DIALOGUE BETWEEN JUDGES 2021

The Rule of Law and Justice in a digital age

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Dialogue between judges 2021

Dialogue between judges

Proceedings of the Seminar
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The Rule of Law
and Justice in a digital age

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

Robert Spano

President of the European Court of Human Rights

WELCOME SPEECH

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

I am extremely proud to be able to open this year's Judicial Seminar and to welcome you in person to the European Court of Human Rights. When we postponed our traditional January event, it was not certain that we would be able to meet physically in September, and yet here we are.

I would like to thank you for making the journey to Strasbourg. Your presence here today demonstrates your commitment to the European Court and to our joint human rights project. It also confirms your interest in the theme for today's event: the digital age.

Let me warmly welcome our distinguished guest speakers: Professor Peggy Valcke, Judge Bart Jan van Ettekoven, Judge María Encarnación Roca Trías and Judge Rajko Knez. I will let our moderators introduce them in more detail. Suffice to say that we are very privileged to have them with us as experts to introduce our discussions.

Before turning to the theme for today, let me thank this year's judicial Organising Committee: Judge Gabriele Kucsko-Stadlmayer, the President of the Committee, who will shortly be taking the floor, Judges Armen Harutyunyan, Jolien Schukking, Ivana Jelić, and Maria Eloseguí. Organising this year's Seminar has been more challenging than usual but you have done a wonderful job. Thanks are also due to Valentin Nicolescu and Rachael Kondak who have assisted the Committee, and Valérie Schwartz and Tatiana Kirsanova.

The digital revolution has changed our lives in ways deemed unimaginable even a decade ago. Yet technological developments also pose major challenges and risks to society. Today's Seminar will look at some of those challenges – artificial intelligence; the pandemic; social media and privacy; – with a focus on the impact on rule of law and justice. How is the digital age affecting our work as Judges? What can we expect from the future? What should we embrace and what should we be weary of?

The Council of Europe has been particularly active in the last years in the domain of human rights and artificial intelligence. As Judges we are all under a certain amount of pressure to perform more efficiently, to deliver justice more speedily. Artificial intelligence offers certain opportunities in terms of case-processing. Yet the risks to human rights need to be clearly understood and managed.

The last 18 months of the pandemic has exposed us to an even greater reliance on digital technology. Courts and Judges have had to adapt in a very short space of time. The European Court of Human Rights has itself been able to continue its public service mission, partly as a result of its investment into IT systems, and this is continuing in the future. For example, video conferencing enabled the Court to maintain the public character of its hearings during the two lockdown periods in France.

Public outreach and court communication is essential in explaining clearly the role of courts in a democracy and clarifying the meaning and scope of certain sensitive judgments. Social media is undoubtedly one of the most important communication tools in today's world and in particular opens courts up to a younger audience. Yet knowing when and where to post or tweet as a Judge is not always an easy task and the public's reaction can be unpredictable.

Finally, privacy issues will increasingly arise as more and more of our data is shared online. Live-streamed hearings fulfil the requirement of transparent justice yet are Judges and witnesses more vulnerable?

I encourage participants to actively take part in this afternoon's discussions. We are so fortunate in having a wealth of different European experience sitting together in this room. Let us make the most of our physical presence here today. I am looking forward to hearing from our speakers, but also to hearing from you.

Now I will hand over to Judge Kucsko-Stadlmayer; Gaby, the floor is yours. I wish you a fruitful afternoon of discussions.

Peggy Valcke[1]

Professor of Law and Technology at KU Leuven

THE USE OF ARTIFICIAL INTELLIGENCE IN THE JUSTICE SYSTEM, WITH EMPHASIS ON JUDICIAL DECISION-MAKING

« We tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run. » (Roy Amara, Institute for the Future)

President, Ladies and Gentlemen

It is a great honour for me to address such a distinguished gathering and I would like to thank the organisers of this seminar for giving me this opportunity. Artificial intelligence (AI for short[2]) is now all around us. It is not a sort of nebulous omniscient creature, but a set of computer technologies used to create machines capable of reproducing the cognitive capacities of the human being. Many of these technologies, such as automatic learning, are already used in many sectors of our society – commerce and marketing, communications and media (for example in your smartphone, to recommend films, etc.), the financial sector, transport, agriculture, education, health, public administration and, yes, also the judicial system.

The number of legal tech[3] companies in Europe is increasing, as is the use of algorithmic systems by the legal professions[4]. It is not only the lawyers and insurance brokers, but also the judicial authorities, who are increasingly relying with some enthusiasm on AI in general, and on automated decision-making systems, in particular. That is what is shown by the latest report of the NGO Algorithm Watch, Automating Society, which describes a number of systems that the police and justice system, in France, Germany, Italy, Spain, Switzerland, the Netherlands and Estonia, have incorporated into their activities, or are in the process of testing. These systems, such as PreCobs[5], DyRiAS[6] or ROS-FaST[7], are used to predict burglaries or recidivism, but also to facilitate decision-making in a litigation context.

1 The author wishes to thank Yannick Meneceur, Geneviève Vanderstichele and Martin Sas for their comments on a preliminary version of this text and all those who took part in the discussion for their precious comments and pertinent questions.

2 To date, there is no single definition of artificial intelligence in the scientific community. The term, which has become part of our daily lives, covers a broad set of scientific methods, theories and techniques whose aim is to reproduce, by a machine, the cognitive abilities of human beings. It can therefore encompass any automation resulting from this technology, as well as specific technologies such as machine learning or deep learning based on neural networks. See the glossary in Annex III to the European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment (CEPEJ, 2018), and Y. LeCun, 2016.

3 Start-up businesses specialising in the design of new services and legal applications. For an overview of the types of services and applications, see CEPEJ, 2018, Annex I.

4 Even though, for the time being, applications are mainly developed in the English-speaking world.

5 Used in Germany and Switzerland; see Algorithm Watch, 2020, pp. 114 and 262.

6 Dynamic Risk Assessment Systems, used in Germany and Switzerland; see Algorithm Watch, 2020, pp. 116 and 257.

7 Risk-Oriented Sanctioning Case Screening Tool, used in Switzerland; see Algorithm Watch, 2020, p. 261.

It is above all these "predictive"[8] applications which have attracted public attention, and the terms sometimes used by the press or even literature, such as "algorithmic justice" or "robot-judge", have raised the hopes of some people with the promise of more efficient justice, but have also given a good many nightmares to others, particularly with regard to respect for judicial procedures and the principles of a fair trial.

Indeed, the detrimental effects that such applications may have on the fundamental rights of individuals, such as the protection of private life and personal data, respect for the principle of non-discrimination or the right to a fair trial, have been widely debated and documented in reports by the press, scientific researchers or digital rights advocates.

These reports have highlighted the potential for bias and discrimination arising from the use of machine learning and AI applications. To put it simply, algorithms are neither "neutral" nor "objective". Cathy O'Neil, a US data scientist[9], calls them a new "weapon of mass destruction", suitable for those who have to make difficult decisions – "computer says no", ah, too bad, but it's not my fault, the machine is always right ("the algorithm made me do it" – this phenomenon is known as "math-washing").

But the truth is that the machine is simply reproducing the biases and beliefs of those who program and operate it. Such 'biases' can also be inherent in the data sets used to train the system, especially when historical data are used. Very often, these historical data contain discriminations, which learning models can potentially reproduce and even aggravate. This was the case with the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) software, which has been used in some US states to assess the risk of re-offending when a judge is sentencing an individual. As you may have read or heard[10], a study by the NGO ProPublica in 2016 revealed the discriminatory effects of this algorithm and found that African-Americans were attributed a higher risk of reoffending than white populations.

Even more seriously, the result of such systems is difficult for their "victims" to challenge – first because the systems have often been developed by private companies which claim intellectual property rights, but also more generally because of the opaque nature of some of the machine learning approaches. Analyses produced automatically from unsupervised learning and deep learning methods risk incorporating undetected illegitimate determinants. Without any explanation or transparency as to what criteria may have influenced the outcome, this is tantamount to allowing a "black box"[11] to influence the outcome of a case in a completely discretionary way and is capable of reproducing inequalities.

In relation to this aspect of the explanation, one must be aware of the mathematical and statistical formalism of these algorithmic systems, especially those used for Legal Judgment Prediction (LJP)[12].

8 According to CEPEJ, the term "predictive justice" should be dismissed because it is ambiguous and misleading. These tools are based on methods of analysis of case-law using statistical methods that do not in any way reproduce legal reasoning but may attempt to describe it (CEPEJ, 2018, at p.61). While the term "predictive justice" is frequently used for the technologies in question, a more precise term would be "judicial decision modelling technologies" because it is more accurate in terms of how they function (by the construction of outcome models), their aim not being confined to mere "predictions" (see below).

9 O'Neil, 2016.

10 For further details see Meneceur and Barbaro, 2019. The authors note that "to reduce an individual's destiny to that of the statistical group of which he or she is a member seems like a determinist approach that would be hard to reconcile with the demands of the right to a fair trial in Europe" (translation from French).

11 Expression used by Frank Pasquale, Professor at Brooklyn Law School, who noted in 2015 that an interconnected society based on opaque algorithmic systems was a sort of black box. The metaphor remains valid today (see Algorithm Watch, 2020).

12 There are already a number of examples of uses for these technologies and a wide range of stakeholders interested in their use (or non-use), including parties to proceedings, judges adjudicating, analysts of the historical performance of judicial systems, or policy makers seeking to ensure the fair and efficient functioning of the judicial system.

HOW EXACTLY DO THESE SYSTEMS WORK?

Without going into technical detail, these systems build models, typically mathematical or statistical models, by trying to reveal **hidden correlations** in a large amount of data. The construction of these models will therefore rely on raw material, in this case a large corpus of judicial decisions already rendered in a certain type of litigation, and machine learning, to discover **correlations** between lexical groups[13] (these models do not therefore attempt to imitate a judge's reasoning – I will come back to this later). More concretely (and to simplify): when the system recognises certain words or groups of words, or links between them, it classifies the text in the category "violation" or "non-violation", with a probability score. These models are then used to assess the **probability** of an outcome in potential or ongoing proceedings.

But is the statistical correlation between two events (or lexical groups) sufficient in itself to explain the actual causal relationships? No, of course not[14]. And a court's decision is often binary – violation or non-violation, allow or refuse, guilty or not guilty, uphold or overturn – but not always, thus complicating the modelling.

In conclusion, while mathematical and statistical formalism performs well in closed, quantifiable environments, it is far less suited to open environments such as justice[15]. As Einstein is supposed to have said: "Not everything that can be counted counts, and not everything that counts can be counted".

Should we thus abandon this idea of "predictive justice"? Not necessarily. Because these technologies are highly **promising**: they can offer more informed approaches to litigation for litigants, to the organisation of the court's work and the prioritisation of cases and, indeed, can also improve the efficiency, consistency and fairness of judicial decisions.

However, they also carry a number of **risks**, including the reinforcement and perpetuation of existing biases in previous decision-making, the imposition of limitations on the right of access to a court, and the weakening of the fundamental principles of judicial independence and the rule of law [16].

HOW SHOULD THESE CHALLENGES BE ADDRESSED?

In the first place, technological progress will undoubtedly remedy some of the problems identified. Algorithmic systems are becoming increasingly transparent, more efficient and more sophisticated. Specifically in the area of LJP, researchers – often Chinese [17] – are becoming better at combining different types of data to produce more accurate predictions: facts, legal rules, annotations, historical information, external factors correlated with the decisions made by a court (such as the court's workload, the time of day a hearing is held, etc. [18]). Through research in the field called XAI (Explainable AI), many methods have been developed to make new models more explainable and interpretable. There is a growing community of researchers and practitioners interested in fairness, accountability and transparency in machine learning[19].

13 In practical terms, the machine will search in various parameters identified by the designers (such as length of marriage, professional situation, disparity of property situations, age and state of health of the parties in the case of compensation) for possible links with the results arrived at by the court (the amount of the compensation awarded according to these criteria).

14 As somewhat amusingly illustrated by Buzzfeed's "10 Most Bizarre Correlations" – https://www.buzzfeednews.com/article/kjh2110/the-10-most-bizarre-correlations.

15 This explains why the development of legaltechs has focussed on disputes with quantifiable decisions, leaving the judge a fairly moderate margin of appreciation, such as in matters of personal injury compensation, employment law or divorce.

16 Among other things, this can be explained by the effect of "automation bias", i.e. the propensity of humans to favour the suggestions of automated decision systems and to ignore contradictory information made without automation, even if it is correct.

17 See for example Zhong et al., 2018, and Zhu et al., 2020.

18 The effect of such external factors on judicial decision-making is nevertheless undisputed – see Jean, 2021.

19 See https://www.fatml.org/

Organisations such as the IEEE (Institute of Electrical and Electronics Engineers) have initiated efforts to develop technical standards that incorporate ethical principles into AI design. Some of these standardisation projects, particularly those dealing with issues of transparency (P7001™) and algorithmic biases (P7003™) are highly relevant to the judicial domain[20].

However, even though technology is advancing, one must be careful not to fall into the techno-solutionist trap: technology will not provide all the answers. *The paradigm shift from print to digital* raises **fundamental questions** – about the role of the law, as well as judges, in our society – and they call for a human response, or more specifically a response from us, in the legal professions, not from engineers. In addition, there are challenges which require a **legal framework** to guide technological innovation in the right direction.

Let us start with these fundamental questions. One of them is the question of the **normative value to be attributed to the result of an algorithmic system**: is it desirable to produce a "norm from a number"? According to one of my colleagues, Geneviève Vanderstichele, a researcher at Oxford University and a judge at the Court of Appeal in Ghent, Belgium, this result cannot currently be characterised as a precedent, as a fact, as expert evidence, or as a secondary source of law[21]. Rather, it should be approached as a sui generis concept in dispute resolution, a stand-alone concept, allowing a **quantitative legal argument** to be incorporated into the open texture of law. Another colleague, Mireille Hildebrandt, professor in Brussels and Nijmegen, is also studying the implications of a new method of quantitative interpretation.

Another question concerns **the identification of cases where the use of algorithmic automated decision-making systems is less, or not at all, appropriate**. As already observed, LJP technologies do not seek to model the reasoning that leads to a judge's decision, "the outcome" of the proceedings. LJP focuses only on that outcome, not on the path leading to it[22]. And the path followed by LJP is fundamentally different from that followed by a human judge. Of course, this does not detract from the "success" of the technology, when it leads to the "right" outcome.

But how does one define "success"? Or the "right outcome"? These are two crucial aspects …

Let us start with "success": what is the success rate we expect from these systems? 50%? In that case, we might as well toss a coin in the air, heads or tails. 100%? That would imply a foolproof system. Somewhere in the middle? A frequently cited (and criticised[23]) study of the effectiveness of LJP in predicting the outcome of proceedings before the European Court of Human Rights[24] reflects, in its conclusions, the levels of accuracy achieved by the technology: on average, it was able to give an accurate prediction of the outcome of proceedings[25] in about 79% of cases. Other evaluations of the effectiveness of LJP technologies have arrived at similar results[26].

These results, although a few years old now, are revealing. Are tools that get the "correct" result only about four times out of five good enough to apply in a court system? And even assuming that the success rate improves in the future, do these tools achieve the "right outcome"? Would this be equivalent to the outcome that a human judge would have obtained in the same proceedings by following conventional legal reasoning? Is the outcome the only relevant element, or also the path leading to it? As legal theory has highlighted, judicial reasoning is above all a matter of assessment

20 See https://ethicsinaction.ieee.org/

21 Categories used in current legal practice.

22 It should, however, be noted that to arrive at a given outcome, technology can, especially if it is designed with explanatory capabilities, identify the factors that led it to that outcome (and these factors may also be among those that would influence a human decision-maker (judge) dealing with the same legal issue).

23 *Inter alia*, by Meneceur and Barbaro, 2019.

24 *Aletras et al.*, 2016.

25 When the outcome was either the finding of a violation of the ECHR or a finding of no violation.

26 The LJP technology evaluated by Katz et al., 2014, for example, achieved 69.7% accuracy. The tools studied by Chen et al, 2017, achieved 82% accuracy. The accuracy of the approaches studied by Grabmair, 2017, ranged from 69.4% to 84.3%. The LJP approach studied by Westermann et al., 2019, achieved an accuracy of 70.8%.

and interpretation, both of the proven and relevant facts of the case and of the applicable legal rules (legislative or jurisprudential), but also involves the judges' subjective interpretation of the concept of fairness.

There are several other issues to be addressed, such as public access to justice and the online publication of court decisions, as these *data provide the fuel*, or "black gold", for AI systems. In several European countries there is an interesting debate on "open data" and anonymisation of court decisions, as well as on the profiling of judges[27].

The time available today is too limited for me to explore all these pressing issues in depth. It should be noted, however, that in its European Ethical Charter on the use of artificial intelligence in judicial systems and their environment, adopted in 2018, CEPEJ (European Commission for the Efficiency of Justice) suggested that, in their current state, AI technologies should not be used in criminal proceedings and, even in other types of proceedings (civil, commercial, administrative), they should only be used as a decision-making aid, and not as the sole determinant of the outcome of proceedings. The second guideline given by CEPEJ says that LJP technologies should only be used within a **normative framework** that offers effective protection against misuse or uninformed use. This brings me to the last point of my presentation: **the need for a legal framework**.

Even in those situations where the deployment of AI is deemed appropriate, its design, development and operation **must be governed by clear and precise norms, which require upholding the principles, values and fundamental rights in our society**.

Thus, in December 2018, in its above-mentioned Ethical Charter CEPEJ set out a working basis by defining five fundamental principles to be adhered to in any AI systems used by courts:

(1) **firstly**, these systems must be **compatible with human rights** (obviously);

(2) **secondly**, they must abide by the principle of non-discrimination (thus **preventing** the creation or strengthening of **discrimination** between individuals or groups of individuals);

(3) **thirdly**, they must respect the principle of **quality and certainty** (with regard to the processing of court decisions and court data used to train, test and validate the models);

(4) **fourthly**, **transparency, impartiality and fairness** (which means making data-processing methodologies accessible and understandable, and allowing external audits);

(5) **fifthly**, **the principle of user control** (thus ruling out a prescriptive approach and enabling the user to be an informed stakeholder and master of his/her choices).

What are the practical implications of these principles? CEPEJ is currently working on defining more specific guidelines for the implementation of these principles in the context of LJP technologies. It is also looking into whether a certification or labelling framework for AI products used in judicial systems would be appropriate and feasible.

In other sectors as well, a number of stakeholders – governmental and non-governmental organisations, but also industry itself – have been produced a raft of **ethical principles, guidelines and other soft law instruments** for the responsible use of AI[28]. While these documents are certainly useful as a moral compass for AI actors, their non-binding nature limits their effectiveness in ensuring proper compliance with the principles they seek to secure. In practice, their implementation depends on the goodwill of those concerned.

27 See, for example, in the case of France, the "open data" project of the Court of Cassation (https://www.courdecassation.fr/acces-rapide-judilibre/open-data-et-api) and the discussion surrounding Article L111-13 of the Code of Judicial Organisation, as amended by Law no. 2019-222 of 23 March 2019 on programming for 2018-2022 and the reform of the justice system.

28 In particular the Ethics Guidelines for Trustworthy Artificial Intelligence (AI) prepared by the High-Level Expert Group on Artificial Intelligence of the European Commission, adopted in April 2019 – https://ec.europa.eu/futurium/en/ai-alliance-consultation.1.html. For a comparison between these non-binding instruments see Ienca and Vayena, 2020.

There is therefore a **growing consensus that the use of AI needs to be regulated by law**, given the significant impact that these technologies can have, not only on the fundamental rights of citizens, but also on the functioning of democratic institutions and processes, and on the rule of law. To be sure, for the time being, the use of AI is not totally outside the law, as several existing rules do apply, such as in the fields of unfair competition, civil liability or personal data protection, where GDPR secures our right not to be subject (with some exceptions) to a decision based exclusively on automated processing, including profiling, if that decision produces legal effects or has a similar significant impact.

However, this is unlikely to be sufficient. There are gaps in the currently applicable legal instruments. This is one of the conclusions of **CAHAI**, the Ad Hoc Committee on Artificial Intelligence, which the Council of Europe Committee of Ministers set up in 2019 for a period of two years and which I have the honour to chair together with my Slovenian colleague, Gregor Stroijin. CAHAI's mission is to examine the feasibility and potential elements of a legal framework for the development, design and application of AI, based on Council of Europe standards in the fields of human rights, democracy and the rule of law.

In its work, CAHAI has concluded that an appropriate legal framework for AI systems would probably consist of a combination of binding instruments – including a new convention – and cross-disciplinary or specific non-binding instruments, which would complement each other[29]. This approach was endorsed by the Committee of Ministers at its 131st Session on 21 May 2021; the intention is to start negotiations on a transversal instrument in early 2022[30].

In addition, the **European Union** is in the process of developing a specific binding legal instrument on AI systems. On 21 April the European Commission published a proposal for a regulation[31]. This regulation will primarily be an internal market instrument, based on Article 114 of the Treaty on the Functioning of the European Union, focusing on AI system conformity, standardisation, and market surveillance. While it seeks to ensure that the fundamental rights of individuals are properly upheld, its aim is above all to harmonise the national laws of the Member States so that AI systems can circulate freely within the Union.

These two initiatives – that of the Council of Europe and that of the EU – will therefore be perfectly **complementary** (as are Convention 108 and the GDPR).

They also share a **common approach**, consisting in establishing a differentiated regulatory framework **according to the risks presented** by the uses of AI. Thus a distinction will be made between, on the one hand, **uses that are prohibited** because they present unacceptable risks (such as the use of AI systems by public authorities for social scoring purposes or remote and "real-time" biometric identification systems in publicly accessible areas for law enforcement), and, on the other hand, **uses that are regulated** because they present high risks to health, security or fundamental rights.

WILL THESE TEXTS BE RELEVANT TO THE JUDICIAL SECTOR?

The answer is yes, as these texts will be able to transform the ethical principles identified by CEPEJ into binding legal obligations. Both CAHAI and the European Commission consider that AI systems used by the police and the judiciary, especially those designed to assist judicial authorities in researching and interpreting facts and the law, and in applying the law to a concrete set of facts, are high-risk applications, remaining subject to requirements related to risk assessment, technical documentation, data quality, human supervision, etc.

29 CAHAI, 2020, p. 63.

30 CM/Del/Dec(2021)131/2b, 21 May 2021.

31 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, 21 April 2021, COM(2021) 206 final.

However, we are still at the **beginning of the legislative process**; the road to the adoption of final texts will be a long one. In the meantime, Ladies and Gentlemen, I am counting on you. As representatives of the superior courts of the Council of Europe member States, you are the custodians of our fundamental rights. Like, for example, your colleagues in the Netherlands, in the AERIUS and Others cases , you have the power to uphold the principles of transparency, non-discrimination, equality of arms and good governance; to condemn "black box" systems deployed by public authorities in violation of these principles; and to protect citizens from what the Council of Europe Parliamentary Assembly called (in its October 2020 resolution) digital authoritarianism. We should all be vigilant in ensuring that the predictive does not become the prescriptive …

Thank you for your kind attention

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ACCESS TO JUSTICE DURING AND AFTER THE CORONAVIRUS PANDEMIC: AN EXCHANGE OF VIEWS – HUMAN RIGHTS RESTRICTIONS, PROCEDURES ADOPTED, LESSONS LEARNED

INTRODUCTION

President, valued colleagues, it is an honour and a pleasure to have been invited to speak to you here today on the subject of access to justice during and after the Coronavirus pandemic.

The pandemic has had serious repercussions for the law and legal protection, for access to justice and for judicial procedures. It is essential, while we are still in the grip of the pandemic, that we use past experiences to learn how we are best able to guarantee access to justice. I will first review what has actually been happening during this period and then briefly discuss the situation in the Netherlands.

I will conclude my presentation with some thoughts on the conflict between two fundamental rights: the right to a public hearing and the right to privacy in proceedings before the courts.

WORLD LITERATURE / ACA SURVEY

An extensive body of literature has been published worldwide on justice in relation to the COVID-19 crisis, including the impact it has had on the courts. To name just a few publications:

– *The Functioning of Courts in the COVID-19 pandemic: A Primer,*[1]

– *Civil courts Coping with COVID-19,*[2] and

– *Remote Hearings and Access to Justice during COVID-19 and Beyond.*[3]

For this presentation I make grateful use of a recent survey by ACA Europe[4]. ACA is the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union.

The survey covers all EU member States. Although that sample is far smaller than the number of signatories of the Convention, hopefully the picture painted by the analysis is nevertheless representative.

The pandemic has had a huge impact on the working life of the courts, and hence on the work of judges, judges' assistants and other court staff. That is reflected in the wide range of measures that were adopted, which included:

1 Organization for Security and Co-operation in Europe, 2 November 2020.

2 Editorial Board: Bart Krans and Anna Nylund. Boom Juridische uitgevers, 16 April 2021.

3 Created by the California Commission on Access to Justice, published by the National Center of State Courts (NCSC, www.ncns.org).

4 "The Supreme Administrative Courts in times of COVID-19 crisis – a lesson learned", Transversal Analysis 2020, ACA Europe, www.aca-europe.eu.

- reductions in the number of court staff;
- implementation of furlough systems;
- introduction of alternative ways of working (digitally and remote);
- working from home and on flexible hours;
- performance of tasks from home (deliberation, drafting, e-signing).

Let me briefly mention some other interesting topics.

Special legislation targeting the activities of the courts. More than 50% of the countries surveyed adopted special legislation targeting the activities of the courts and designed to prevent the spread of the COVID-19 virus.

Physical access. Physical access to justice was hindered or even blocked. In most countries court buildings were closed, particularly in 2020.

Authorities with competence to order closure of the courts. Interestingly from a constitutional point of view, the authorities with competence to order the closure of the courts during the pandemic varied from one country to another: Parliament (Austria, Poland), the Government (Poland), the president of the court (Austria, Czech Republic), the Chief Justice (Ireland) and the Special Pandemic Medical Officer (Sweden). In some member States, that competence lay with multiple authorities.

Compulsory health measures for gaining entry to court buildings. With the exception of Sweden, every respondent country adopted compulsory health measures with respect to access to court buildings. These measures included: social distancing (1.5 or 2 metres), face masks, plexiglass face shields and glass barriers, disposable gloves, measurement of temperature, hand sanitizer, signposting of courtroom entrances, walking routes and exits, and wider spacing between seats in the courtrooms and therefore limited seating.

Use of video conferencing and live streaming. The speed with which courts switched from a paper-based process to a digital process, including video conferencing and remote hearings with live streaming, has been revolutionary. The institutions in most countries now use two-way video-conferencing systems. 25% of the countries surveyed arrange live streams of hearings in order to limit the number of people present in the court itself and to promote the public character of the hearings.

National procedural law: modifications to facilitate judicial functions. Of the countries surveyed, 64% have modified their national procedural law in order to facilitate the courts in the performance of their judicial functions during the pandemic. The relevant amendments to regular procedures are related to:

- special parts of the procedure (for instance, urgent measures) (25%);
- mandatory timeframes for deciding cases (11%);
- procedural deadlines (43%);
- the deadline for appeal (14%);
- time-limits for execution of court decisions (11%);
- other parts of the procedure (43%), mostly:
  - the organisation of oral hearings
  - the possibility to decide a case without an oral hearing
  - the possibility to hold hearings remotely
  - the exclusion or restriction of attendance by the public.

It is noteworthy that no country has modified the form of judgments (for example, short judgements, oral judgments), or the number of judges required to decide cases, in order to cope with the situation during the pandemic.

THE PUBLIC HEARING

The European Court of Human Rights (ECHR) has repeatedly emphasised the importance of a public hearing. The survey shows that there are many nuances in national procedural law to the fundamental right to be heard in a public hearing. A number of factors are relevant in that context:

- the area of law concerned
- the legal person involved (for instance, minors, prisoners)
- the type of court (first instance – appellate – cassation – constitutional)
- is a hearing mandatory or optional?
- the right to be physically present
- can a hearing be held remotely?
- can the hearing be waived and by whom?

Digital public hearings. As regards digital or remote hearings, the first relevant point is the type of two-way communication that is used: telephone, some form of video conferencing, or also live streaming. Then the setting: there are significant differences between countries and courts in terms of who can participate in the digital hearing and from what location. I will give you three scenarios.

First scenario: all of the participants attend from home, including the judge(s). This can provide an unusual glimpse into kitchens, bedrooms and studies. With holiday snaps, IKEA lamps and other household items in the background. On a personal note, I find that these domestic scenes distract attention and undermine the status of the court and the legal procedure. I therefore suggest the use of a court template as background.

Second scenario: the judge(s) in the courtroom, everyone else via video.

Third scenario: the judge(s) and some parties in the courtroom, other parties via video (a hybrid hearing).

THE SITUATION IN THE NETHERLANDS

After this brief European tour d'horizon, I would now like to discuss some of our experiences in the Netherlands. The doors of the courts in the Netherlands were closed on 16 March 2020 and reopened in the middle of May 2020. During those two months, numerous measures were adopted to ensure that the courts' own personnel, the participants in proceedings, but also journalists and the general public, could again have access to our courts and courtrooms.

Many hearings were postponed because of the temporary closure. And the backlog grew rapidly.

The Dutch courts employed various methods to continue administering justice during the crisis.

The first was to dispose of cases by means of a decision in camera, without a hearing, which is only possible if procedural law allows it. The courts also instituted a second round of written pleadings in lieu of the public hearing. Some hearings were conducted by telephone or video or in the form of a hybrid hearing, sometimes in combination with live streaming of the hearing.

Live streaming presented us with a number of dilemmas.

- Can the court alone decide to stream a hearing live, or is the consent of the parties required? My court assigned greater weight to the right to a public hearing than to privacy, partly with a view to ensuring that participants and other interested parties could follow the hearing.

- Can a video recording also be made available after the hearing? And for how long? There were objections to this from both our own judges and from some lawyers. On the other hand, other lawyers, academics and the press were very enthusiastic about the service we offered.
- Our own Data Protection Officers warned me that live streaming without the consent of all of the participants at the hearing, and posting the video recordings on the court's website after the day of the hearing, could be in breach of the core principles underlying the EU General Data Protection Regulation (GDPR) such as purpose limitation and data minimisation. My counter-argument was that the processing of personal data was necessary for the performance of a task of public interest, the public administration of justice.

MODIFICATION OF NATIONAL PROCEDURAL LAW IN THE NETHERLANDS

In the Netherlands, the legislature amended procedural law to allow for video hearings, under the Temporary Dutch COVID-19 Justice & Security Act (*Tijdelijke wet COVID-19 Justitie en Veiligheid*)[5]. Section 2 of the Act reads:

"If, in connection with the COVID-19 epidemic, it is not possible to proceed with a physical hearing in civil and administrative legal proceedings, an oral hearing may be conducted via a two-way electronic means of communication."

In other words, it is for the court to decide whether the hearing will be conducted remotely. The court may consider the wishes of the parties in making that decision, but is not obliged to do so. However, an important caveat is that the judge can only exercise this power if physical hearings are unable to proceed because of the COVID-19 crisis.

The end of the COVID-19 crisis is hopefully in sight and it will soon be possible to hold all hearings physically again. But that raises a question of its own: should we really want that? Remote hearings have some drawbacks, but also many benefits. In my opinion, it would be a good thing if the legislature incorporated in our procedural laws the option of holding digital, remote hearings. At the same time, the legislature could also stipulate for which areas of law, procedures and legal persons a digital hearing can be held, the rules that apply, who decides whether a hearing may be conducted digitally and whether the consent of the parties is required.

CASE-LAW FROM THE NETHERLANDS

Like the ECHR, the highest courts in the Netherlands have had to decide on issues of procedural law arising from the COVID-19 crisis. I would like to briefly mention a number of judgments here.

No hearing

The first case is one that was heard by the Council of State[6] and was followed by a complaint to the ECHR: the case of *Ibrahim BAH against the Netherlands*[7]. The case concerned an applicant whose asylum application in the Netherlands had been rejected. He was placed in immigration detention with a view to his deportation. Mr Bah, invoking Articles 5 and 6 of the Convention, complained that his rights under those provisions had been violated because he had not been heard in person by the Regional Court. The Strasbourg Court found the application manifestly ill-founded, and referred to the following circumstances:

- the practical problems during the first weeks of the pandemic;

5 The Act entered into force on 24 April 2020. Section 2 was implemented with retroactive effect to 16 March 2020.
6 Council of State (Raad van State, Afdeling bestuursrechtspraak), 7 April 2020 (ECLI:NL:RVS:2020:991).
7 European Court of Human Rights, 22 June 2021, no. 35751/20.

- the de facto impossibility of hearing the applicant in person at the time;
- the fact that the Regional Court had endeavoured to hear the applicant in person or by video conference;
- the fact that the Regional Court had explained in detail why it had been unable to do so;
- the fact that the applicant was represented by and heard through his lawyer;
- the importance of the applicant's other applicable fundamental rights, namely the right to have the lawfulness of his detention decided "speedily" by a court; and
- the general interest of public health.

There are also some lessons to be drawn from a number of judgments of the Dutch Supreme Court[8].

If it is not reasonably possible, or would not be responsible, for the applicant to be physically present at the hearing, an alternative form of participation in the hearing may be chosen; in principle, participation by means of a two-way video connection is the better option in this regard. If no such connection is possible, in urgent cases it may be decided to hear the case by telephone, provided the requirements of a fair trial are met.

Hearing and ruling in public?

An interesting judgment of the Dutch Supreme Court[9] concerned the question whether a hearing that could not be attended by the public because of the outbreak of the pandemic met the requirements of a public hearing. Referring to the relevant case-law of the ECHR, the Supreme Court found as follows.

- Not every restriction of access to the courtroom deprived the hearing of its public character.
- It was relevant that parties and the press had been admitted to the courtroom. This provided a sufficient guarantee of scrutiny. The non-admission of the public did not detract from that. Furthermore. the complaint that the judgment had not been pronounced in public failed, because the parties and the press were able to be present.

Hybrid hearing

There have been hybrid hearings in the Netherlands, at which some parties were physically present and others participated through video conferencing. This was due to travel restrictions, but also to people being confined to their homes because they were infected or required to go into quarantine.

Mandatory quarantine also applied to judges if a person in their household had COVID-19, but it did not prevent them from performing their work.

The Supreme Court[10] had to rule on an appeal in a criminal case. At the level of the appellate court the case was heard by a three-judge chamber, with two of the judges present in the courtroom and the third participating through video conferencing.

The Supreme Court ruled that, in view of the exceptional circumstances, the principle that a hearing must be public, as laid down in Article 6 of the Convention, was complied with, provided the following conditions were met.

- No more than one judge participated via video conferencing.

8 Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 25 September 2020 (ECLI:NL:HR:2020:1509) and 9 April 2021 (ECLI:NL:HR:2021:505).

9 Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 15 December 2020 (ECLI:NL:HR:2020:2008).

10 Supreme Court of the Netherlands (Hoge Raad der Nederlanden), 15 December 2020 (ECLI:NL:HR:2020:2037).

- The judge's absence had to be directly linked to the outbreak of the pandemic.
- The two other judges had to be present in the courtroom.
- The judge participating by means of two-way audio-visual communication could not be tasked with leading the examination during the hearing.
- That judge had to be able to form a clear impression of the proceedings in the courtroom and to participate unhindered in the communication process, and had to be visible and audible to those present in the courtroom.

UNDUE DELAY (ARTICLE 6 OF THE EUROPEAN CONVENTION)

Finally, I would like to mention a judgment delivered in February 2021 which extended the maximum reasonable period for the highest courts to render judgment on account of the logistical problems ensuing from the pandemic. In the Netherlands, that period is in principle two years, but can be shorter or longer depending on the circumstances of the case.

The Trade and Industry Appeals Tribunal[11] found that the COVID-19 crisis was an exceptional and unforeseeable situation and as such constituted sufficient grounds for adopting a period longer than two years as a reasonable period. The deadline was extended by four months to take account of the period for which the court buildings had been closed, and by two months for the rescheduling of hearings that had been postponed.

PHYSICAL AND DIGITAL

Dear colleagues, we are entitled to compliment one another. Generally speaking, the courts performed well during the pandemic, really well. We did everything in our power to uphold the rule of law and safeguard fundamental rights by continuing to hear cases – with the use of digital tools.

The pandemic prompted a wide range of procedural changes across countries. Whilst not all countries envisage the changes being permanent, it is likely that the business of courts across Europe will incorporate more technological solutions going forward, even after the pandemic.

A danger is that we will fall back into the default position and return to our former ways once the pandemic has been brought under control. My wish is that the courts should carefully reflect on what we have learned during the pandemic and which methods we should continue to use or need to improve, particularly in terms of addressing fundamental rights. These rights are a living instrument and leave sufficient room for their transposal to today's society, and tomorrow's. The challenge is to deliver a modern, efficient and public system of administration of justice.

One of the first points that needs to be considered in that context is whether the dominance of print communication over digital communication ("the paper ceiling") is still justifiable in 2021.

The same applies to the primacy of physical presence over digital presence. What is the future of justice: is a court a service or a place? – a relevant question posed by Professor Richard Susskind.

The right to appear in person before a judge can be of great importance, depending in part on the type of case. But providing a few seats for the press and the general public in a court building somewhere in Europe is "old school" transparency, which adds little to clarity and controllability, to the transparent administration of justice.

We therefore need to step up. We should combine physical hearings with digital services such as improved digital access and digital filing, drafting and e-signing. The technology for video conferencing must be improved. We should end the use of standard office video-conferencing software

11 Trade and Industry Appeals Tribunal (College van Beroep voor het bedrijfsleven - CBB), 16 February 2021 (ECLI:NL:CBB:2021:158).

and invest in court software, secure and under our control, with which we can better safeguard the fundamental rights at stake. The video technology of the near future will close the gap between physical and digital hearings.

TRANSPARENCY AND/OR PRIVACY

An interesting aspect of the upscaling of digital technologies in the administration of justice is the conflict between, on the one hand, the right to a public hearing and, on the other hand, respect for private life and the protection of the personal data of judges, parties, witnesses and others attending a hearing.

The case-law of Europe's highest courts, under both the Convention and the Charter, has taught us that there is no absolute ranking of fundamental rights and that rights must be reviewed in relation to their function in society, weighed against other fundamental rights in accordance with the principle of proportionality and, in the event of conflict, reconciled where possible.

But what does that mean in the event of a conflict between the right to a public hearing and privacy in court proceedings? I am not aware of any judgments of the highest European courts on that question. What does conducting a hearing and pronouncing a judgment in public mean in 2021?

The Anglo-American concept of public justice differs greatly from that of many European countries. Since 1955, the US Supreme Court has produced audio recordings of hearings, which are published for the public. Documents from cases heard by the federal courts are in principle also available to the public. That raises the question: what is our concept? What is the European tradition? Do we have a European tradition? The practice of the ECHR on the publication of case documents and of recordings of hearings seems to correspond with the vision of the American courts. The European Court of Justice (ECJ), however, seems to take a different approach.

Case documents

As regards case documents, in Rule 33 of the Rules of Court the ECHR emphasises the public character of all documents. As a rule they are accessible to the public. In the procedure before the ECJ documents are NOT accessible to the public, only to the parties.

Hearings

As to hearings, the ECJ switched over to digital video hearings during the pandemic. Audio recordings are made, not video recordings. And the audio recordings are in principle mainly intended for internal use, not for the parties and certainly not for the press and the general public.

Rule 63 of the Rules of Court of the ECHR is clear: hearings shall be public.

Since 2007, the ECHR has released video recordings (webcasts) of hearings on the Court's website. It is a fantastic service: the hearings in the morning are available online the very same day in the afternoon. But this service is not without an impact on the privacy of persons who attend the hearing. The quality of the video recordings is so good that the name tags of experts and members of the public are clearly legible. With artificial intelligence and face-recognition software, it will not be difficult to discover the personal details of members of the public. Is that the price we have to pay for the right to a public hearing in this day and age? Should the Court change camera positions and show only the judges and the experts?

Judgments

We see a similar approach by the Strasbourg Court when it comes to the question whether personal data should be removed from judgments in the version that appears on the website. The ECHR's principal rule is that judgments must be published in full, unless there are exceptional circumstances. The Court leaves it to the initiative of the parties to submit a request for anonymity in good time[12].

CONCLUSION / DIALOGUE

The procedures in Strasbourg and Luxembourg are not similar, which may explain some of the differences. Overall however, my impression is that the Strasbourg and Luxembourg Courts take a different approach. Whilst both courts try to reconcile the fundamental rights at stake, in Luxembourg the interest of protecting the privacy of parties apparently outweighs the interest of a public hearing. In Strasbourg the public character of the proceedings and the hearing is leading.

I would like to end here with an appeal to my fellow judges to engage in a dialogue on lessons learned from the pandemic period, and on this conflict between fundamental rights.

A dialogue within our courts and between our courts, but also with the legislature and other stakeholders: such a dialogue is essential for finding a new balance between the aforementioned fundamental rights in this digital age. Courts in all countries have to seek that balance, which is quite a challenge. Therefore some guidance from the European courts would be most welcome.

12 See Rules 33 and 47 of the Rules of Court, and the guideline on requests for anonymity.

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EXERCISE OF FREEDOM OF EXPRESSION BY JUDGES: SOCIAL MEDIA

The principle that judges are independent means that they can exercise their right to freedom of expression. However, this raises a number of problems, including that of the judge's impartiality; for how will a judge who has exercised this right be able to adjudicate with all due impartiality, if called upon to rule in a case about which he or she has previously and lawfully expressed an opinion? What is more, is the exercise of this freedom confined to only certain means of communication, perhaps in particular excluding social media?

(A) FREEDOM OF EXPRESSION AND IMPARTIALITY

The CJEU followed a tortuous path before reaching the conclusion that the rule of law must be applied in the EU. The fact that judges are independent of the political power in each country is indeed because the rule of law prevails in the EU, thus encompassing the independence of the judiciary. The CJEU judgment in Associação Sindical dos Juízes Portugueses paved the way for preliminary rulings on national laws that may potentially be regarded as breaching judicial independence. I would merely point out that, while freedom of expression belongs to everyone, Article 10 § 2 ECHR enables the legislature to impose conditions, restrictions or sanctions on the exercise of this right, provided they are "necessary in a democratic society", when it comes to "maintaining the authority and impartiality of the judiciary". But this is a question that could be seen as subjective, as much as it is an objective and general one, in so far as it depends on the given case or judge. The question is therefore whether a judge is totally free to express his or her opinion, and if so what the consequences of such actions will be for him or her as a judge[1]. A brief study of certain decisions of the European Court of Human Rights will provide a few indications.

(a) Some of the Court's judgments, such as *Pitkevich v. Russia*, *Baka v. Hungary* or *Otegi Mondragon v. Spain* contain some key conclusions. However, other cases examined from the perspective of recognising the exercise of freedom of expression by a judge will also raise impartiality-related issues, namely where an applicant has complained of a violation of Article 6 § 1 ECHR also on account of a judge's lack of impartiality.

The case of *Buscemi v. Italy* is a very important one. It arose from a very complex procedure concerning the custody of a child born out of wedlock. At one point there had been a confrontation between the applicant and the President of the Turin Minors Court, and letters were disclosed to the press. The applicant took the view that the case should not have been examined by a court presided

1 "**VI. Expression and contacts** - Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office and their loyalty to the institution of the Court. ... They shall proceed with the utmost care if using social media." European Court of Human Rights, Resolution on Judicial Ethics, 21 June 2021.

over by a judge who had expressed his views in the media. The Strasbourg Court pointed out that a judge was bound by a duty of discretion[2], and that this duty should dissuade him or her from using the media, not even to respond to provocation. It thus found a violation of Article 6 § 1 ECHR.

The obligation to be discreet and not to use the media is also present in cases concerning the right of judges to freedom of expression. Thus the *Kayasu v. Turkey* judgment imposes a significant duty of discretion on the judicial authorities (§ 100), such that they are not supposed to use the media even in case of provocation, in view of the importance of their role. That duty was confirmed in *Olujić v. Croatia* (§ 59), *Poyraz v. Turkey* (§§ 67-69), and *Di Giovanni v. Italy* (§ 80), to mention only those cases where the judge's freedom of expression was directly at issue. To look at a particular example, in the *Poyraz* judgment of 7 December 2010 the European Court of Human Rights found no violation of Article 10. In that case an investigation had been opened against a judge, who was the head of an administrative board of the Foundation for the Promotion of Justice, following an anonymous complaint that he belonged to a religious group. The judge was appointed to the Court of Cassation. After the investigation had been closed the details were leaked to the media. The investigator subsequently lodged an application in Strasbourg to complain of a violation of Articles 6 § 1 and of Article 10 ECHR on freedom of expression. The freedom of expression of the investigator and the rights of the judge concerned were competing interests[3]. When the respective interests were weighed in the balance, the person who had leaked the information was not protected. In sum, this was one of the permissible limits under Article 10 § 2 ECHR.

(b) Fundamental rights are not absolute. There is no need to dwell on this point. But what does freedom of expression protect? A general idea is provided by Professor Solozábal, when he says that it protects only one activity: the unhindered communication of thought[4]. Judge Diez-Picazo Giménez, for his part, asserts that the sphere protected by the Constitution is more one of opinion than one of information[5]. And all authors interpret it as a right to a freedom[6].

Hitherto the solution to the problems raised has seemed obvious and the concept of incompatibility self-evident: the idea of exempting judges from sitting in cases they have already heard has been quite clear, in accordance, for example, with the rules laid down in section 219 of the Spanish Organic Law on the Judiciary, and it has been equally clear that a judge may exercise his or her right to freedom of expression, but has to assume the consequences of doing so with regard to his or her participation in a case on which he or she has publicly expressed an opinion. A distinction can also be drawn between the various purposes of the relevant statements – as the European Court of Human Rights has done in the various judgments examined –, which, according to Mr Climent[7], may be categorised as follows: criticism on a purely legal level, a conflict with the right to honour or reputation of other judges, and the use of the media in response.

(B) EXERCISE OF FREEDOM OF EXPRESSION BY JUDGES

The limits to the exercise of freedom of expression are set out in Article 10 § 2 ECHR. But those who exercise their freedom of expression must also face the consequences of doing so even when it is exercised legally. Therefore, I must point out that the facts I am about to mention should be seen not as a penalty for the exercise of freedom of expression[8] but as a means of protecting the rule of law, one of the components of which is the independence of the judiciary. That independence guarantees the impartiality of judges in the eyes of society, and to this end, the measures provided for

2 *Buscemi v. Italy* §§ 67-69.

3 *Poyraz v. Turkey*, 7 December 2010, §§ 78-80.

4 Solozábal Echavarría, J. J. "La libertad de expresión desde la teoría de los derechos fundamentales", *Revista Española de Derecho Constitucional*, 32, 1991, p. 81.

5 Diez-Picazo Giménez. *Sistema de Derechos Fundamentales*. Cizur Menor: Civitas-Thomson Reuters, 2013, p. 317.

6 Villaverde, *Commentarios a la Constitucion española*, art. 20 CE, 2018, I, p. 595.

7 Climent Gallart, J. A., "La jurisprudencia del TEDH sobre la libertad de expresión de los jueces", *Revista Boliviana de Derecho*, 25, 2018, pp. 526-534.

8 As can be inferred from *Baka v. Hungary*.

by law must be taken. Under point VI of the ECtHR Resolution on judicial ethics, judges "shall exercise discretion in dealing with their judicial functions. They shall respect the secrecy of deliberations. Judges shall exercise the utmost discretion in relation to secret or confidential information relating to proceedings before the Court. ...".

Solutions are forthcoming in the rules governing the grounds for exemption and withdrawal of members of the judiciary. In a democratic system, the exercise of freedom of expression by a judge has two aspects: (i) *the external aspect*, i.e. the protection of the rule of law and the relationship between the judge and the society in which he or she operates, in order to guarantee his or her independence, and thus the possibility of withdrawal from a case; and (ii) *the internal or subjective aspect* represented by the judge's own consideration of his or her position with regard to the dispute after – or because – he has made use of his freedom of expression with regard to a given case, and thus the possibility of requesting an exemption from sitting in that case.

The European Court of Human Rights applies what it calls the "objective and subjective test" to analyse the conduct of a judge who has made use of his or her right and the impact on his or her impartiality: impartiality normally implies a lack of bias, but can be determined by the *subjective* approach, which consists in verifying the personal conviction of a given judge in a given case; and by the *objective* approach, which consists in verifying whether the judge offers sufficient guarantees to exclude any legitimate doubt in this regard[9]. The clearest application of these principles can be found, for example, in the *Castillo Algar v. Spain* judgment (§ 45), where it is stated that "even appearances may be of a certain importance" or, in other words, "justice must not only be done: it must also be seen to be done" (see *De Cubber*, § 26). "What is at stake is the confidence which the courts in a democratic society must inspire in the public .... Accordingly, *any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw*" (*Castillo Algar*, ibid., emphasis added).

(C) JUDGES AND SOCIAL MEDIA

The question of the practical application of the principles discussed above will now arise in relation to the use by judges of another communication system – a more extensive, more immediate and more general one – namely social media. The matter now to be addressed is not whether or not judges have the right to exercise their freedom of expression, or whether this exercise risks undermining their impartiality, or at least the appearance of impartiality that should exist. This right has already been accepted by the ECtHR in its case-law and, as its judgments are of general application, countries acceding to the European Convention on Human Rights thus have at their disposal an enumeration of the criteria applicable to each individual situation. The question now is whether or not these new means of social communication affect the considerations set out above, in other words whether they should be treated in the same way as the traditional press, radio and media which have hitherto been at issue before the European Court of Human Rights, or whether they call for a new and different set of criteria. In this connection, the April 2010 summary of network access issues by the Committee on Codes of Conduct of the Judicial Conference of the United States may be of interest. I realise that more *social media networks* have emerged since that time, but I believe that, although they have different characteristics, they can all be likened to those described in that summary. According to this document[10], social networking refers to building online communities of people who share interests or activities. These web-based applications allow users to create and edit personal or professional "profiles" that contain information and content that can be viewed by others in electronic networks that the users can create or join. The document also draws a distinction between social networks that offer personal connections and professional networks that accomplish other business-related goals.

9 *Olujić v. Croatia*, §§ 59, 60, citing among others the Buscemi judgment.

10 US Judicial Conference Committee on Codes of Conduct, Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees, April 2010.

Here are the different types of network currently existing:

(i) **Facebook**, which provides an easy way for people to keep in touch, and for individuals to have a presence on the web without needing to build a website;

(ii) **LinkedIn**, which is used mainly for professional networking and offers a means of self-promotion;

(iii) **Blogs**, which are a type of website maintained with regular entries of commentary, descriptions of events or personal online diaries, combining images and links to other blogs, sometimes with the ability for readers to leave comments in an interactive format;

(iv) **Twitter**, which is a combination of instant messaging and blogging; tweets are text-based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers, who are known as "followers" or "friends", and senders can restrict delivery to those in their circle of friends or, by default, allow open access;

(v) **YouTube** is a video-sharing system.

The classification of the various forms of communication in social media leads to a question: is there a difference between traditional social media and the new electronic networks? I would say there is no difference, as they all have a common element, namely the communication of information or opinions to a segment of the population which is outside the circle in which the news is generated. Consequently, at first sight, it should be considered that the rules which can be inferred from the judgments of the ECtHR must also be applied to social media. Thus point VI, *in fine*, of the above-mentioned resolution calls for prudence: "[judges] shall proceed with the utmost care if using social media".

In various international working groups dealing with the issues of independence, impartiality and integrity of judges, a series of questions have been raised that relate to the use of social networks by judges and the consequences that may result in the protection of the principles that are supposed to govern their actions, since it should not be forgotten that "the independence of judges is a right of every citizen, the protection and defence of which is a fundamental element of the judge's professional duties, and not a personal privilege deriving from his or her status"[11] (emphasis added). Under the ECtHR resolution, cited above, « judges shall be independent of any public national or international institution, body or authority or any private entity » (point II)[12].

The issue of social networking by judges has also been a subject of debate in the specialised press. For example, on 24 May 2019, Colin Perkel published in La *presse canadienne* an article headed *La présence des juges dans les réseaux sociaux*, in which he asked whether it was fair, or even desirable, to require the judiciary to remain excluded and isolated from such social interaction.[13]

I believe that the basic rule remains the same as that which I have been defending: judges should be allowed to use social media. As indicated by the Doha Declaration[14], "[i]t is important that judges, both as citizens and in their judicial role, should be involved in the communities they

11 General Council of the Spanish Judiciary, *Code of Ethics for the Judiciary*, Principle 1.

12 "**II. Independence**. In the exercise of their judicial functions, judges shall be independent of any public national or international institution, body or authority or any private entity. They shall keep themselves free from undue influence of any kind, whether external or internal, direct or indirect. They shall refrain from any activity, expression and association, refuse to follow any instruction, and avoid any situation that may be considered to interfere with their judicial function and to affect adversely public confidence in their independence".

13 www://lapresse.ca/actualites/justice-et-faits-divers/actualites-judiciaires/201903/24/01-5219425. A few months later, on 30 October of the same year, Marine Babonneau published in Dalloz Actualité an article headed "Réseaux sociaux et pouvoir judiciaire : la nécessaire « *incarnation* »?" in which she referred to the case of a Spanish judge who, via Twitter, had given an opinion on the reasons for domestic violence, and reported on a conference about the influence of social media on the conduct of judges, held by the *École nationale de la magistrature française* and directed by Judge Clémence Caron, https://www.dalloz-actualite.fr/flash/reseaux-sociaux-et-pouvoir-judiciaire-necessaire-incarnation.

14 UNODC, *Non-Binding Guidelines on the Use of Social Media by Judges*, The Doha Declaration: Promoting a Culture of Lawfulness, Global Judicial Integrity Network.

serve", and therefore "[t]he public benefit of such judicial involvement and participation must ... be balanced with the need to maintain public confidence in the judiciary, the right to a fair trial and the impartiality, integrity and independence of the judicial system as a whole".

A distinction must be drawn between different situations:

1° **Institutional social media**. Media through which the courts announce their decisions, or explain the structure, functioning and administration of the justice system, etc. An example can be found on the website http://www.poderjudicial.es. These networks do not generally pose any problem and contribute to making justice more accessible and more transparent, and to strengthening public confidence in an understanding of how the courts work[15].

2° **Social networks made up of groups of individuals to discuss issues related to their profession**. For example, where a blog is created exclusively to discuss judgments on a specific point. Such blogs should not pose any major problems either, provide they are limited to an exchange of opinions and do not seek to impose legal views on a case being heard by a given judge.

3° The most important aspect is **the personal use of social networking**.

This is where the most sensitive issues arise.

(D) INDEPENDENCE ON SOCIAL MEDIA

None of the soft law documents concerning the participation of judges in social media and described as "ethical rules" do anything other than recommend caution, without imposing sanctions. For example, the Code of Ethics for the Judiciary, approved by the General Council of the Judiciary in Spain, expressly states in its preamble that "the disciplinary rules have nothing to do with judicial ethics", and adds that "it functions as a positive incentive since it aims at excellence", which translates into "the promise of good justice in so far as it incorporates the qualities necessary to achieve the goal assigned to it by the Constitution: the protection of citizens' rights". Thus, in point 9, it is stated that "judges must conduct themselves and exercise their rights, in all activities in which they are recognised in that capacity, in such a way as not to compromise or undermine society's perception of the independence of the judiciary in a democratic State governed by the rule of law". As I have already said, this document does not refer to the issue of social media at all; however, the opinion of the Judicial Ethics Commission dated 25 February 2019 (consultation 10/2018)[16] answers the questions raised about the use by judges of any social network. It reaches the following conclusions: (i) there is no reason why a judge should not use a pseudonym, but this does not mean that he or she can use it to circumvent the rules governing his or her actions; (ii) a distinction must be made between the closed groups I mentioned above and open-access groups (in the latter case, the analysis from an ethical perspective is more complex); (iii) when giving opinions on legal matters, it should be borne in mind that they may "compromise not only the appearance of impartiality" but also, in certain circumstances, affect the impartiality, independence and integrity of the judge himself or herself; (iv) the use of the words "friend" or "follower" on a social network does not compromise the independence and impartiality of the judge. Similar conclusions are set out in the above-mentioned opinion of the same Commission of 14 January 2021.

15 Such media are mentioned at point 11 of the document cited in the previous footnote: "Institutional (as opposed to individual) use of social media by the courts can, in appropriate circumstances, be a valuable tool for promoting issues such as (a) access to justice; (b) administration of justice, in particular judicial efficiency and expedition of case processing; (c) accountability; (d) transparency; and (e) public confidence in, understanding of, and respect for, the courts and the judiciary".

16 CGPJ, opinion of the Spanish Judicial Ethics Commission of 25 February 2019 (consultation 10/2018).

The conclusions of this opinion are in line with what has been said so far, namely, that in the exercise of their freedom of expression, judges may or may not express their legal opinions, but the appearance of independence and impartiality may be undermined, and therefore, in accordance with what the case-law of the European Court of Human Rights has emphasised, there is an ethical duty of care and restraint[17].

The regime described above must have its exceptions, which are none other than those relating, for example, to extreme political situations, failure by public authorities to respect fundamental rights or the principles of the rule of law, etc. Judges are entitled, in the exercise of their freedom of expression, to speak out in such cases, regardless of the means they use to do so.

The solutions adopted in the cases examined by the CJEU and the European Court of Human Rights are applicable.

In these circumstances, what would be the consequences of an "imprudent" exercise of freedom of expression in social media? The first answer is that, unless it is one of the cases for which a sanction is prescribed, according to the rules governing judicial discipline, it will always be necessary to preserve the judiciary's independence and impartiality, which are pillars of the rule of law. In other words, the constitutional system establishes the independence and impartiality of the judiciary as essential components, such that the legitimate exercise of freedom of expression will have consequences. Therefore, I believe that two groups of aspects can be distinguished:

(i) Aspects that are **external and specific** to each judge, for which the mechanisms of withdrawal and exemption exist. A judge who has legitimately expressed an opinion on legal issues that may be of interest to him or her may withdraw from a case, either before or after formulating that opinion. In other words, the judge may be suspected of bias or prejudice, or predisposition towards a particular solution, as the Bangalore principles state[18]. This situation may follow physical manifestations, previously expressed legal opinions, or membership of a particular political party[19]; it also applies to relationships with family or friends.

(ii) **Internal aspects**, for which the judge may, or rather must, withdraw. It is therefore logical that the Spanish judicial system should see these as grounds for withdrawal, because it recognises the existence of external aspects, which allow any interested third party to seek the withdrawal from a trial of a judge who has expressed his opinion or who has a relationship of kinship or friendship with a person connected with the trial. At the same time, these aspects have consequences for the personal attitude of the judge, who will know that for these reasons he or she must stand down from the case in question. Thus, the grounds for exemption and withdrawal are concrete safeguards ensuring the effective impartiality and independence of the judge.

17 An interesting comparative law study is that of Ordóñez Solís: "¡¡¡Pero bueno, los Jueces también están en las redes sociales!!!", *Diario LA LEY*, nº 8762, 16 May 2016. See also point V of the ECtHR Resolution.

18 Bangalore Principles (Commentary). *Impartiality*. 2.1, § 57: "Bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction ...". Or as point III of the above-cited resolution states: "Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations in and outside of the Court that may be reasonably perceived as giving rise to a conflict of interest. Judges shall not be involved in dealing with a case in which they have a personal interest. They shall refrain from any activity, expression and association that may be considered to affect adversely public confidence in their impartiality."

19 Bangalore Principles (Commentary). *Impartiality*. 2.2, § 65: "Outside court too, a judge should avoid deliberate use of words or conduct that could reasonably give rise to a perception of an absence of impartiality. ... Partisan political activity or out of court statements concerning issues of a partisan public controversy by a judge may undermine impartiality. They may lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches on the other ...". An interesting case concerning the principle of impartiality as applied at the Spanish Constitutional Court is that of the withdrawal of the President Pérez de los Cobos on account of his membership of a political party, which he left shortly afterwards (see judgments 180/2013 of 17 September 2013 and 238/2013 of 21 October 2013, which dismissed one of the grounds for withdrawal under Article 219).

(E) CONCLUSION

Everything that has been said leads to one single conclusion: the principles of independence and impartiality of judges form an indispensable component of a State governed by the rule of law. The status of judges cannot prevent them from exercising their freedom of expression, regardless of the means they use to do so. Judges must, however, assume the consequences, otherwise the presumption of impartiality may be called into question. They will then be able to rely on grounds for withdrawing, or for being exempted, from a case, and it is only in that way that the principles of the rule of law can be upheld.

ABBREVIATIONS

ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
CGPJ General Council of the Judiciary, Spain.
CJEU Court of Justice of the European Union.
UNODC United Nations Office on Drugs and Crime.

Rajko Knez

President
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PRIVACY AND DIGITAL TECHNOLOGY (JUDGES AND WITNESSES)

INTRODUCTION

Technological developments do not entail a decline or waning of politics as was anticipated by philosophy in the past, but rather a new tool and means at its disposal. This is predominantly beneficial, but may also influence our privacy (and dignity)[1]. The modern era of vast technological development, especially digital, confronts legal systems (national and international) with rapid and tremendous changes. What used to be a topic for science fiction movies has, at least to a certain extent, become reality. What may be considered an essential tool for authorities in their fight against crime and in ensuring public order and public safety may also easily interfere with fundamental human rights such as privacy and human dignity.

Numerous challenges confront legal systems: (i) technological development is faster than the development of regulatory frameworks; (ii) rules differ from State to State; (iii) not all effects can be easily anticipated and (international) jurisprudence is also evolving (but not fast enough); (iv) it is mostly the highest European judiciary (the ECHR and the CJEU) that is setting the (minimum and EU) standards; (v) legal reasoning is complex, far from easy, and no one solution or test fits all cases; (vi) a step-by-step approach should be applied (for instance, an end-to-end safeguards rule[2]); (vii) the issues are different in relations between authorities and individuals and among individuals, but they often overlap. Put simply, the effects of digital technology are overwhelming.

I will focus on several points. Firstly, I will address the difference between the vertical and horizontal issues brought about by digital developments. Secondly, I will discuss the broader picture of the power of digital technology with regard to the executive and legislative branches of power. Thirdly, I will discuss the judiciary's role and the importance of the ECHR in this regard.

THE EFFECTS OF DIGITAL DEVELOPMENTS ON VERTICAL AND HORIZONTAL RELATIONS

One can easily divide up the open questions along two main lines: vertical and horizontal. The vertical line offers empowered institutions advanced technology to ensure safety, prevent crime, etc., in relation to individuals. On the other hand, along the horizontal line, the development of the Internet, especially social media, has allowed for almost unlimited, high-speed and effortless (also anonymous) access by individuals not only to other individuals but also to the general public.

1 Two values that interact with and support each other.
2 If a process of assessment is subject to "end-to-end safeguards", this means that, at the domestic level, at each stage of the process an assessment has to be made of the necessity and proportionality of the measures being taken.

Along both lines, huge dilemmas are present. They stem, as I see it, from the question whether privacy is under such heavy attack from the rapid and substantial digital developments that we have to protect it more robustly by also adopting deterrent measures and more far-reaching safeguards. It seems that this is true, especially in vertical (that is, de iure imperii) cases.

Hence the same technology might, on the one hand, prevent crime and on the other hand, for instance, detect and trace a journalistic source, decipher our bank codes, eavesdrop on our conversations without our knowledge, etc. And it is not only a matter of safeguarding privacy. Whenever the powers of the executive and legislative branches are used to control individuals or for mass surveillance, the principle of legality is also in the foreground. The scope and limitations of such measures must be widely discussed in democratic procedures. First, they have to be the subject of discussion in parliaments. And after that, the scrutiny of judicial control follows.

The picture regarding horizontal relationships is different. As mentioned, the Internet and social media allow individuals fast and instant access to the general public. Filters, cookies, algorithms, etc., make it possible not only to select what we would like to read, see and hear (thereby diminishing pluralism in a way that we do not really notice, that is, quietly but efficiently), but also allow for personal attacks, insults and offence. Even where these are deemed necessary for democracy, we must ask where the threshold lies. Is there a line beyond which lies so-called over- (or excessive) democracy? Do we need a new notion of privacy to safeguard victims? Can specific platforms indeed be treated differently? Twitter, for instance, is defined by some as a social network with a particular subculture of expression and communication. This could lead to differential treatment of social media and, as a corollary, also of the assessment of instances of defamation. What is in the foreground of these developments is not only privacy but also the dignity of individuals, which can be attacked much more easily. As a premise, I believe that technological development cannot justify a decrease in the level of protection of personal dignity. We can also expect the same in a digital age, in both vertical and horizontal relations.

THE ROLE OF THE JUDICIARY AND THE ECHR AS A BEACON

What is the role of the law, the judiciary and (national) judges, and our responsibility in a modern State that utilises sophisticated technology[3] ? Superior courts also articulate values such as dignity and privacy by restraining political power. Firstly, one has to look at the whole picture. Those who have access to technology and information are powerful. An expansion of power is also a kind of teleological tendency. Interference can be aimed at limiting individual rights as well as collective rights. Broadening powers can also serve legitimate aims, but this mere possibility is not enough. The legitimate objective is only the first in a series of conditions. It is easily fulfilled. The central and more complex conditions follow in the next stages. Miss just one of the safeguards and national regulations will overstep the line. This may not even occur intentionally. The faster and more overwhelming the development, the more numerous, complex and detailed are the rules. In the words of the ECHR, in principle, the broader the objectives the greater the potential for abuse. Hence, in areas where the authorities have a lot to gain, self-restraint on the authorities' part might not be sufficient. Temptation can be a dangerous thing. Democracy on the one hand, which is a slow and complex system (sometimes not easy to understand), and rapid, bold and overwhelming technological development on the other hand, may easily clash.

3 The issue, however, does not only concern judges: even witnesses may easily intrude on someone's privacy, for instance by recording them doing something in order to produce a piece of evidence. However, it is not so easy for individuals to know whether such an invasion of privacy will result in the exclusion of the evidence or even in their being held liable.

Therefore, the key issue concerns not only privacy or dignity: it concerns the search for the right balance. Sensitive balancing between a legitimate aim and privacy safeguards is not an easy task[4]. Also, one test does not usually fit all (cases). Therefore, upgrades (that is, constant developments) of the case-law are necessary. The ECHR expressed this nicely in *Big Brother Watch*[5]. And the ECHR is doing an important job. It offers us (minimum) guidance that needs to be put on the scales[6].

The ECHR is a vital beacon in these circumstances, where national legal systems are (slowly) catching up with technological developments (and the above-mentioned Big Brother Watch judgment proves that). In the face of diversity and under-regulation, etc., the ECHR offers national judges detailed, specific, urgent, wide-ranging, courageous and balanced guidance. Cases like *Roman Zakharov*[7], *Weber and Saravia*[8], *Gaughran*[9], *Centrum för rättvisa*[10], the above-mentioned Big Brother Watch, and many others, shaped rules that need to "radiate" back to national legal systems. The case-law of the CJEU is also to be taken into account. For legislatures and governments, this entails ex ante applicability in drafting (changing) legal frameworks, and for national judiciaries, ex post relevance for the cases at hand.

The ECHR judgments emphasise (inter alia) the following: (i) transparency and the necessity of a measure in a democratic society are among the most important starting-points for the assessments; (ii) measures adopted with legitimate objectives serving public safety, public order and the prevention of crime are to be further scrutinised by the use of tests and criteria; in this regard, the objectives have to be addressed diligently (they need to be taken seriously, and this is the approach taken by the Court); and (iii) criteria for the assessment of measures, such as the possibility of less intrusive measures, end to end safeguards at every stage of the process, a sufficient degree of precision of measures, strong and appropriate selectors, appropriate limitations as to what materials can be collected, intercepted and shared, the level of protection and safeguards in the receiving State, independent control and ex post facto review, etc., must be carefully applied in each case. And there are numerous such cases every day.

CONCLUSION

In the sphere of law, whenever we have a vulnerable individual on the one side, and an empowered State with very effective tools at its disposal on the other side, the judiciary must play its role carefully. Hence, I believe that history has proven that a combination of the following elements is dangerous: (i) a vulnerable group (or subject); (ii) prejudice against such a vulnerable group; (iii) the State being supported by politicians and (iv) the State having effective tools (that is, technology) at its disposal. Therefore, at the end of the day, the judiciary must be the one to set the limits if the other branches of power fail to do so.

The national courts in EU member States also need to apply EU rules and the case-law of the CJEU in a highly synchronised manner, without causing legal uncertainty. This is because both the ECHR and EU law regulate the same topics mentioned above. Nevertheless, I observe some specific differences: EU law can be much more detailed. The regulative framework of EU law is also, but not exclusively, composed of directives containing detailed (and complex) rules on e-commerce, data

4 For this reason, the judiciary must also remain completely independent. Clipping the wings of the judiciary (which is not the topic of this speech) would result in weakened protection of individuals and reduced collective protective safeguards.

5 In *Weber and Saravia and Liberty and Others*, the ECHR applied the minimum safeguards developed in its case- law on targeted interception. However, seen in the light of the intervening technological developments, the scope of the surveillance activity considered in those cases would be much narrower: targeted interception and bulk interception are different in several important respects. See *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13 and 2 others, 25 May 2021.

6 On the one side of the scales is the legitimate aim pursued. On the other side is an assessment of whether the safeguards applied sufficiently protect our privacy (and dignity), or whether less intrusive measures should have been applied, etc.

7 *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015.

8 Weber and Saravia v. Germany (dec.), no. 54934/00, ECHR 2006 XI.

9 *Gaughran v. the United Kingdom*, no. 45245/15, 13 February 2020.

10 *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, 25 May 2021.

protection, e privacy, and many other subjects. The case-law of the ECHR is based predominantly on a broad interpretation of Article 8 of the European Convention. Hence, a particular case "in concreto" can also be adjudicated from a broader perspective. Both approaches are welcomed.

The above reference to how to strike the proper balance between dignity and privacy on the one hand, and safety on the other hand, is essential in this regard. There are two sides to the same coin. Let us imagine that we address these questions exclusively through the lens of safeguards, without focusing on security (which also ensures personal freedoms): in such cases, distortions may result.

I would like to add that a comparative approach is very necessary. Judges have to learn from each other. Digital developments are borderless. This is not true of legal systems, but with comparative approaches and guidance from the ECHR (as well as the CJEU) our decisions will follow the same path. As remarked by Judge Ziemele at the opening of a previous judicial year, since Europe is a space of common minimum values, it is important that the courts within the common European legal space take similar approaches on values.

In addition, one more thought from my own experiences. Whenever the legal sphere is faced with (highly) advanced issues of a nature different from the law (like technology), we may not fully understand them. However, to be able to adjudicate we have to, sometimes even in detail. Therefore, such situations demand from us also a broader technological knowledge. With such combined knowledge of the law and an understanding of technology, a judge can adjudicate confidently.

There is more, however. The internal sense of each judge as to the effects (of such power to control) is also important. This is my own experience from adjudicating such cases. It involves two elements, namely a sense of human dignity and ethics. It involves values. Something that technology, even when carefully wielded by State authorities, must not push aside. The effects of technological (ab)use are liable to be irreversible. That is why a mindful and bold approach by the whole judiciary in the European legal space, including the two highest European courts, is necessary.

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

Robert Spano

President of the European Court of Human Rights

OPENING ADDRESS

President of the European Court of Human Rights, Presidents of Constitutional Courts and Supreme Courts, Madam Secretary General of the Council of Europe, Chairman of the Ministers' Deputies, Your Excellencies, Ladies and gentlemen,

I would like to thank you on behalf of myself and all my colleagues for attending this formal hearing of the European Court of Human Rights. Your presence, in the difficult times we are going through, demonstrates your respect and consideration for our Court.

Today's hearing has a special significance for me. In January of this year, the health situation did not allow us to meet for our traditional meeting. But I was determined that we should be able to meet at least once in 2021.

I am all the more delighted to be able to count on your presence because, as we know, the pandemic is not entirely over. This is why we have been forced to limit the number of participants for this event and I thank you for your understanding.

I would like to begin by saying that the Court, like your respective courts, has adapted to the unprecedented situation arising from the COVID-19 crisis. Since the first lockdown and without interruption, all the Court's services have functioned perfectly. We have continued to carry out our mission. During this period, new technologies have shown how indispensable they have become. They have enabled us to continue to work, even from a distance, and to deliver judgments and decisions.

As an indication, we decided 39,190 applications in 2020, a slight decrease of 4% compared to the figure for 2019, which was 40,667. However, most importantly, if we look only at the number of applications that ended in a judgment either by the Grand Chamber or by the Chambers, there were 556 in 2020 and 455 in 2019, an increase of 22%. This shows our willingness to give priority to the most important cases. I will come back to this later.

If I have to make an assessment of this extraordinary period, it is that, in these dramatic circumstances, the Court has been able to adapt. This has been possible thanks to the dedication of the judges and staff of the Court who have been able to cope with the situation. Their commitment was exceptional and I would like to thank them publicly.

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The year 2020 has been an important year for the European human rights protection system. The Interlaken reform process has come to an end. The outcome is largely positive. We have considerably reduced the number of pending cases compared to the beginning of the Interlaken process.

The time has come to move on to the next stage. The success of the Court cannot be measured only by the number of cases dealt with in a given period, but also by the way in which the most important cases are handled.

It is vital that the Court is able to respond effectively and rapidly to the many human rights challenges facing Europe.

Of course, the Court will continue to make every effort to reduce its stock. It will continue to deal with the most serious cases in a timely manner, in line with its prioritisation policy.

But in recent years we have found that a number of cases, although important, do not fall into the category of priority cases and are therefore not dealt with the necessary speed. These are mainly chamber cases which are not considered as priority cases, following the categories established by the Court.

So the time has come for a paradigm shift.

We will, of course, maintain our policy of prioritisation, which has proved to be effective, especially for the most serious cases. But, at the same time, we are putting in place a new, more targeted case-processing strategy, designed to deal with those complex and often sensitive cases that we call 'impact' cases.

Very concretely, there are currently almost 18,000 applications which do not concern the core rights protected by the European Convention on Human Rights, Article 2 or Article 3. These cases take, on average, between five and six years to be processed by the Court. Even if these cases are not considered to be priority cases, this is not acceptable.

Some of these applications raise issues of great importance to the State concerned and to the Convention system as a whole. It is therefore essential that they be dealt with more quickly. We have made an inventory of these cases and about 800 out of 18,000 have been identified as impact cases.

The criteria for identification vary.

By way of example, the solution adopted by the Court is sometimes likely to lead to a change in domestic legislation. In some cases, the case raises new societal or technological issues that have never been addressed by the Court. Without wishing to speak about specific instances, these may be cases relating to the independence of the judiciary, the environment, or the consequences of the COVID-19 crisis.

In order to deal with these «impact» cases as effectively as possible, a new strategy has been put in place since 1 January. It is based on three principles: firstly, their rapid identification; secondly, their rigorous follow-up; and thirdly, the simplification of the processing of all the other "non-impact" cases.

I would like to add two clarifications here. Firstly, as this afternoon's seminar reminded us, in order to carry out this new strategy, we will continue to invest in IT, which will enable us to be much more efficient. Secondly, from 1 September 2021 and for a trial period of two years, cases under the jurisdiction of the three-judge committees will be drafted in a much more concise and focused manner. This new format of short judgments and decisions is aimed at accelerating the processing of these cases and at the same time reducing the Court's backlog.

Here we are at the heart of the concept of subsidiarity, which is one of the foundations of our system of human rights protection. In the vast majority of cases, these important cases have been examined by your courts and you are awaiting the response of our Court. It is therefore essential that you receive it quickly. Without a rapid response from us, subsidiarity cannot work. This will be our challenge for the next few years.

But the challenges facing the Court are not only organisational.

Ladies and gentlemen,

The challenges facing the European Court, like all domestic superior courts, are global. One major challenge is the technological revolution we are living through as explored during today's

fascinating Judicial Seminar; climate change and environmental litigation is another global challenge, as well as the pandemic and its consequences on society.

However, the topic I have chosen for my intervention this evening is the current challenge we are witnessing to the rule of law and judicial independence. This is what the Secretary General of the Council of Europe has termed "democratic backsliding".[1]

The rule of law is more than a series of procedural rights. It is one of the foundations of an effective and meaningful democracy, at the heart of the core values of the Council of Europe and the European Court. Yet, it is uncontroversial to state that the rule of law in Europe is now under pressure.

In the landmark judgment in *Golder v. the United Kingdom* of 1975, the Court made clear that the rule of law is 'one of the features of the common spiritual heritage of the member States of the Council of Europe'.[2]

The rule of law, by requiring that governmental power be regulated by law and not the whims and caprice of men,[3] demands that laws are clear and not excessively vague and open to abuse[4]. The rule of law does not allow for unfettered powers to be granted to the organs of Government.[5] Laws must be interpreted and applied by independent and impartial courts, and that once lawfully constituted courts have rendered final and binding judgments they should not be called into question.[6]

These conceptual elements explain why this fundamental principle is anathema to authoritarian states or the realms of dictators and why the rule of law and democracy go hand in hand.

As we all know, an efficient, impartial and independent judiciary is the cornerstone of a functioning system of democratic checks and balances. Judges are the means by which powerful interests are restrained. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law.

Our Court has a well-developed body of case-law related to the concepts of 'independence' and 'impartiality' of judges.[7] However, for the first time in 2020, the Grand Chamber clarified the scope and meaning of the "tribunal established by law" concept under the Convention's fair trial provision. This was in the Grand Chamber judgment of *Guðmundur Andri Ástráðsson* against my own country, Iceland[8]. In this judgment, the Court held, unanimously, that the respondent State had violated Article 6 § 1 due to grave breaches of national law in the appointment of a judge to the newly established Court of Appeal in Iceland.

The judiciary is therefore an essential component of democratic societies and a key institution that needs to be protected.

Judicial independence has both de jure and de facto components. As to de jure independence, the law itself must provide for guarantees in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

But *de jure* independence, that is independence of the judiciary set out in legislation, does not alone guarantee nor secure judicial independence. What is also needed, and perhaps even more crucially, is de facto independence. In concrete terms this means that the scope of the 'State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and

1 "State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe", Report by the Secretary General of the Council of Europe, 2021.

2 *Golder v. the United Kingdom* (no. 4451/70), 21 February 1975, § 3.

3 *Sinkova v. Ukraine* (no. 39496/11), 27 February 2018, § 68; *Baydar v. the Netherlands* (no. 55385/14), 24 April 2018, § 39.

4 *Işikirik v. Turkey* (no. 41226/09), 14 November 2017, §§ 57-58.

5 *Roman Zakharov v. Russia* [GC] (no. 47143/06), 4 December 2015, § 230; *Beghal v. the United Kingdom* (no. 4755/16), 28 February 2019, § 88.

6 *Ireland v. the United Kingdom* (revision) (no. 5310/71), 20 March 2018, § 122.

7 *Ramos Nunes de Carvalho E SÁ v. Portugal* [GC] (nos. 55391/13, 57728/13 and 74041/13), 6 November 2018, §§ 144-150.

8 *Guðmundur Andri Ástráðsson v. Iceland* [GC] (no. 26374/18), 1 December 2020

decisions of the courts, even when they do not agree with them. In particular, ad hominem attacks on individual judges for their decisions or attempts at pressuring the judiciary to deliver politically acceptable outcomes is not acceptable in a democracy governed by the rule of law.

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It is not just the Strasbourg Court which has been grappling with crucial rule of law questions over the last few years. The Court of Justice of the European Union has delivered a number of important judgments on judicial independence. Why do I mention this?

It is because of the symbiotic relationship between Strasbourg and Luxembourg on this question. The jurisprudential core of many of the Luxembourg Court's rulings rely upon Strasbourg case-law, and Strasbourg case-law itself relies upon the findings of the Luxembourg Court.

The important element to highlight here is the clear symmetry of values between the two systems. This is the case despite the procedural differences between the cases brought to each European Court. Yet, the two systems are evidently complimentary and mutually reinforcing. This symmetry is an important conceptual building-block common to both systems which facilitates the necessary judicial dialogue between the two Courts.

It is essential that the Strasbourg and Luxembourg Courts continue to develop and reinforce their continuing jurisprudential dialogue in this field. But the current framework is not sufficient. As we all know, there are ongoing negotiations on the accession of the European Union to the European Convention on Human Rights which in my view are of great importance in bringing the two systems more closely together in responding to our current rule of law crisis.

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It is custom for the President of the Court at the solemn hearing to highlight one or two of the most important judgments of the Court delivered during the year gone by. In 2020, the Grand Chamber of the Court delivered ten judgments and two decisions and its second advisory opinion under Protocol No. 16 of the Convention. I have already mentioned the Icelandic Court of Appeal case.

I would now like to refer to two important Grand Chamber cases which reflect the human tragedies linked to migration. Recent events in Afghanistan have demonstrated how further human rights complaints linked to migration may be a feature of domestic and international litigation in the coming years.

The first case I would like to highlight is the Grand Chamber judgment in *N.D. and N.T. v. Spain* from February 2020. This case examined the immediate and forcible return of aliens from a land border, following an attempt by migrants to cross in an unauthorised manner. In August 2014 a group of several hundred sub-Saharan migrants, including the applicants, attempted to enter Spain by scaling the barriers surrounding the town of Melilla. Having climbed the fences, they were arrested by members of the Civil Guard, who returned them to the other side of the border. The Grand Chamber found, inter alia, no violation of the prohibition against collective expulsion.

The judgment established a two-tier test to assess the extent of protection to be afforded under this provision to persons who cross a land border in an unauthorised manner, deliberately taking advantage of their large numbers and using force. The Grand Chamber emphasised, however, that the finding of no violation in this case did not call into question the obligation of Contracting States to protect their borders in a manner which complied with Convention guarantees and in particular with the obligation of non-refoulement.

The second case is the decision in *M.N. and Others v. Belgium* from May 2020. The applicants, a Syrian couple and their two minor children, travelled to Beirut where they submitted short-term visa requests to the Belgium embassy to allow them to travel to Belgium to apply for asylum. Their requests were processed and refused by the Aliens Office in Belgium and the applications lodged before the Belgian courts were unsuccessful. The applicants complained that the refusal to grant them visas had exposed them to a risk of ill-treatment for which they did not have an effective remedy. The Grand

Chamber declared the application inadmissible finding that the applicants had not been within the jurisdiction of Belgium. The decision examined whether a State exercises control and authority, and thus jurisdiction, over individuals lodging visa applications in embassies or consulates abroad. To be clear, these cases were indeed challenging for the Court, requiring it to carefully balance the State's sovereign right to control entry into their territories and individual rights of peoples in often precarious situations.

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These judgments were handed down in 2020. Logically, I should wait until our next meeting, in January, to talk about the case law of 2021. However, current events oblige me to mention today, a case handed down this year whose impact, to use a word I have already employed today, has been considerable in Europe and far beyond.

This is, of course, the judgment in *Vavřička and Others v. the Czech Republic*, concerning the compulsory vaccination of children against well-known childhood diseases. In that case, this Court recalled that compulsory vaccination constituted an interference with the right to respect for private life. However, it considered that the policy of vaccinating children in the Czech Republic pursued the legitimate objectives of protecting the health and rights of others. This policy was in line with the best interests of children, which was the focus of the Court's attention. The Court therefore found no violation of the European Convention on Human Rights and concluded that the measures adopted were necessary in a democratic society.

It is interesting to see that in this judgment, our Court referred in particular to the notion of social solidarity for the benefit of the most vulnerable in order to justify its position.

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Ladies and Gentlemen,

The time has come to hand over to our guest of honour. This evening we welcome a Chief Justice of a superior Court.

Madam President Dineke de Groot,

You come from a country, the Kingdom of the Netherlands, which has always supported the Court. But that is not the only reason you are here.

In your swearing in speech as President of the Court of Cassation in 2020, you chose to speak about the values that you hold dear: the trust of citizens in justice; the rule of law.

You also made express reference to the Council of Europe and the principles that our Court defends. Your personality and the depth of your speech made us want to hear you this evening.

Madam President of the Dutch Court of Cassation, Dear Dineke de Groot,

We are happy to be able to listen to you now.

Dineke de Groot

President of the Dutch Supreme Court of Cassation

A THING OF BEAUTY IS A JOY FOREVER

"Its loveliness increases; it will never Pass into nothingness; (...)"
John Keats, Endymion, 1818

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

It is an honour to have been invited as President of the Supreme Court of the Netherlands – and as a citizen of European society – to attend this solemn ceremony of the European Court of Human Rights and to be given the opportunity to speak to you. I would like to share some observations about judicial dialogue, criticism, beauty and joy in relation to the protection of human rights as part of the rule of law.

The European Convention on Human Rights ("the Convention") and the case-law of the European Court of Human Rights ("ECHR") are of paramount significance for the human rights and democracy oriented rule of law in Europe. The dynamic way in which your Court cares about the interpretation and the functioning of the Convention and the Protocols thereto in the light of present-day conditions[1] inspires national judges. It guides them in securing human rights in individual cases, in the common interest of European society in peace and well-being. Citizens and companies will not get much out of human rights if these rights are granted on paper only, without being practical and effective. It is essential that human rights be complied with voluntarily within national systems and, if unexpectedly they are not, they must be enforceable. In this dual approach, stimulating compliance and requiring procedural and substantive guarantees for enforcement, the ECHR leads by example in Europe in applying the Convention as a living instrument within the rule of law. Commonly, we address this system of protection in terms of its righteousness or goodness. Today at this solemn hearing, I would like also to sing the praises of its beauty and the joy it radiates.

My personal awareness of the significance of the Convention for the development and the application of national law did not only arise during law school in the Netherlands, but also during my subsequent study at the law faculty of the University of Vienna, Austria, shortly before I became a trainee judge in the Netherlands. It was the year of the fall of the Berlin wall, 1989. A Viennese professor organised a weekend seminar in a somewhat dilapidated Habsburg castle. The ins and outs of the Convention were addressed, including the meaning for one's personal performance as a legal professional of Article 1 of the Convention: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". It was also meaningful for my legal education to study the Convention within a Central European jurisdiction, after becoming acquainted with it in the then rather Atlantic-oriented Dutch jurisdiction. I think it is important for the sustainable common understanding of our legal cultures in Europe that

1 ECHR 25 April 1978, *Tyrer v. United Kingdom*, 5856/72, no. 31; ECHR 9 October 1979, *Airey v. Ireland*, 6289/73, no. 26; ECHR (GC) 8 July 2004, Vo v. France, 53924/00, no. 82; ECHR 20 January 2011, *Haas v. Switzerland*, 31322/07, no. 55.

exchange programmes are available for European law students and legal professionals. At the age of 24, having grown up in the peaceful and open, high-trust society of the Netherlands, I learned that living in such a society was of a beauty which was not self-evident, for instance from the insight that, for Austria, the Staatsvertrag of 1955 had in some ways also been an escape out of a closed society behind the iron curtain. I have a strong memory of the intense joy that came over the city of Vienna in 1989 during the opening up of the borders with neighbouring countries. Free exchange across open borders between the peoples of Europe is a factor of cultural enrichment for all of us.

Since 1989, the human rights approach of the Convention as a major part of the rule of law has been spread further across the European continent. Today, more than 30 years later, the protection of human rights by national authorities is still essential in contributing to peace and tolerance across our countries. The significance of judicial dialogue for this protective role of national and international courts was extensively discussed in solemn hearing speeches in the past years, for instance by President Pérez de los Cobos Orihuel of the Constitutional Court of Spain (2015), President Lenaerts of the Court of Justice of the European Union (2018) and Justice Clarke, Chief Justice of Ireland (2020). I do fully agree with them that a constructive and mature judicial dialogue between national and international courts is a meaningful instrument in the effective protection of human rights.

I think a judicial dialogue may also support courts in dealing with criticism as to the requirements regarding the protection of human rights and freedoms within the rule of law. Criticism as to what the Convention demands from States or legal professionals in regard to this protection is all around us. In my country too.

It is my perception that the judiciary in the Kingdom of the Netherlands generally implements the Convention in good faith, in accordance with Article 26 of the Vienna Convention on the Law of Treaties. In the Netherlands, almost every judge in every case at every instance is able to apply the Convention. Under Article 93 of the Dutch Constitution, provisions of an international treaty such as the Convention that may be considered "generally binding" as to their content, are obligatory just like national law after being published. According to Article 94 of the Dutch Constitution, national law is not to be applied if this is not compatible with such generally binding provisions of an international treaty. Thus, the Dutch Constitution prescribes that national law must be interpreted in the light of the international human rights treaties and agreements entered into by the Netherlands. Following the ratification of the Convention, the acquis of your Court's case-law concerning the rights enshrined in the Convention became an essential hermeneutical canon for the Dutch legislative, executive and judicial powers. This canon has proved and is still proving fruitful for the task of Dutch courts in applying national law in accordance with human rights. It would be an enormous job for the Dutch legislator if Articles 93 and 94 of the Constitution obliged this canon to be codified in Dutch national legislation. The approach to the Convention and to this canon by the Supreme Court of the Netherlands is aimed at an effective application of human rights in a particular court case. In the Netherlands, critical consideration of the merit of the courts' case-law is seen as a valuable addition to their daily instruments. It is part of our checks and balances to monitor whether arguments in critical comments about a judgment have been recognised in the judicial debate in the case.

Criticism as to the requirements regarding the protection of human rights and freedoms within the rule of law is sometimes related directly to the Convention or to courts.

The very essence of a human rights approach within the rule of law by courts is respect for human dignity and human freedom, just as this is the very essence of the Convention.[2] National courts have to make every possible effort to apply the Convention and to give at least as much protection as the Convention requires in the interpretation of the ECHR. If national courts act like this, they will contribute to the necessary level playing field for the ECHR to stand for procedural and substantive subsidiarity. A proper judicial dialogue between our courts is a natural part of this level playing field. Such a dialogue can take place at a general academic level, by individual case management, and through responsive legal reasoning in a judgment. The Knowledge Sharing Platform of the Superior

2 ECHR 29 April 2002, *Pretty v. United Kingdom*, 2346/02, no. 65.

Courts Network of the ECHR is helpful for the dialogue within case management, for instance because it facilitates national contributions to the Court's comparative-law activities. A recent example in the Netherlands of dialogue through responsive legal reasoning is a judgment about the line between freedom of expression and the offence of insulting a group, in the case of a Dutch politician. In this case, the Criminal Division of the Supreme Court of the Netherlands continued its practice of elaborately integrating the case-law of the ECHR into national law and jurisprudence.[3]

Case management and responsive legal reasoning are instruments of a constructive judicial dialogue. At the same time they are instruments for dealing with criticism as to the requirements regarding the protection of human rights and freedoms within the rule of law. National contributions to the Court's comparative-law activities during case management may for instance be used to guarantee procedural and substantive fairness, or to ensure responsive legal reasoning in a judgment, in order to facilitate the acceptance of the interpretation of the Convention by the ECHR. Sometimes, criticism can be transformed into improvement of human rights protection. As you know, a severe point of criticism some years ago was the ECHR's enormous backlog in processing cases. The ECHR has substantially increased the efficiency of its handling of the caseload in the past years, since Protocol no. 11 came into force. The ECHR developed its successful approach in conjunction with the relevant partners. This major achievement is all the more commendable if the budgetary difficulties of the ECHR are taken into consideration. In the context of reducing the caseload, the ECHR showed the same responsive attitude towards its relevant environment as it does in its case management and judgments in individual cases.

Critical comments on the work of the courts, and especially on judgments of the ECHR against States, will "never pass into nothingness", to paraphrase John Keats.

There will always be some criticism. It is a normal aspect of the task – common to international and national courts alike – which is to promote an effective approach to human rights protection in European society. I began this speech by quoting the first verse of John Keats' celebrated poem, "A thing of beauty is a joy forever". It should be noted straight away that one important difference between Keats and the European Convention is their respective ages. Keats died at the age of twenty-five. The Convention, for its part, will be celebrating its 71st anniversary in two months time – and it is in jolly good health.

Looking more closely, there are also some interesting similarities between the European Convention and Keats. For example, when it is created, a literary work often receives harsh criticism but it is also defended, particularly by those who discern its underlying philosophy (Byron and Shelley, in the case of Keats). Moreover, after a certain time has elapsed, the importance of the created work becomes more generally recognised and its influence on the national and international scene increases significantly. Keats sought to crystallise the experience of beauty in a romantic poem on the assumption that everyone would feel the joy of that experience for the rest of their days. He was criticised by those who pursued a different approach to the role of the traditional romantic concept, in literature which was increasingly inspired by nationalism.

In applying the Convention the judge is sometimes confronted with the following dilemma: how can thoughts and feelings about the concept of human dignity and liberty be transposed in practice into the law? How can human dignity and liberty be accessible and effective for the individual?

Perhaps you have in mind your own examples of Strasbourg judgments in which thoughts and feelings about human dignity and liberty are transposed into rights and obligations in the realm of human rights. Allow me to mention just one aspect: the obligation for the national authorities to encourage citizens to have genuine confidence in the upholding and maintaining of those rights and obligations.

3 Hoge Raad 6 July 2021, ECLI:NL:HR:2021:1036.

Confidence is a good example of "a thing of beauty which is a joy forever" and, at the same time, of a thing which represents an everyday challenge in terms of securing the requisite rights and obligations. When it comes to confidence, in all our respective courts we have become familiar with the role of the judge in promoting and sustaining the confidence which the courts in a democratic society must inspire in the public, as stated in the exemplary and settled case-law of the ECHR[4]. This will require, in particular, a judge who does justice in an upright, competent, attentive, and benevolent manner, and a State which genuinely allows the judge to accomplish this task.

This role increasingly requires judges to behave as courageous and alert officers of the law, even when the result of their judicial work displeases the legislature or the executive. On the position of the judiciary among the three powers, the ECHR declared as follows in 2020, in paragraph 215 of its judgment in *Gudmundur Andri Ástrádsson v. Iceland*: "a certain interaction between the three branches of government is not only inevitable, but also necessary, to the extent that the respective powers do not unduly encroach upon one another's functions and competences"[5]. In fact, in the spirit of the separation between the three powers, the sharing of responsibilities has been the crux of the matter for centuries. The word "sharing" highlights a key point that is not often made, namely the fact that none of these powers – legislative, executive or judicial, by nature – is capable of maintaining the rule of law on its own, by its own means. All stakeholders need to accept the fact that the pursuit of justice is a shared responsibility. By the exercise of competence in the context of the three powers, the responsibility for securing respect for human dignity and liberty is shared, this being a sovereign responsibility that cannot be assumed by any one power in its sole interest, without undermining its position in terms of the rule of law. If this reality is ignored, the outcome will sooner or later be one of failure, to the detriment of peace and the common good, as history has shown us, more than once.

Nowadays we are increasingly hearing about concrete threats to human rights, such as the coronavirus health crisis, climate change, cybercrime or drugs mafias. These questions are no less important for the preservation of human rights protection in today's world than for the question of the rule of law. For example, on the subject of drugs mafias, there is a quite remarkable debate under way in the Netherlands at the moment about confidence in a fair trial. One of the questions is whether a suspect can retain a full right to challenge the reliability of a principal witness by raising specific motions to secure the hearing of other witnesses and experts, when that suspect himself or herself systematically invokes the right to remain silent, even though he or she is suspected of running a criminal organisation involved in drug trafficking and killings[6]. An argument frequently made against the retention of this full right consists in saying that the search for truth and justice is being undermined by a delaying tactic. The judges of the Nuremberg trials in 1946, but also, to take a more recent example, those who sat in the trial concerning the Charlie Hebdo attack in 2020[7], clearly showed that all suspects have the right to a fair trial. In the Strasbourg case-law, Article 17 on the prohibition of abuse of rights has a negative impact and cannot be interpreted a contrario as depriving an individual of the right to a fair trial[8]. One must not overlook that the rules of application of the Convention must guarantee human rights to a very large number of citizens who genuinely need its protection and have no intention of abusing the system. However, the Convention and its dynamic application by the Court must allow all domestic courts the possibility of finding the right solutions in a situation where the preservation of human rights protection in the general interest must be carefully weighed up against the specific importance of individual rights and safeguards. This means that, where necessary, the judge will have to consider and explain to what extent thoughts and feelings, whether or not they are comprehensible, are compatible with the respect for human rights acknowledged and guaranteed by the Convention, and whether they can legitimately restrict those

4 See, for example, *Micallef v. Malta* [GC], no. 17056/06, § 98, ECHR 2009.

5 *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 215, 1 December 2020.

6 Pieter van der Kruijs (oud-strafrechtadvocaat/former defence lawyer), Richt systeem van strafrecht in op de nieuwe werkelijkheid (Modelling the system of criminal law around a new reality), NRC Handelsblad, 10 August 2021.

7 Emmanuel Laurentin, Antoine Mégie, Florence Sturm, François Boucq, Que nous a raconté le procès des attentats de janvier 2015 ?, France Culture, Le temps du débat d'été (from about the 27th minute).

8 European Court of Human Rights, Guide to Article 17 of the Convention – prohibition of abuse of rights, updated 31 August 2020, § 57.

rights. And let us not forget that this task is entrusted above all to the domestic courts. The ECHR has publicly taken the direction of a more specific form of subsidiarity. In its judgments it points towards a requirement of procedural and substantive safeguards on the part of a domestic court, rather than carrying out an in-depth assessment of the court in question.

The transformation of the Convention's application in a direction which takes account of current individual needs is an ongoing trend. I would express the wish that all of you here today are all able to disseminate, in your daily lives, the beauty and joy of the Convention, and I also sincerely hope that the Convention itself will never "pass into nothingness".

Thank you for listening.

Dialogue between judges 2021

PHOTOS

Dialogue between judges 2021

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