict.

The metaphor of a "body" brings with it the notion of life: this happens when courts construct common standards, through a coherent, living reading of legal sources.

This interpretative process should constantly feed the culture created by constituent bodies and enlarge the space for constitutionalising fundamental rights as well as create a scenario of peace, which is what we all expect.

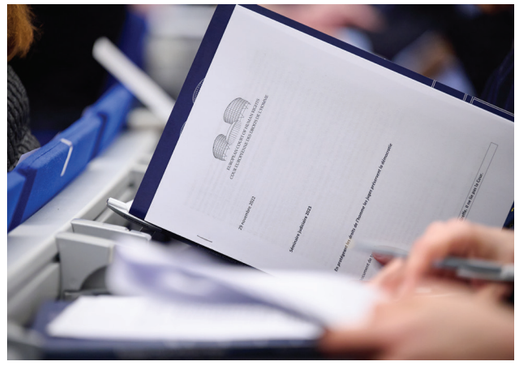
A discourse on the European Convention is strengthened – as I have indicated – by cross-fertilisation and mutual learning among the judiciaries.

Constitutional Courts and the European Courts talk to each other using a common language: they come closer in sharing the language of human rights and in adopting objective criteria, as shown by research on different countries.

When they defend the independence of the judiciary, they act as responsible guardians of the rule of law and adopt a semantics of power in preserving democracy.

Thank you for your kind attention. My best wishes to President O'Leary and to the whole Court for the new judicial year.

PHOTOS



Dialogue between judges 2023

PREVIOUS DIALOGUES BETWEEN JUDGES

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