

**DIALOGUE BETWEEN JUDGES 2020**



# The European Convention on Human Rights: living instrument at 70



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

# Dialogue between judges

Proceedings of the Seminar  
31 January 2020

*The European Convention on Human Rights:  
living instrument at 70*

1. *Living instrument: The evolutive doctrine*
2. *Gender equality*
3. *The environment*
4. *Science and technology*

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## Linos-Alexandre Sicilianos

**President of the European Court  
of Human Rights**

### WELCOME SPEECH

Presidents, Dear friends,

Allow me at the outset to say how glad I am to see so many of you gathered here for this seminar, which traditionally precedes the Solemn Hearing of the Court.

This is a particularly important seminar, since it is the first event organised this year to mark the 70th anniversary of the European Convention on Human Rights. I shall return to this point in a moment.

Your presence here testifies to your interest in this traditional rendezvous between the European Court of Human Rights and the European supreme courts.

I am sure that the presence of distinguished academics and the Government Agents to the Court will further enrich this afternoon's discussions.

I should like to thank Judges Turković, Dedov, Motoc, Kucsko-Stadlmayer, Chanturia and Jelić, who organised the seminar, assisted by Rachael Kondak and Valentin Nicolescu.

Naturally, I welcome our four speakers: Rick Lawson, a well-known specialist on the European Convention on Human Rights, Professor in Leiden; Juliane Kokott, Advocate General at the Court of Justice of the European Union; Laurence Boisson de Chazournes, Professor in Geneva and recognised expert on environmental law (among other areas); and, lastly, our friend and former colleague Ineta Ziemele, President of the Constitutional Court of Latvia.

The theme chosen for today's event is highly topical, since it refers to the 70th anniversary of the European Convention on Human Rights, which we are celebrating this year.

To mark this anniversary, it was decided to prepare a commemorative book, a copy of which you will all receive this evening. In addition to historical and contemporary photographs and archival material, you will find, in respect of each member State, information about an important judgment, one that was a landmark for the protection of human rights. I should like to thank all those who contributed to this book, working to extremely tight deadlines, and I thank the judges of the Court, each of whom chose the judgment which struck them as the most salient for their country.

Over seven decades, the European Convention on Human Rights has become our common language. Although our legal traditions differ, as illustrated by the range of nationalities represented here today, the Convention nurtures our dialogue and we all apply it. It is a working instrument used by every one of us – by you in the first place, in your courts, and on an increasingly frequent basis. Then by us in Strasbourg, since that is the role assigned to us by the treaty.

If, to return to the theme of our seminar, it can be stated that the Convention is nowadays a living instrument, this is really as a result of the evolutive interpretation given to it. Over the years, the text has been constantly adapted to present-day conditions, enabling the Convention to remain

an incredibly modern text. In addition, it has continued to nourish all branches of law. For its part, the Court has extended the scope of the guaranteed rights to take account of technological and societal developments that were unforeseeable 70 years ago.

This is illustrated by the topics chosen for today's seminar: gender equality, the environment, and science and technology. Here indeed are three areas where we can be certain that the Convention's founding fathers did not imagine the role that their text would be required to play. These are topics which did not have the importance in 1950 that they have now assumed.

If we examine the case-law in these areas, however, it is rich and varied. For that reason, I look forward immensely to hearing our speakers and listening to your comments. It is you, members of the superior courts, who give life to the European Convention on Human Rights. Without you, and the lawyers who rely on its provisions, this treaty would be a dead letter. I am therefore convinced that this 70th anniversary seminary will be a fascinating one.

I have already spoken at some length, and so I immediately hand the floor to my colleague and friend Iulia Antonella Motoc, who has very kindly agreed to chair this seminar.

Thank you for your attention.



**Rick Lawson**

**Professor of European Law  
at the University of Leiden**

**A LIVING INSTRUMENT: THE EVOLUTIVE DOCTRINE  
– SOME INTRODUCTORY REMARKS**

**1. INTRODUCTION: THE TYRER CASE AND THE ORIGINS OF THE  
EVOLUTIVE DOCTRINE**

We all know by heart the famous passage of the Court's judgment in the *Tyrer* case (1978): "The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions".<sup>1</sup>

This statement was the starting point for an impressive body of case-law, as set out in the excellent Background Document prepared by the Registry for this seminar.

In a way, *Tyrer* takes us back to the classic tale of nature and nurture. On the one hand, there is **nature**: the Convention has its basic characteristics enshrined in its DNA – "the very essence of which is respect for human dignity and human freedom".<sup>2</sup> This DNA encapsulates the consensus of the days after the Second World War: Europe was in need of an alarm bell, an early warning mechanism. The result was "an instrument designed to maintain and promote the ideals and values of a democratic society", equipped with "institutions that were set up to protect the individual".<sup>3</sup>

On the other hand, there is **nurture**: the impact of the surroundings. This is where *Tyrer* comes in. The evolutive approach introduced in the *Tyrer* case allows the Convention to respond to a changing environment, with all the opportunities and threats that it presents.

The very term "evolutive approach" reminds us of biology, which teaches us that the capacity to adapt may prove crucial for the survival of a species. For the survival of the Convention, both nature and nurture are indispensable. The "Conscience of Europe", to use Pierre-Henri Teitgen's famous expression, needs both. It needs the firmness of its founding principles, and it needs flexibility to accommodate and address the realities of modern life: the roots and branches of a living tree, as the Canadian Supreme Court has put it.<sup>4</sup> And so, following in the footsteps of the *Tyrer* judgment, the evolutive doctrine has become one of the main pillars of Strasbourg case-law, closely connected with the principle of effectiveness. This principle entails interpreting and applying the Convention in a manner that renders its rights practical and effective, not theoretical and illusory.<sup>5</sup>

But before moving on to explore the potential of the jurisprudence that builds on *Tyrer*, it may be worth pausing for a second to reflect on the wording of the famous passage in *Tyrer*. The Convention "is" a living instrument, we are told. This is presented to us not as a choice but as a

<sup>1</sup> ECHR, judgment of 25 April 1978, *Tyrer v. UK* (no. 5856/72), § 31.

<sup>2</sup> ECHR, judgment of 11 July 2002, *Christine Goodwin v. UK* (no. 28957/95), § 90.

<sup>3</sup> ECHR, judgments of 7 July 1989, *Soering v. UK* (no. 14038/88), § 87, and 6 September 1978, *Klass and Others v. Germany* (no. 5029/71), § 34.

<sup>4</sup> See, e.g., Supreme Court of Canada: *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698 § 22.

<sup>5</sup> Clearly a lot has been written and said about the interpretation of the Convention. For a recent discussion see J. Gerards, *General Principles of the European Convention on Human Rights*, Cambridge UP 2019.



blunt fact. The Court “must” “recall” that the Convention “is” a living instrument which “must” be interpreted in the light of present-day conditions. The words give the impression that the Court was stating the obvious, or even that it had no choice.

Of course, there was no express obligation to do so. True, the Court was given the task of “interpreting and applying” the Convention, which implies a certain latitude.<sup>6</sup> And using that latitude, the Court felt that a static or originalist approach – whereby one would continue to interpret the Convention as it was understood by its drafters in 1950 – would produce undesirable results. Such a “frozen” attitude could not guarantee the continued relevance of the Convention as our societies developed. A dynamic approach would surely be in keeping with the preamble of the Convention, which refers to “the maintenance and further realisation of human rights and fundamental freedoms”. But a choice it was.

In this connection, it is interesting to observe that the Court in *Tyrer*, for once, prayed in aid the Commission. In the passage we just quoted, the Court remarked that “the Commission rightly stressed” that the Convention had to be interpreted in the light of present-day conditions. The verb “stress” is perhaps a bit grand. It is true that the Commission’s Delegate, Mr Kellberg, made this point at the public hearing before the Court.<sup>7</sup> But actually, the Commission’s Opinion in the *Tyrer* case, of December 1976, was completely silent on this issue! The Commission simply found it obvious that “judicial birching humiliates and disgraces the offender and can therefore be said to be degrading treatment or punishment”.<sup>8</sup> The UK Government actually agreed,<sup>9</sup> and had no difficulty in accepting that the Convention had to be construed in the light of present-day thinking.<sup>10</sup>

So the evolutive doctrine found its place in the Strasbourg case-law with an ease that, especially in hindsight, is striking. The official summary of the judgment, in the *Yearbook of the European Convention*, did not even refer to the Court’s characterisation of the Convention as a “living instrument”.<sup>11</sup> Apparently it was not seen to be such a big deal.

## 2. THE EVOLUTIVE DOCTRINE AS A BONE OF CONTENTION

Truth to tell, when *Tyrer* was discussed by the Commission, the issue of interpretation methodology was raised at one point: by its Irish member, Mr Kevin Mangan.<sup>12</sup> But he was opposed to an evolutive approach! In his dissenting opinion, Mr Mangan referred to the “concerns which moved the framers of the Convention”. In his view “[t]he practices and views on punishment of young persons in the various communities involved in the preparation of the Convention, at the time it was concluded, and the really great evils against it was mainly directed, must be considered in determining what it was that the parties agreed to curb”.<sup>13</sup>

6 Art. 32 ECHR. See also Art. 31 Vienna Convention on the Law of Treaties.

7 See Verbatim Report of the public hearings held on 17 January 1978, Eur. Court H.R., Series B, no. 24, *Tyrer* case, pp. 57, 86.

8 ECommHR, report of 14 December 1976, *Tyrer v. UK* (appl.no. 5856/72), § 35, reproduced in Eur. Court H.R., Series B, no. 24, *Tyrer* case, p. 24.

9 Judicial corporal punishment had been abolished in the UK, but was retained in the Isle of Man, which is where Mr Tyrer was birched. As a result, the British Government did not dispute that there had been a violation of Art. 3 ECHR, leaving it to the Attorney-General for the Isle of Man to try to defend the birching of Mr Tyrer.

10 See Verbatim Report of the public hearings held on 17 January 1978, Eur. Court H.R., Series B, no. 24, *Tyrer* case, p. 86, with a reference to Document Cour (77) 43, p. 47.

11 Council of Europe, *Yearbook of the European Convention on Human Rights*, vol. 21 (1978), p. 614.

12 That in itself is a small miracle, as Mr Mangan was no longer a member of the Commission by the time the Report in *Tyrer* was adopted. His term of office had ended 1½ years earlier, in May 1975. A closer study of the archives brings to light an interesting puzzle. The Court’s records suggest that Mr Mangan continued to be involved in the case after the end of his term of office: ECHR, Series B, no. 24, *Tyrer* case, pp. 31-35. But according to the Commission’s original report (a facsimile of which can still be found on Hudoc), his place was taken by his successor, Mr Brendan Kiernan. As a result Mr Mangan was not listed as one of the Commission members deciding this case (see p. 2 of the Report). Yet somehow, he managed to make his voice heard through a dissenting opinion. The latter scenario reminds us of the “ghost opinion” attached (initially) to the Court’s judgment in the case of *D v. UK* (2 May 1997, no. 30240/96), as recalled by Michael O’Boyle at the seminar on the occasion of his departure as Deputy Registrar of the Court, 13 February 2015.

13 ECommHR, Report of 14 December 1976, *Tyrer v. UK* (appl. No. 5856/72), dissenting opinion of Mr Kevin Mangan, §§ 7 and 18, on Hudoc and in Eur. Court H.R., Series B, no. 24, *Tyrer* case, pp. 28, 30.

There we have, in a nutshell, the two main arguments levelled against the “evolutive doctrine” as introduced in *Tyrer*. The High Contracting Parties were entitled to expect that the Court would only apply the obligations which they had agreed upon in 1950, and the Court should limit itself to dealing with the “really great evils”.

The first argument quickly lost much of its force. In April 1978, when the *Tyrer* judgment was delivered, there were only 18 Contracting Parties. Even if some of them might have claimed that the Court’s evolutive approach had taken them by surprise, this does not apply to the 29 States that joined the Convention after *Tyrer*. They knew full well that they were acceding to a living instrument. And all Council of Europe Member States, old and new, have expressed their support for the Court and its case-law on countless occasions.<sup>14</sup>

This does not mean, of course, that the limits of the evolutive interpretation will never be the subject of discussion. On the contrary: a judgment that is welcomed by NGOs as a progressive step ahead may be criticised by governments as legislation from the bench, an illegitimate limitation of their freedom to manoeuvre. Why does the Court not confine its attention to the “really great evils”? And a judgment that will be perceived by some as a missed opportunity to develop case-law, will be seen by others as the proper application of the principle of subsidiarity, needed to retain the Court’s credibility among the High Contracting Parties. Within the Court, there will always be those who argue that “one *Salduz* judgment per year is enough”,<sup>15</sup> and those who emphasise the need to move boundaries and enhance the protection of individual freedom and human dignity.

## 3. THE EVOLUTIVE DOCTRINE: A MODEST TYPOLOGY

A look at the case-law makes it clear that there are various categories of situations where the evolutive doctrine is applied. The first one, obviously, is the scenario of *Tyrer* itself: the Court responds to what it perceives as a positive trend in the domestic law of the Council of Europe Member States. It may observe, for instance, that the rights of the child receive wider recognition. Against such a background, the Court may find that there is sufficient common ground to allow the corresponding rights and freedoms of the Convention to evolve; it codifies, as it were, the new consensus in Europe.

The second scenario is triggered by the emergence of new factual situations that pose new threats to human dignity and thus necessitate the articulation of relevant standards. In the case of *Szabó and Vissy*, for instance, the Court noted the technological advances of the last decades. It considered that a stronger protection of private life was required, in view of the possibilities of mass surveillance and the potential for interferences with our use of the Internet.<sup>16</sup>

In both cases, I suppose, the Court will need to make an effort to convince a potentially sceptical audience of its new interpretation. In the former category of cases, it needs to substantiate the claim, empirically, that there is common ground among the Council of Europe Member States. In the latter category, it will need to convince the reader that human dignity is *really* at stake and that the new approach is unavoidable. The better the Court manages to convey the message that its judgment is firmly grounded in a European consensus, or that it is actually dealing with “really great evils”, the easier its judgments will be accepted. If it neglects this, it may be more vulnerable to criticism. Indeed, there will always be critics who are keen to dismiss a new interpretation as a

14 For a recent example see the Copenhagen Declaration (2018), § 26: “The Court ... authoritatively interprets the Convention in accordance with relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties, giving appropriate consideration to present-day conditions”.

15 Cf. E. Myjer, “One *Salduz* a year is enough”, in D. Spielmann, M. Tsirlis, P. Voyatzis (eds.), *La Convention européenne des droits de l’homme, un instrument vivant – The European Convention on Human Rights, a living instrument* (Essays in Honour of Christos L. Rozakis), Bruylant 2011, pp. 419-430.

16 ECHR, judgment of 12 January 2016, *Szabó and Vissy v. Hungary* (no. 37138/14), § 53.

mere nicety, a matter of subjective preferences, or even an act *ultra vires*.<sup>17</sup> But I will leave it at that, assuming that the other presentations of this seminar will address developments that belong to one of these two categories.

This allows me to focus on a third dimension, one that is perhaps rather overlooked in this connection – though I believe it is crucial. The Court’s evolutive approach may also extend to procedural matters and lead to institutional adaptation. Sometimes, the Court will expressly refer to the *Tyrer* case – as it did in *Mamatkulov*, where it held that the failure of a Contracting State to comply with interim measures will amount to a violation of Article 34 ECHR.<sup>18</sup> But the Court developed its practice on many more occasions. When faced with problems of a systemic nature, the Court developed the practice of pilot judgments.<sup>19</sup> In 2003 it started to accept unilateral declarations, a practice now embodied in Rule 62 A of the Rules of Court.<sup>20</sup> And what about the countless measures the Court has taken over the years to cope with the ever-growing case load: do they not reflect the living character of the Convention?<sup>21</sup> Perhaps these procedural innovations provide the strongest illustration of the fact that the capacity to adapt is crucial for the Court’s effectiveness – and, indeed, for its survival.

#### 4. PRECARIOUS PRESENT-DAY CONDITIONS

It is important to keep this in mind, because the Convention’s environment does not just offer opportunities that allow the Court to happily move on and enhance its standards. It also presents challenges. Indeed, the Convention’s current environment features a genuine “climate change” which cannot be ignored by the Convention and the institutions established for its implementation. Pluralism, tolerance and broadmindedness – to use the famous expression from *Handyside*<sup>22</sup> – are in decline. It has been stated, and deplored, time and again by the Secretary General of the Council of Europe, the Parliamentary Assembly, the Commissioner for Human Rights, the Venice Commission, and so on: the rule of law is under pressure.<sup>23</sup>

So we face new “present-day conditions”<sup>24</sup> – conditions that may have a direct impact on the very foundations of the Council of Europe: human rights, democracy and the rule of law. I am not saying that each and every one of those developments involves violations of the Convention. This is for the Court to decide; and that is the very problem. Virtually all the organs of the Council of Europe have expressed and continue to express their views regarding measures that allegedly

17 Cf. current discussions in Russia, as reflected in the press clipping “Constitutional amendments to protect Russia from free interpretation of European Convention on Human Rights – Kosachyov” (Interfax, 21 January 2020). For a wider analysis, see, e.g., M. Smirnova, “Russia”, in F.M. Palombino (ed.), *Duelling for Supremacy – International Law vs. National Fundamental Principles*, Cambridge UP 2019, pp. 297-319, and M. Antonov, *Formalism, Realism and Conservatism in Russian Law* (PhD Leiden, 2019).

18 ECHR, GC judgment of 4 February 2005, *Mamatkulov & Askarov v. Turkey* (no. 46827/99), § 121.

19 ECHR, GC judgment of 22 June 2004, *Broniowski v. Poland* (no. 31443/96).

20 ECHR, GC judgment of 6 May 2003, *Tahsin Acar v. Turkey* (no. 26307/95).

21 See, e.g., for an overview of the period 2000-2009: Council of Europe, *Reforming the European Convention on Human Rights – A work in progress* (2009).

22 ECHR, judgment of 12 December 1976, *Handyside v. UK* (no. 5493/72), § 49.

23 See, e.g., Report by the Secretary General of the Council of Europe, *State of democracy, human rights and the rule of law* (2017), p. 15; PACE, *New threats to the rule of law in Council of Europe member States: selected examples* (Resolution 2188(2017)); Commissioner for Human Rights, *The independence of judges and the judiciary under threat* (Human Rights Comment, 3 September 2019); and the various Venice Commission opinions.

24 For reasons of brevity, I must leave aside the question whether these new conditions might lead to lower standards. The Court seemed to indicate that this is not the case: ECtHR, judgment of 28 July 1999, *Selmouni v. France* (no. 25803/94), § 101: “having regard to the fact that the Convention is a ‘living instrument which must be interpreted in the light of present-day conditions’ (see ... *Tyrer*...), the Court considers that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies”. In terms of nature/nurture, this would imply that the nature of the Convention allows only for the adoption of increasingly higher standards, leading to an irreversible *acquis*.

affect our common values. They are often joined by the European Commission<sup>25</sup>, the OSCE<sup>26</sup> and the United Nations<sup>27</sup>. But the voice that, if I may say so, matters most to us is rather muted. In the current debate we hear relatively little from the “Conscience of Europe”: the Court.

To put it differently, and at the risk of simplifying matters: until about a decade ago there was, by and large, an overall consensus, in the areas covered by the Convention, about the direction in which society was supposed to develop. Perhaps prison conditions in some countries were poor, but their improvement was a matter of time (and money) – not a matter of principle. Time was on the Court’s side. Certainly, there were delays in Strasbourg, and that was of course a source of frustration to many – and first and foremost to the individual applicants. But at least things were moving in the right direction. The Court’s task was, in essence, to receive applications and use these, through its judgments, to remind the High Contracting Parties of their engagements. As long as the Committee of Ministers was able to effectively supervise the execution of its judgments, all would end well.

Today, the picture is rather different. In a number of countries there is increasing pressure on the independence of the judiciary, on civil society, on human rights defenders, on academic freedom. Controversial measures are rapidly adopted, creating facts on the ground: systemic changes which – if found to be in breach of the Convention – cannot easily be reversed. Time is no longer on the Court’s side – it has become its enemy.

Justice delayed has always meant justice denied. But now the ramifications of delays may extend beyond the individual applicant and affect the entire system. What does this mean for the Convention as a living instrument?

#### 5. INDEPENDENCE OF THE JUDICIARY: AN ATTACK ON ONE IS AN ATTACK ON ALL

The well-known case of *Baka* illustrates the point. The President of the Hungarian Supreme Court complained about the premature termination of his mandate, which occurred in the context of a reorganisation of the judiciary. He brought his application in March 2012 and obtained a favourable Grand Chamber judgment – in June 2016.<sup>28</sup> But this victory did not bring about his reinstatement in his original position: a *fait accompli* had been created.

Of course, this is inherent in the *ex post* review exercised by the Court. A violation of the right to life cannot be undone either. However, there is a difference: what happened to Mr Baka was, *because of his function*, part of a much wider picture. The judiciary has a central place in the “human rights eco-system”. This means that a measure affecting the position of the judiciary is *necessarily* capable of affecting the State’s institutional capacity to secure effective protection of the rights and freedoms protected by the Convention. If *in this context* a breach of the Convention occurs, one might say: an attack on one is an attack on all.

Everyone will be familiar with the widespread concern that has been voiced, since the end of 2015, about the series of measures concerning the position of the Polish judiciary. The Government are seeking to defend their reforms, while critics are voicing the fear that judicial independence is being undermined. In this situation, one would like to know the Court’s position on the various measures taken. A speedy and authoritative Court judgment is in the interests of all: the applicant who claims that his rights have been violated, and the respondent Government which claims that its policies are fully justified. A speedy and authoritative judgment provides legal certainty and guidance.

25 See, e.g., press release of 10 October 2019, Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control, at [ec.europa.eu](http://ec.europa.eu) (IP\_19\_6033).

26 See, e.g., ODIHR, press release of 14 January 2020, Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019) at <https://www.osce.org/odihr/443731>.

27 See e.g. United Nations OHCHR, press release of 25 June 2018, Poland: Reforms a serious blow to judicial independence, says UN rights expert, at [www.ohchr.org](http://www.ohchr.org).

28 ECHR, GC judgment of 23 June 2016, *Baka v. Hungary* (no. 20261/12).

And it can be done! One only has to think of the speed and diligence with which the case of *Ástráðsson v. Iceland* was dealt with. The case was communicated within a month, a judgment was delivered well within a year. A Grand Chamber hearing took place 20 months after the case was introduced in Strasbourg.<sup>29</sup>

It is therefore difficult for an outsider to understand why something similar has not happened in the case of Poland. The Court clearly depends on applications being lodged, but the fact remains that a relevant case was brought in January 2018 but was only communicated in September 2019<sup>30</sup>, that is to say 20 months later. Of course, the Court is facing an enormous case load and despite all its efforts it has a significant backlog. But that raises the question whether the Court should not reconsider its priorities. European judicial intervention is a scarce commodity, and it should be applied where and when it is most needed.

## 6. THE EVOLUTIVE DOCTRINE AND THE NEED TO PRESERVE THE STATE'S INSTITUTIONAL CAPACITY TO SECURE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Again, it is not my aim to express a substantive opinion on these cases, or to launch a debate on the situations in a number of other countries that come to mind. The point I wish to make is a different one. In cases where it is stated, *prima facie* on arguable grounds, that the very essence of the rule of law is under pressure, that structural changes may affect judicial independence, and that as a result the integrity, indeed the very core of the system for the protection of human rights is at issue, the Court ought to respond immediately. To my mind, this entails that the Court should review its policy on priorities<sup>31</sup> as well as its practice concerning interim measures.<sup>32</sup>

As to prioritisation, the current "Category II" features "Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) ..." Consideration might be given to adjusting this, or adding a separate category: "Applications which raise issues that are capable of seriously affecting the State's institutional capacity to secure effective protection of the rights and freedoms protected by the Convention". Clearly such cases must enjoy top priority.

But it is equally important to reflect on the question *who* decides into which category a particular case should fall. It is imperative to ensure consistency across the Court's practice: similar problems must be categorised similarly, irrespective of the country concerned. A system involving two pairs of eyes may serve as an important guarantee.

When it comes to responding to challenges to the rule of law, inspiration may be taken from the Court of Justice of the European Union. The Luxembourg Court has had to rule on a whole series of cases involving the rule of law in various EU Member States. In doing so, it has been in a position to develop its case-law considerably, thus influencing the course of events. Space does not permit us to analyse recent case-law in any detail. But two elements stand out: substance and procedure. As regards substance, the Luxembourg Court has developed its interpretation of the Member States' obligation to ensure effective judicial protection in the fields covered by EU law, linking it to judicial independence and the principle of irremovability of judges.<sup>33</sup> In the coming months and years, the

Strasbourg Court too will face the challenge to ensure, somehow, that tribunals *are* established in accordance with the law, that domestic courts *are* independent, that judges *are* protected against unjustified dismissal, that vehement attacks on the authority of the judiciary *are* addressed. Many cases will involve the application of existing case-law. But there will also be cases that will require new, innovative interpretations of Article 6 of the Convention.<sup>34</sup>

Where procedure is concerned, the Luxembourg Court has been able to play its role by using expedited procedures and, where necessary, adopting interim measures. In doing so, it has managed to avoid being confronted with a *fait accompli* which might undermine the full effectiveness of any future final decision.<sup>35</sup> There is nothing to prevent the Strasbourg Court from doing exactly the same thing, starting today.<sup>36</sup>

This year we will be celebrating the adoption of the Convention 70 years ago. The *Tyrer* judgment was delivered more than 40 years ago. In line with its evolutive doctrine, the Court is responding to the changing environment of which it is part. Many have applauded the "living instrument" doctrine and the benefits it has brought. Others are more cautious, for instance because they feel that the Court should limit itself to dealing with the "really great evils". But all will agree that the Court was set up as the "Conscience of Europe". It must act decisively to protect what is really precious – decisively and quickly. An early warning mechanism must be early, or it will cease to be a warning mechanism.

29 ECHR, Chamber judgment of 12 March 2019, *Guðmundur Andri Ástráðsson v. Iceland* (no. 26374/18), now pending before the Grand Chamber.

30 See the case of *Xero Flor v. Poland* (no. 4907/18). The case of *Bojara v. Poland* (no. 27367/18) was lodged in April 2018, communicated in September 2019. *Grzęda v. Poland* (no. 43572/18) was lodged in September 2018, communicated in July 2019.

31 See Rule 41 of the Rules of Court and [https://www.echr.coe.int/Documents/Priority\\_policy\\_ENG.pdf](https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf).

32 See *Practice Directions - Requests for interim measures* (Rule 39 of the Rules of Court): "The Court will only issue an interim measure against a Member State where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied" ([https://www.echr.coe.int/Documents/PD\\_interim\\_measures\\_ENG.pdf](https://www.echr.coe.int/Documents/PD_interim_measures_ENG.pdf)).

33 See, notably, CJEU, judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C 64/16), § 37; of 25 July 2018, *Minister for Justice and Equality* (Deficiencies in the system of justice) (C 216/18 PPU), § 52; and of 24 June 2019, *Commission v. Poland* (C-619/18), § 55.

34 To single out a few examples: the Court may receive applications from judges who were subjected (or felt the threat of being subjected) to more or less subtle methods to "discipline" them. Complaints, from either judges or litigants, may concern vehement attacks in the press, or even by public authorities, on the judiciary. The Court may have to rule on the correlation between a perceived "systemic" lack of independence of the judiciary and the position of individual courts and judges. Can an individual complain about a systemic problem, without being able to show that "his" judge was under pressure, or is that an *actio popularis*?

35 See, notably, CJEU, Order of 17 December 2018, *Commission v. Poland* (C-619/18 R), § 68 *et seq.*

36 Seen from this perspective it would be helpful too, if an alternative procedure were established to allow situations to be brought before the Court, comparable to the infringement procedure under Article 258 TFEU. As has been proposed before, the Commissioner for Human Rights could play such a role. This, however, would obviously require an amendment to the ECHR.





## Juliane Kokott

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### THE ECHR AND THE CJEU – SOCIAL ENGINEERS AND “MOUTHPIECES OF THE LAW” AS REGARDS GENDER EQUALITY

In 2020 the European Convention on Human Rights (“the Convention”) turned seventy. In the seven decades since it was drafted in 1950, this living instrument has undergone remarkable developments, reflecting at the same time changes across our societies. The case-law of the European Court of Human Rights (“the ECHR”) in the area of gender equality is a perfect illustration of this point.

Women’s status in a society is frequently an indicator of social progress: one example concerns women’s right to vote in national elections, which was enacted by the majority of the Council of Europe’s member States in the first half of the last century. The granting of this right was preceded by a long struggle, which was waged by the women’s movement and begun in the 18th century.

Equally, where the requirement for a woman to obtain the agreement of a man – usually her husband or father – in order to choose her place of residence, enter into an employment contract or even open a bank account was abolished, this was merely the logical conclusion to a more modern train of thought which had gradually taken root in people’s minds.

However, none of the significant achievements made over the course of recent decades and centuries in terms of equal treatment would have been imaginable without a case-law which implements and facilitates progress. In certain cases, the adoption of judicial rules was simply the culmination of a social development which had already made itself felt and been underway for some time. In other cases, this development was triggered by judicial decisions.

What then is the role of the courts in implementing the principle of equality between the sexes? Can the courts be simultaneously “mouthpieces for the law” and “social engineers”? A brief overview of the relevant case-law of the ECHR and of the Court of Justice of the European Union (“the CJEU”) seems to support this view.

The two European courts have always paid close attention to societal changes. In this context, developments in the Council of Europe and the European Union have provided mutual inspiration.

At European Union level, tangible implementation of the principle of gender equality began with the insertion of a provision in the Treaty of Rome, namely Article 119 of the EEC Treaty, today Article 157 of the TFEU. This provision established the principle that men and women should receive equal pay for equal work or work of equal value.

In the 1950s this was a particularly progressive clause, one which by no means reflected the economic reality. However, France, whose domestic legislation already contained a rule concerning equal pay and which was afraid of finding its industries at a competitive disadvantage, had insisted on the need for an equivalent provision throughout the Common Market.<sup>1</sup> The initiative was thus motivated, at least at the outset, more by financial than by social considerations.

In the 1970s, however, the CJEU took the opportunity to underline the two-fold aim of this provision. Thus, it ruled that gender equality was also a principle of social law, which was to be implemented not only by means of legislation, but also through case-law. In consequence, in the context of three well-known judgments named for Ms Defrenne,<sup>2</sup> an air-hostess for the former airline Sabena, it enshrined, among other points, the direct effect of the principle of equal pay.

Several acts of secondary legislation were subsequently enacted on the basis of the current Article 157 of the TFEU. These acts were intended to implement the principle of gender equality in all aspects of professional life.

However, the principle of gender equality is not only an instrument which serves to promote women’s rights. The ban on gender-based discrimination has also been the starting point for recognition of the rights of transsexual people in the CJEU’s case-law.

This subject – which has also preoccupied the Strasbourg Court on several occasions over the years – illustrates the interaction between the two institutions and the two legal systems.

Of course, this is a very sensitive area. For this reason, in 1986 the ECHR held that it could not discern a consensus among the States Parties to the Convention with regard to recognition of the legal situation of transsexuals. Accordingly, it held in the *Rees* case that the refusal to amend the civil-status records of a transsexual person did not breach Article 8 of the Convention (right to respect for private life).<sup>3</sup> Equally, the fact that it was impossible for such a person to marry a person of the opposite sex to his or her newly acquired sex did not entail a violation of Article 12 of the Convention (right to marriage), given that there was no obligation to recognise in law the post-operative gender.<sup>4</sup>

Ten years later, in 1996, the CJEU took a step forward in this area. It extended the scope of the principle of gender equality to include gender reassignment surgery. In the case in question, *P v. S*, a female employee was dismissed on the sole ground that she had changed sex. The CJEU held that the prohibition of gender-based discrimination was not limited to forms of discrimination flowing from the fact of belonging to one or the other gender. It considered that, on the contrary, this prohibition also applied to forms of discrimination which originated in an individual’s post-operative gender.<sup>5</sup>

In his conclusions in this case, Advocate General Tesouro had emphasised the need for the law to adjust to social change.<sup>6</sup> He considered that there was a clear trend towards granting legal recognition of the situation of transsexual persons within the Member States of the European Union as it stood at that time.

Within the considerably more diverse group of States Parties to the Convention, a much larger group than the Member States of the European Union, especially at the relevant time, it was naturally more challenging to establish a consensus on such a sensitive and controversial societal issue.

Nonetheless, subsequent developments bear witness to intense and reciprocal communication between the two legal systems.

Thus, in 2002, or only a few years after the 1996 *P v. S* judgment, the Strasbourg Court received another complaint from a transsexual person, namely Ms Goodwin. On this occasion the ECHR held that the refusal to grant legal recognition to the applicant’s gender reassignment gave rise to a violation, “in the light of present-day conditions”, of her right to respect for her private life.<sup>7</sup> In reaching this conclusion, it took account of the important developments which had occurred in the meantime in the legal, social and scientific fields. In consequence, it is only the newly acquired gender of a transsexual person which must be considered for the purposes of Article 12 of the

<sup>2</sup> CJEU, judgments *Defrenne I*, 25 May 1971 (80/70, EU:C:1971:55), *Defrenne II*, 8 April 1976 (43/75, EU:C:1976:56), and *Defrenne III*, 15 June 1978 (149/77, EU:C:1978:130).

<sup>3</sup> ECHR, judgment of 10 October 1986, *Rees v. the United Kingdom* (CE:ECHR:1986:1017JUD000953281, § 47).

<sup>4</sup> ECHR, judgment of 10 October 1986, *Rees v. the United Kingdom* (CE:ECHR:1986:1017JUD000953281, §§ 49 and 50).

<sup>5</sup> CJEU, judgment of 30 April 1996, *P v. S* (C 13/94, EU:C:1996:170, § 20).

<sup>6</sup> Conclusions of Advocate-General Tesouro in the case of *P v. S* (C 13/94, EU:C:1995:444, § 9).

<sup>7</sup> ECHR, judgment of 11 July 2002, *Goodwin v. the United Kingdom* (CE:ECHR:2002:0711JUD002895795, § 93).

<sup>1</sup> Kokott, Juliane, “Le statut des femmes et l’état de droit : la perspective européenne”, *Le statut des femmes et l’état de droit*, ed. Alain Grosjean, Bruylant, 1st edition, 2018, p. 40.



Convention (right to marry). It is interesting to note that the Strasbourg Court specifically referred, in its analysis of legal developments, to the content of Article 9 of the Charter of Fundamental Rights of the European Union, which had just been adopted: this article no longer refers to the right of a man and a woman to marry, but simply to the right to marry<sup>8</sup>.

This change in the ECHR's case-law was soon echoed in that of the CJEU. Two years after the *Goodwin* judgment, the CJEU was required to rule on the refusal to pay a widower's pension to the transsexual partner of a female employee<sup>9</sup>. Payment of this pension was restricted to married couples. However, transsexual persons could not marry, given that their post-operative gender was not legally recognised. The situation was thus almost identical to that in the *Goodwin* judgment.

Here again, it was interpretation of the principle of equal pay, the provision which marked the beginning of this development, which enabled the CJEU to strengthen the applicant's rights. The transsexual partner of the employee in question could thus rely on the principle of gender equality in arguing her case. In this way, the case-law of the CJEU contributed to making this rule a key element of European social law.

However, the case-law's influence can also be more subtle. A few years previously, in the case of *Grant*, the CJEU had been asked to rule on a case concerning the fact that it was impossible for a homosexual to satisfy a condition for marriage. Thus, the question also arose in that case whether this barrier amounted to gender discrimination. At the relevant time, in spite of certain developments in the Member States' societies and legal systems, the CJEU was obliged to find that European Union law did not cover discrimination on grounds of sexual orientation.<sup>10</sup> It therefore assumed its role as "mouthpiece of the law".

However, while denying Ms Grant the option of relying on the principle of gender equality in her case, the *Grant* judgment called on the European legislature to take action.<sup>11</sup> As a result, Directive 2000/78 was adopted two years later. This directive established a general framework for equal treatment in the field of employment and occupation. It now includes discrimination on grounds of sexual orientation, as well as religion, age or disability. More recently, the European legislature further extended the principle of equal treatment beyond the traditional area of employment. Directive 2004/113, the so-called "anti-discrimination directive", now also guarantees non-discriminatory access to goods and services.

This development confirms that courts can at one and the same time act as mouthpieces of the law and as social engineers.

Seventy years after the Convention was drafted, it must be recognised that much has been achieved. At the time of Ms Defrenne's case, the CJEU stated, for the first time, that the elimination of discrimination based on sex forms part of fundamental human rights.<sup>12</sup> In a recent judgment concerning quotas for female election candidates, the ECHR not only pointed out that the promotion of gender equality is now a major goal in society; it also considered that a lack of gender balance in politics was a threat to the very legitimacy of democracy.<sup>13</sup>

The principle of gender equality is thus not only an instrument intended to promote the rights of individuals. Today gender equality has in reality a societal dimension. Furthermore, at European Union level this is clearly illustrated by the references to this principle which are found in provisions with cross-sectoral scope, such as Article 3 of the TEU or Articles 8 and 19 of the TFEU.



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### ENVIRONMENT – HUMAN RIGHTS AND THE ENVIRONMENT: AN EVOLVING RELATIONSHIP

President, Judges, Ladies and gentlemen,

It is an honour and a pleasure for me to be taking part in this seminar organised for the opening of the judicial year in this distinguished institution.

#### FROM ABSENCE TO AFFIRMATION

At the end of World War II, reconstructing the economy and respecting the fundamental freedoms were the central concerns of Europe and the then international community. The Preamble to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms states that those freedoms "are the foundation of justice and peace in the world".<sup>1</sup> Environmental issues were not yet a priority at that point in history. This transpires from a series of remarkable instruments which have helped to construct modern international law, including the 1948 Universal Declaration of Human Rights, the Treaties establishing the European Communities and the European Convention on Human Rights, which do not mention environmental protection at all.

Nevertheless, from the 1960s onwards in the Council of Europe,<sup>2</sup> and then more broadly in the early 1970s, the need to protect the environment was affirmed and its link was forged with human rights. Thus the *Declaration on the Conservation of the Natural Environment in Europe*, adopted by the European Conference on the Conservation of Nature in 1970, proposed drawing up a protocol to the European Convention on Human Rights securing everyone's right to enjoy a pollution-free environment.<sup>3</sup> At the global level, the *Declaration on the Human Environment* adopted at the UN Stockholm Conference in 1972, proclaims in its Preamble that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights and the right to life itself".<sup>4</sup> Principle 1 of the Declaration emphasises the mutual nature of that relationship:

*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*<sup>5</sup>

<sup>8</sup> ECHR, judgment of 11 July 2002, *Goodwin v. the United Kingdom* (CE:ECHR: 2002:0711JUD002895795, § 100).

<sup>9</sup> CJEU, judgment of 7 January 2004, *K. B.* (C 117/01, EU:C:2004:7, § 34).

<sup>10</sup> CJEU, judgment of 17 February 1998, *Grant* (C 249/96, EU:C:1998:63, § 47).

<sup>11</sup> CJEU, judgment of 17 February 1998, *Grant* (C 249/96, EU:C:1998:63, §§ 36 and 48).

<sup>12</sup> CJEU, judgment of 15 June 1978, *Defrenne* (149/77, EU:C:1978:130, §§ 26 and 27).

<sup>13</sup> ECHR, decision of 12 November 2019, *Zevnik and Others v. Slovenia* (CE:ECHR:2019:1112DEC005489318, § 34).

<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Preamble; Schuman Declaration of 9 May 1950.

<sup>2</sup> See the European Water Charter (1968), the Declaration of Principles on Air Pollution Control (1968) and the 1972 European Soil Charter (1972).

<sup>3</sup> A. C. Kiss, *La protection de l'environnement et les organisations européennes* (Environment Protection and the European Organisations) (1973), 19 *Annuaire français de droit international*, p. 895-921, 898.

<sup>4</sup> UN Conference on the Environment, Stockholm, 5 to 16 June 1972; Declaration on the Environment, 16 June 1972, Preamble, recital 1.

<sup>5</sup> UN Conference on the Environment, Stockholm, 5 to 16 June 1972; Declaration on the Environment, 16 June 1972, Preamble, Principe 1.

This interdependence between human rights and the environment has gradually taken up its place in the European system of human rights protection. Ever since the 1990s, in line with its interpretation of the Convention to the effect that “the Convention is a living instrument which ... must be interpreted in the light of present-day conditions”,<sup>6</sup> the European Court of Human Rights has construed the rights enshrined in this instrument so as to take account of environmental issues. In so doing, the Court has noted that “in today’s society the protection of the environment is an increasingly important consideration”.<sup>7</sup> In fact, this development was reflected in the 1970s by the inclusion of the right to a healthy environment in a fair number of national constitutions.<sup>8</sup>

## ENVIRONMENTAL PROTECTION IS NECESSARY FOR EFFECTIVE HUMAN RIGHTS PROTECTION

Throughout the 1990s the European Commission and Court produced a wealth of case-law enshrining the principle that the effective protection of the rights secured under the Convention required a high-quality environment. The right to life (Article 2), the right to respect for private and family life (Article 8) and the protection of property (Article 1 of Additional Protocol no. 1,) were all conducive to opening up to environmental issues, but other rights such as the prohibition of torture (Article 3), the right to liberty and security (Article 5) and freedom of expression (Article 10) have also played their part. We can therefore note that the right to environmental protection has been established through the intermediary of existing rights.

The cases in question have often involved problems of pollution such as noise, gas emissions, smells and other similar types of nuisance.<sup>9</sup> In such cases the States are required to take action to reduce or put an end to the pollution. The competing interests are balanced. The measures adopted must be “reasonable and adequate” in order to strike a fair balance “between the competing interests of the individual and of the community as a whole”.<sup>10</sup> In assessing the reasonableness of the measures, the Court grants the States some discretion in “deciding on local needs and contexts”.<sup>11</sup> This balancing of interests can work in both directions. Considering that the environment is a matter of general interest,<sup>12</sup> the enjoyment of specific rights may be restricted.<sup>13</sup> To that effect, the Court has found that “[f]inancial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations”.<sup>14</sup>

6 See *Tyrer v. the United Kingdom*, judgment of 25 April 1978, § 31, Series A no. 26.

7 See *Fredin v. Sweden*, judgment of 18 February 1991, Series A, no. 192, § 48.

8 The first time was in Sweden in 1974, followed by Portugal in 1976, Spain in 1978, Austria in 1984, Columbia in 1991, Russia and Peru in 1993, Argentina, Belgium and Germany in 1994, Finland in 1994, Cameroon and Ghana in 1996, and Mexico in 1999.

9 See, for example, *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990; *López Ostra v. Spain*, judgment of 9 December 1994; *Giacomelli v. Italy*, judgment of 2 November 2006; and *Borysiewicz v. Poland*, judgment of 1 July 2008.

10 See *Hatton and Others v. the United Kingdom*, Grand Chamber, judgment of 8 July 2003, § 98, and *López Ostra v. Spain*, judgment of 9 December 1994, §§ 55-58.

11 *Ibid.*

12 See, for example, *Valico S.R.L. v. Italy*, judgment of 21 March 2006, decision on admissibility.

13 See, for example, *Fredin v. Sweden*, judgment of 18 February 1991, and *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991.

14 See *Hamer v. Belgium*, judgment of 27 November 2007, § 79; see also *Lazaridi v. Greece*, judgment of 13 July 2006, § 34; *O’Sullivan McCarthy Mussel Development Ltd v. Ireland*, 7 June 2018; and *Yaşar v. Romania*, 26 November 2019.

We might wonder in this context whether the concept of weighing up interests is still relevant where the environment is concerned. The International Court of Justice has pointed out that the latter “is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”.<sup>15</sup> And the International Court adds that “safeguarding the ecological balance has come to be considered an ‘essential interest’ of all States”.<sup>16</sup> It is becoming clear that the requirements of environmental protection are now in the interests both of the individual and of the national community as a whole, and must therefore benefit from protection at all levels.

Cases of industrial or natural disaster have also provided an opportunity for the Court to specify the States’ obligations. It is no doubt in this sphere that the Court has been most daring. For instance, where certain activities prove dangerous to the environment, the States must put in place a legislative and administrative framework “to ensure the effective protection of citizens whose lives might be endangered by the inherent risks” of the activity in question.<sup>17</sup> The Court also points out that that framework “must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures”.<sup>18</sup> In the sphere of natural disasters, States must mitigate their effects “in so far as the circumstances of a particular case point to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use”.<sup>19</sup> In any/either case the Court has emphasised that the States have a positive obligation to prevent risks. It has thus addressed both definite risks and uncertain hazards covered by the precautionary principle. The appraisal of whether or not this obligation has been met will depend on such factors as the origin of the threat and the dangerousness of activities. Account is also taken of the capacity for anticipation and the possibility of mitigating specific natural hazards.<sup>20</sup>

In this connection I would like to highlight the recent decision of the Supreme Court of the Netherlands, which relies on this prevention requirement – which the Supreme Court sees as deriving from Articles 2 and 8 of the European Convention on Human Rights – to impose an obligation on the State to take action to combat climate change; the aim being to limit the harmful effects causing the temperature of the earth to rise. The court’s reasoning also applies to other global issues such as the protection of biodiversity and forests. It would be desirable for the Court to have a say concerning public policies to protect the global environment, relying on the aforementioned case-law arsenal. This would highlight the close relationship between the local and the global environment.

## IMPORTANCE OF PROCEDURAL OBLIGATIONS

Alongside these substantive obligations, the Court has also noted that a number of procedural obligations in the sphere of environmental protection can help guarantee the exercise of the rights secured under the Convention. This applies to the obligation to ensure a fair and informed decision-making process.<sup>21</sup> European case-law has rightly noted that that process must “involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals’ rights may be predicted and evaluated in advance”.<sup>22</sup> Outlining a new form of “environmental democracy”, the Court recommends that the general public should be brought into the decision-making process, that the views of individuals should be taken into account<sup>23</sup> and that

15 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, I.C.J. Reports 1996, p. 241-242, para. 29.

16 See International Law Commission, *Yearbook of the International Law Commission*, 1980, Vol. II, Part II, p. 38, para. 14; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, judgment, I.C.J. Reports 1997, p. 41, para. 53.

17 See *Öneryıldız v. Turkey*, Grand Chamber, judgment of 30 November 2004, ECHR 2004-XII, § 90.

18 See *Budayeva and Others v. Russia*, judgment of 20 March 2008, §§ 131-132, 138, 159, and *Öneryıldız v. Turkey*, Grand Chamber, judgment of 30 November 2004, ECHR 2004-XII, §§ 89-90.

19 See *Budayeva and Others v. Russia*, judgment of 20 March 2008, §§ 135 and 137.

20 *Ibid.*, § 137.

21 See *Taşkın and Others v. Turkey*, judgment of 10 November 2004, § 118.

22 See *Giacomelli v. Italy*, judgment of 2 November 2006, § 83; see also *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, § 128, and *Tătar v. Romania*, 27 January 2009, § 101.

23 See *Taşkın and Others v. Turkey*, judgment of 10 November 2004, § 118.

the findings of the surveys conducted should be made public.<sup>24</sup> This emphasis on the local level is a highly valued aspect of environmental protection which should be the driver of global action. Human rights should provide the foundation for such a bottom-up approach.

However, procedural obligations are not confined to the decision-making process. They include a requirement to keep the public informed of the possible risks and dangers of their environment. This obligation to inform encompasses the duty to provide “all relevant and appropriate information”<sup>25</sup> and to facilitate access to the information held.<sup>26</sup> The purpose of these requirements is to allow local populations to assess the danger to which they are exposed.

Those obligations, together with the previously mentioned substantive obligations, are broad in scope. States must implement them in the framework of their activities, and they are also required to ensure that the various public and private operators observe and comply with them in their mutual relations.<sup>27</sup>

## THE PLACE OF THE STANDARDS AND PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

It is interesting to note that for the purposes of interpreting the precise scope of the obligations on States, the Court “take[s] into account elements of international law other than the Convention”,<sup>28</sup> where such rules and principles are accepted by a large majority of States and “show, in a precise area, that there is common ground in modern societies”.<sup>29</sup> Thus, in the context of environmental protection, the following have been mentioned: the Rio Declaration on Environment and Development, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the precautionary principle and the European Directives on the protection of the environment.<sup>30</sup> Legislative developments in international environmental law can help to bring the European Convention on Human Rights to life. That having been said, this approach of referencing other standards would be well worth following more explicitly and systematically, as the Court seldom spells out the conclusions which it draws from its perusal of other rules and principles of international environmental law.<sup>31</sup>

## CROSSING THE RUBICON – OR NOT, AS THE CASE MAY BE

Ladies and gentlemen, in conclusion let me point out that in a number of different judgments the Court has stated that “[t]here is no explicit right in the Convention to a clean ... environment”,<sup>32</sup> nor does the instrument “provide general protection of the environment as such”.<sup>33</sup> Some judges have disagreed with those positions, particularly in the case of *Hatton and Others* as regards the existence of a right to a healthy and quiet environment.<sup>34</sup> This means that the Court has not crossed the Rubicon in terms of explicitly recognising a right to a healthy environment. But is it really up to the judicial authority to recognise such a right on its own? Is it not time the Parliamentary Assembly and the Committee of Ministers of the Council of Europe readdressed this issue? In the past the Parliamentary Assembly has on various occasions pondered the expediency of adding an explicit right to a healthy, viable environment, but all those attempts have failed.<sup>35</sup> Surely these endeavours should be resumed? That would enable us to take into account the constitutional and legislative developments that have occurred in many member countries of the Council of Europe and at EU level.<sup>36</sup> It would also allow us to consider the political, legal and judicial expediency of affirming such a right at the European level, particularly at a time of increasing citizen involvement in the fight against climate change.

Thank you.

<sup>24</sup> See *Tătar v. Romania*, 27 January 2009, § 101.

<sup>25</sup> See *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998, §§ 97 and 101; see also *Guerra and Others v. Italy*, judgment of 19 February 1998, §§ 48 and 60; *Öneriyıldız v. Turkey*, Grand Chamber, judgment of 30 November 2004, ECHR 2004-XII, § 90; and *Tătar v. Romania*, 27 January 2009, § 113.

<sup>26</sup> See *Roche v. the United Kingdom*, Grand Chamber, judgment of 19 October 2005, § 162.

<sup>27</sup> See *Hatton and Others v. the United Kingdom*, Grand Chamber, judgment of 8 July 2003, §§ 98 and 119.

<sup>28</sup> See *Demir and Baykara v. Turkey*, Grand Chamber, judgment of 12 November 2008, § 85, and *Saadi v. the United Kingdom*, Grand Chamber, judgment of 29 January 2008, § 63.

<sup>29</sup> See *Demir and Baykara v. Turkey*, Grand Chamber, judgment of 12 November 2008, §§ 76 and 86.

<sup>30</sup> See, for example, *Guerra and Others v. Italy*, judgment of 19 February 1998, § 34; *Taşkın and Others v. Turkey*, judgment of 10 November 2004, §§ 98-100; and *Di Sarno v. Italy*, judgment of 10 January 2012, §§ 71-77.

<sup>31</sup> See *Tătar v. Romania*, 27 January 2009, § 111-112.

<sup>32</sup> See *Jugheli v. Georgia*, judgment of 13 July 2017, § 62; see also *Hatton and Others v. the United Kingdom*, Grand Chamber, judgment of 8 July 2003, § 96.

<sup>33</sup> See *Kyrtatos v. Greece*, judgment of 22 May 2003, § 52.

<sup>34</sup> See *Hatton and Others v. the United Kingdom*, joint dissenting opinion by Judges Costa, Ress, Türmen, Zupančič and Steiner, §§ 1-2.

<sup>35</sup> See, as regards proposals put forward between 1970 and 1980, D. Shelton, “Human Rights, Environmental Rights, and the Right to Environment”, (1991) 28 *Stanford Journal of International Law*, pp. 103-138, 132; see also Parliamentary Assembly Recommendation 1614, “Environment and human rights”, of 27 June 2003.

<sup>36</sup> Although the EU Charter of Fundamental Rights lags behind somewhat. Article 37 of the Charter provides: “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development .”





## Ineta Ziemele

President of the Constitutional Court  
of Latvia

### THE EUROPEAN CONVENTION ON HUMAN RIGHTS: LIVING INSTRUMENT AT 70 – SCIENCE AND TECHNOLOGY

#### INTRODUCTION

I will address three points. Firstly, I will show that the development of science and technology, while enhancing human potential like never before, challenges those concepts and intellectual frameworks which have been instrumental in conceiving and building our modern democratic societies. The notion and value of human dignity has been one such central concept. Secondly, through the lens of Article 8 case-law I will address the question of the challenges that the digital age brings for human dignity. Finally, I will provide a few comments on what lies ahead for the courts. It is true that there are by now a number of initiatives and studies being carried out to assess the impact on human rights of developments in science and technology. However, a great many questions will have to be solved in practice, not least by the courts, using the concepts and methods that we have developed so far.

#### HUMAN DIGNITY IN THE DIGITAL AGE

There is one fundamental value at the very centre of our liberal worldview – the dignity of each human being. In this regard privacy is an essential element of human dignity. It is a necessary part of a person's self-determination, which is one of the qualities that drive human evolution. The ECtHR, while always acknowledging that there is no exhaustive definition of the notion of private life under Article 8 of the Convention (see *Niemietz v. Germany*)<sup>1</sup>, has defined, among its many aspects, the right to personal autonomy and self-determination (see, for instance, *Pretty v. the United Kingdom*)<sup>2</sup>. The Court's case-law in the field of human beings' internal and external space is extensive; this attests to the fact that in the European worldview the protection of that space is very important for who we are and how we evolve as personalities and societies.

The twenty-first century has arrived together with the realisation that technology, especially digital technology, not only opens up new possibilities for individuals and societies but also allegedly blurs the boundaries of, and even challenges, the behaviour and concepts that we developed as democratic societies in the twentieth century.

If, on the one hand, the Internet was hailed as the new public place where all opinions could meet, today, on the other hand, algorithm-driven social media and other phenomena are enclosing us in bubbles, ultimately preventing a transparent and all inclusive discussion.

Although our societies benefit greatly from technological tools, these are simultaneously creating more and more vulnerabilities. Cyberspace, which is a non hierarchical system with no clear points of control, creates a platform where hackers and analytical systems in fact enjoy their right to privacy much more than we do, because they are anonymous. The fact is that our societies and social behaviours can be easily manipulated, since technologies offer individuals, governments and businesses growing possibilities to collect and analyse our personal data. Analytical systems collect information on our personal choices, habits, interests and intimate preferences.

If technologies reduce our privacy or make us believe that privacy is something obsolete, does that not also affect a person's self-determination? Somebody else might own our personal data to such an extent that it raises a question firstly about the very possibility of our right to privacy, and ultimately about human dignity. In a post liberal, technology-driven world are we still the masters of our inner self? In a world where algorithms are using our data, questions about the changed scope of the right to privacy arise and may reasonably suggest that we ought to look at subtle changes in the concept of human dignity.<sup>3</sup>

#### THE IMPORTANCE OF ARTICLE 8 CASE-LAW

The Court, too, has been drawn into these processes of increased opportunities for access to and control of personal information in cyberspace. The same is equally true for national courts. Certainly, the Latvian Constitutional Court has had to answer questions concerning the impact of the development of technologies on the legislative work of Parliament and the Cabinet of Ministers. It has pointed out that "as a result of the development of technologies and relations in society ..., rules that were once compatible with the Constitution may become outdated and eventually violate human rights".<sup>4</sup> The European Court of Human Rights has ruled that the Internet is part of the exercise of freedom of expression and part of the means of access to information. It has grappled, for instance in the *Delfi* case,<sup>5</sup> with the issue of the protection of honour and reputation, which is evidently more difficult to ensure on the Internet. If we consider such judgments as *Delfi*, *Magyar Helsinki Bizottság*,<sup>6</sup> *Roman Zakharov*,<sup>7</sup> and *Szabó and Vissy*,<sup>8</sup> we can see the growing tension between the value of freedom of expression and the right to privacy, a tension that is heightened by technological developments. The Internet has pushed this tension to the extreme owing to its particular character (speed, spread, lack of possibilities of control).

Article 8 case-law has often generated criticism because of its supposedly casuistic character. For example, after the *Delfi* judgment, when the judgment in *Magyar* was adopted it was difficult to explain and to distinguish the Court's approach in these two cases for the general public. Both cases show the heightened tension between freedom of expression and the right to privacy on the Internet.

In the context of the challenges and changes described above, I would take the view that the **clarity** of the Court's position assumes a particular importance. By clarity I mean a clear view on the Court's part as to what competing values are at stake and as to the need to distinguish carefully between individual cases where the need arises.

<sup>3</sup> For more detail see: Ziemele I., *Human Dignity in Technology Driven World: Role of Constitutional Courts*. Speech at the Constitution Day of the Republic of Slovenia. Accessible at: [www.satv.tiesa.gov.lv/](http://www.satv.tiesa.gov.lv/)

<sup>4</sup> Judgment of the Constitutional Court of the Republic of Latvia of 11 October 2018 in case no. 2017 30-01, paragraph 19.

<sup>5</sup> European Court of Human Rights (Grand Chamber), *Delfi AS v. Estonia*, no. 64569/09, ECHR 2015.

<sup>6</sup> European Court of Human Rights (Grand Chamber), *Magyar Helsinki Bizottság v. Hungary*, no. 18030/11, 8 November 2016.

<sup>7</sup> European Court of Human Rights (Grand Chamber), *Roman Zakharov v. Russia*, no. 47143/06, ECHR 2015.

<sup>8</sup> European Court of Human Rights, *Szabó and Vissy v. Hungary*, no. 37138/14, 12 January 2016.

<sup>1</sup> European Court of Human Rights, *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251 B.

<sup>2</sup> European Court of Human Rights, *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III.



## CONCLUSIONS

What lies ahead? On the issue whether privacy should be given up in the epoch of science and technology, I would argue strongly that from the point of view of human dignity that is not an option. Privacy in terms of private space, freedom of choice and free will is intricately linked to human dignity. The philosophy underlying cases such as *S. and Marper v. the United Kingdom*<sup>9</sup> and, more recently, *Bărbulescu v. Romania*,<sup>10</sup> is good law in this broader context. In *Bărbulescu*, the Court ruled in favour of the importance of privacy in the following terms: "... an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary".<sup>11</sup> That is the position of the Court on privacy as a value in a controversial setting.

The epoch of science and technology has increased the burden of responsibility on the courts, both national and international. Legislators will lag behind in legislating on these matters and on the new paradigms of human relationships that will emerge owing to the possibilities created by science and technology. Interestingly, the comparative-law material presented in the *Bărbulescu* judgment attests to this point. Based on the practice at the Constitutional Court, I can see that in continental legal systems also, more responsibility will lie with the courts for reiterating the values and choosing among them in a context of Internet-dependent relations. This may also revive the question in the ECtHR as to how the Court looks at the work done by the national courts in upholding the human rights concerned. This was the point of distinction between the Estonian and Hungarian cases. However, the courts should be aware and ready to accept that often this might not simply involve a decision on rights enhanced by the opportunities provided by technologies. It may also involve decisions on vulnerabilities and threats posed to existing rights by the development of science and technology. Since Europe is a space of common minimum values among which human dignity has a central place, it is important that the courts within the common European legal space take similar approaches on values. The age of science and technology reinforces the importance of judicial dialogue in Europe.

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

<sup>9</sup> European Court of Human Rights (Grand Chamber), *S. and Marper v. the United Kingdom*, nos. 30562/04 and 30566/04, ECHR 2008.

<sup>10</sup> European Court of Human Rights (Grand Chamber), *Bărbulescu v. Romania*, no. 61496/08, 5 September 2017 (extracts).

<sup>11</sup> *Ibid.*, § 80.



## Linos-Alexandre Sicilianos

**President of the European Court  
of Human Rights**

### OPENING ADDRESS

Presidents of Constitutional Courts and Supreme Courts, President of the Parliamentary Assembly, Chairman of the Ministers' Deputies, Madam Secretary General of the Council of Europe, Your Excellencies, Ladies and gentlemen,

I would like to thank you, on behalf of all my colleagues and also in my own name, for agreeing to attend the solemn hearing for the opening of the judicial year at the European Court of Human Rights. Your presence here bears witness to the strength of the bonds that unite us.

The tradition is that on this last day of January I can still wish you a happy New Year 2020. I would also like to take stock with you of the many events in 2019, which was an important year for both the Court and the Council of Europe.

As regards the Council of Europe, I am particularly pleased to be able to welcome the Organisation's new Secretary General, Marija Pejčinović Burić, who has honoured us with her presence, for the first time, at our solemn hearing.

Madam Secretary General, you have come upon an Organisation which is relaunching itself on very solid foundations, after an unprecedented political and financial crisis.

Right from the start of your term of office you emphasised your attachment to the Court. My colleagues and I myself are extremely grateful to you for this.

Dear Presidents of Superior Courts,

Over the past year our Network has undergone enormous expansion. It now comprises 86 courts from 39 States, making it the biggest network of this type worldwide. The presence in our midst of Chantal Arens, First President of the Court of Cassation, and Bruno Lasserre, Vice-President of the Conseil d'État, is an opportunity for me to thank them for having welcomed us all to a very successful conference of superior courts held in Paris on 12 and 13 September. The event bore witness to the growing importance over the years of dialogue between judges. In receiving us all at the Élysée Palace alongside the conference, President Emmanuel Macron clearly expressed his support for this gathering of judges, symbolising the rule of law Europe-wide.

2019 marked the completion of the Interlaken Process, which had begun in 2010. During this process, far-reaching reforms were made to our structures and working methods. It was really the decade of reforms. Our Court showed its capacity for reform and for turning to good account all the tools at its disposal.

The results of the policies implemented were conclusive, as you will see from the statistics which I would like to share with you.

Many of you will remember that at the end of 2011, as the Interlaken Process was just beginning, we had 160,000 applications pending. That astronomic figure has been significantly reduced, and at the beginning of this year it stands at just under 60,000. I might add that in 2019 the Court heard and determined more than 40,000 cases. That is the result of the efforts expended by all the judges and the members of the registry, whom I thank.

However, the situation is still open to improvement in terms of backlog, and major effort will be needed over the months and years to come.

The biggest challenge is that of the 20,000 Chamber cases pending. Even though in 2019 the number of such cases decreased slightly from their 2018 figure, they still constitute the "hard core" of our stock of cases. It is vital that we manage to devote all the requisite attention to them. Indeed, many of them are major cases, sometimes raising very serious issues. The Court is fully aware of this and is constantly refining its working methods to address this issue. It will, however, require additional resources to do so.

One of the main events for the Court in 2019 was the first advisory opinion issued pursuant to Protocol No. 16, in response to a request from the French Court of Cassation.

The case concerned the situation of a child born abroad by gestational surrogacy, conceived from the biological father's gametes. The father's parentage was recognised under French law following the first few judgments delivered by our Court. Question marks remained over the status of the intended mother.

Our advisory opinion stated that the right to respect for the child's private life required domestic law to provide for the possibility of recognising the legal parent-child relationship with the intended mother. Such recognition could be achieved by means of adoption.

A few months after our advisory opinion, the Court of Cassation, sitting as a full court, finally opted for having foreign birth certificates registered in France in order to establish the parent-child relationship between such children and their intended mothers. It thus went even further than our opinion. This is a perfect example of the dialogue-based approach established under Protocol No. 16.

This protocol is a challenge for our Court, because proceedings are pending when we receive the request, and we must therefore adjudicate very rapidly on highly sensitive matters. And that is what we have done.

Protocol No. 16 is clearly not designed to be applied on a day-to-day basis. It must be confined to questions of principle. Nevertheless, because European justice must be an area of dialogue and complementarity, Protocol No. 16 is now the most advanced instrument available to us in this sphere. Its first application therefore marks a milestone in the history of the European system of human rights protection. A second request, this time from the Armenian Constitutional Court, has already been lodged and is under examination.

The second major legal development in 2019 concerned the execution of our judgments. We all know that the success of our whole system relies on the complete enforcement of our judgments. The role of the Committee of Ministers, which is enshrined in the Convention in order to guarantee the effectiveness of their supervision, is therefore vital in safeguarding the credibility of the system. We can well imagine what happens to that credibility when a judgment is not executed.

This shows the importance of the new infringement proceedings introduced under Article 46 § 4 of the Convention. That provision was applied for the first time in 2019.

In the framework of these first infringement proceedings the Court was invited to determine whether Azerbaijan had refused to comply with a judgment delivered in 2014. The case concerned an imprisoned political opponent, Ilgar Mammadov. The question was whether the respondent State had failed in its obligations by refusing to release that political opponent further to our judgment.

Our Court considered that the State in question had indeed failed in its obligation to comply with a judgment previously delivered by the Court.

That first application of infringement proceedings, above and beyond the case in question, bears witness to the advanced institutional cooperation between the Court and the Committee of Ministers. The Committee of Ministers and the Court intervene in the system in different ways. One is political and the other legal. They nevertheless pursue the same aim, that is to say ensuring the efficiency of the system. Infringement proceedings, as implemented for the first time, bring us closer together. They reinforce our shared responsibility, which is a vital component of the European mechanism for human rights protection.

The opening of the judicial year would not be complete without reference to the key cases of the past year.

Although the cases which I have selected differ widely, they nevertheless all concern major issues which will most certainly increase in importance over the next ten years: protecting children; preventing violence against women; migration issues and protecting the environment.

The first is a Grand Chamber case, *Strand Loben v. Norway*, which concerned the removal of a child from its mother. On that occasion the Court pointed to the importance of the biological bonds between parents and their children, which must be protected. In this judgment, the Court specified the meaning and scope of the concept of the “best interests of the child” and harmonised the different approaches which exist at the pan-European level.

Our Court is also present on another front which has taken on cardinal importance, that is to say combating violence against women. As we have pointed out in one of our judgments, that kind of violence is a widespread problem confronting all member States, and is particularly alarming in contemporary European societies.

As you know, for several years now the Court has been delivering judgments on that subject. In fact, the *Opuz v. Turkey* judgment was clearly in line with the growing international awareness of the vital need for a specific convention. Thus *Opuz* led the way for the Council of Europe’s Convention on preventing and combating violence against women and domestic violence. *Opuz* is a good example of the synergy operating between the work of the Council of Europe and that of the Court. The so-called Istanbul Convention now constitutes an additional tool for the Court in safeguarding the fundamental rights.

In 2019, for the first time in this sphere, the Court found a violation concerning Russia. In its *Volodina* judgment it observed that Russian law did not recognise marital violence and therefore failed to provide for exclusion and protection orders. In our Court’s view, these omissions showed clearly that the authorities had not acknowledged the seriousness of the problem of domestic violence and its discriminatory effects on women.

In 2019 the Court took up another of the challenges currently facing States. Over the last few years it has received many applications concerning the situation of migrants in Europe. Three major judgments were delivered in 2019 concerning different aspects of this difficult issue: first of all, the confinement of migrants in an airport transit zone (*Z.A. v. Russia*); secondly, “chain refoulements” in the case of *Ilias and Ahmed v. Hungary*; and lastly, the situation of unaccompanied children, in the case of *H.A. v. Greece*. In these different cases the Court was careful, firstly, to protect the case-law *acquis* in the sphere of refugee law, and secondly, to map the way forward for the States’ migration policy.

The last judgment which I would like to mention also concerned a vital issue, albeit a global one. It was delivered in the case of *Cordella v. Italy*. In that case the applicants had complained of the effects of the toxic emissions from a factory on the environment and on their health. The Court held that a continued situation of environmental pollution endangered the health of the applicants and of the whole population of the areas affected. The Court therefore invited the Italian authorities promptly to introduce an environmental plan to ensure the protection of the population.

This judgment is tragically topical. A few months ago we all watched, dumbfounded, images of Amazonia in flames. At the beginning of this year the bushfires in Australia have again reduced us to stunned silence. We have unfortunately entered the Anthropocene age in which nature is being destroyed by man.

In that context, more than ever, it is right and proper for the Court to continue with the line of authority enabling it to enshrine the right to live in a healthy environment. However, the environmental emergency is such that the Court cannot act alone. We cannot monopolise this fight for the survival of the planet. We must all share responsibility.

That is why I would like to conclude this case-law round-up with a recent example from the Netherlands. At the end of December last the Supreme Court of the Netherlands delivered a judgment which prompted an immediate reaction around the world. In that case the Supreme Court ordered the Dutch State to reduce greenhouse gas emissions by at least 25% by the end of 2020.

In giving this decision, which has been hailed as historic, the Dutch Supreme Court relied explicitly on the European Convention on Human Rights and the case-law of our Court.

By relying directly on the Convention, the Dutch judges highlighted the fact that the European Convention of Human Rights really has become our shared language and that this instrument can provide genuine responses to the problems of our time.

I will now turn to English. The cases I have just mentioned clearly attest to the modernity and relevance of the Convention as interpreted by the Court. For 60 years now the Court has been using its case-law to promote rule of law, democracy and human rights, the core values of the Council of Europe. This year, in 2020, we will celebrate the 70th anniversary of the Convention. The European Convention is no doubt one of the greatest peace projects in the history of humanity.

Today’s formal opening session is also our first opportunity to commemorate this Treaty. It might therefore be useful briefly to take stock of the main achievements of the system.

The Court’s case-law is based on the idea that the rule of law underpins the entire Convention. The rule of law is not the rule of just any law. It is the rule of law based on the values of the Convention.

In my view, there are three reasons for the universal success of the European mechanism for the protection of human rights.

First of all, the Convention permeates all the branches of law: criminal and civil law, private and public law, not to mention such new areas as new technologies and environmental law. It is, so to speak, present on all fronts. In short, this text provides answers to a wide variety of complex questions arising in our societies.

The second reason for this success has a great deal to do with its evolutive interpretation, first of all by our Court and then by your courts. This interpretative methodology is clearly in line with the wishes of the founding fathers. They had a perception of human rights which was not static or frozen in time but dynamic and future-oriented. The generic terms used by the Convention, together with its indeterminate duration, suggest that the parties wished the text to be interpreted and applied in a manner that reflects contemporary developments. This viewpoint is backed up by the Preamble to the Convention, which refers to not only the “maintenance” but also the “further realisation of human rights and fundamental freedoms”, in other words their development.

This evolutive interpretation method has allowed the text of the Convention to be adapted to “present-day conditions”, without any need for formal amendments to the treaty.

This mode of interpretation has also been confirmed on several occasions by the case-law of the International Court of Justice.

And most importantly, we have all of us, in our respective courts, ensured the permanence of the Convention, since it is still incredibly modern in 2020.

The third reason for the Convention's success over its seventy years of existence is the crafting of a specific European legal identity. By interpreting the Convention, the Court has helped to harmonise European rules in the sphere of rights and freedoms.

From its beginnings right up to the present, the Court has reinforced respect for human dignity by guaranteeing observance of such fundamental safeguards as: the right to life and the abolition of the death penalty; prohibition of ill-treatment; prohibition of slavery, servitude and human trafficking.

It has introduced safeguards protecting individuals against arbitrariness, injustice and abuse of power. It has ensured the protection of the dignity of persons deprived of their liberty. And it has also built up comprehensive case-law to protect private and family life.

Where political rights are concerned, the Court has endeavoured to protect pluralistic democracy by guaranteeing respect for the basic democratic principles in such areas as participation in free elections and freedom of expression, religion, assembly and association. The concern to promote tolerance and broad-mindedness has consistently underpinned the Court's case-law.

It is essential here to remember that democracy is the only political model envisaged by the European Convention of Human Rights and the only system compatible with it. No other international body has established in such a crystal-clear manner this link between democracy and human rights.

That is why the Court remains particularly vigilant when the foundations of democracy are imperilled, including any attempt at undermining the independence of judges. It should be noted that the Court of Justice of the European Union recently applied our principles in this sphere.

This also explains our Court's concern about cases of violation of Article 18 of the Convention concerning misuse of power. In three politically sensitive cases in 2019, the Court found violations of that provision. Such cases are always symptomatic of regression on the part of the rule of law. Whether they involve attempts to silence an opponent or to stifle political pluralism, such cases run counter to the notion of an "effective political democracy" set out in the Preamble to the Convention.

As we can see, the work completed over 70 years has been immense, covering a large number of fields. In 2020, a series of events and conferences will be held enabling us to go back over all these achievements. In order to mark this anniversary, a commemorative book has just been published. It looks at 47 judgments which have changed Europe, one from each Member State. It also includes other documents from the Court archives as well as a number of stunning photographs. Copies will be available for you at the end of this hearing and I warmly invite you to take one.

Ladies and gentlemen,

Sixty years ago the first judgment delivered by the European Court of Human Rights, under the presidency of the illustrious René Cassin, was *Lawless against Ireland*. Indeed, our ties with Ireland are close and deep-rooted. Our early case-law includes several leading Irish judgments. We are all acquainted with *Open Door and Dublin Well Woman*, an important case concerning freedom of expression regarding abortion; *Norris*, which concerned the prohibition of same-sex relationships between consenting adults; *Bosphorus Airways*, a case of cardinal importance in terms of relations between European Union law and Convention law; and, of course, *Airey*, which was fundamental as regards the right to a court.

In a common law country, which benefits from a Constitution, the Convention has played a fundamental role in guaranteeing respect for Human Rights.

On several occasions the Irish political authorities have signalled their attachment to the Court, and we have been honoured to welcome three Presidents of the Republic of Ireland.

Lastly, for several years now, thanks to Irish generosity, all our hearings are filmed and can be broadcast on the Internet. That obviously also applies to this solemn hearing marking the new judicial year.

For all these reasons I am delighted to welcome an Irish friend of the Court to this hearing. More than thirty years ago he was one of the lawyers in the famous *Open Door and Dublin Well Woman* case. But today, we are welcoming him in his capacity as President of the Supreme Court of Ireland. The friend in question is Chief Justice Frank Clarke.

Dear Chief Justice, you have the floor.





## Frank Clarke

**Chief Justice, Supreme Court of Ireland**

### WHO HARMONISES THE HARMONISERS?

President Sicilianos, Colleagues of the European Court of Human Rights and of the Constitutional and Superior Courts of the States of the Council of Europe, President of the Parliamentary Assembly, Madame Secretary General, Distinguished Guests,

President Sicilianos, can I thank you and your colleagues for the great honour which you have done me by asking me to make this address. My only complaint is that, by revealing that my last formal appearance before this Court was as Advocate on behalf of Open Door almost three decades ago, you have made me feel and seem very old.

But more importantly, can I especially thank you for your kind comments about the contribution which Ireland has made to the Court both in practical terms, as you mentioned and also through the important jurisprudence deriving from Irish cases. We are a small country but we like to think that we contribute more than our size might suggest. That we, to use an English phrase, punch above our weight.

That will be particularly important for us in the context of Brexit which will, of course, occur at midnight tonight. While the United Kingdom will remain a member of the Council of Europe and will continue to contribute to this Court, there will be additional challenges for Ireland, and not least for the Irish legal system, as we become the largest remaining common law country within the European Union. But we are also, as you pointed out Mr. President, a legal system governed by a strong Constitution and thus our own national constitutional jurisprudence is richly informed both by the jurisprudence of this Court but also that of the Supreme Courts of other prominent common law jurisdictions. I would like to think that the diversity of influences which that brings to bear enhances our understanding and protection of human rights.

President Sicilianos,

When we consider the development of the international legal order that includes human rights, it is important to note the progress made in seventy years. This Court, and the Convention which it applies, have a long tradition which guides the shared approach to human rights protection.

But the development of human rights protection is, of course, subject to many other national and international influences. In reflecting on the progress achieved over the past seventy years it will be useful to discuss the challenges which await us over the next seventy years.

One of those challenges is the problem posed by populism for the rule of law, the independence of the Court and the recognition of the Court's authority.

However, that challenge has already been the subject of discussions within each State and, while it is very important, I propose to address a different issue facing national courts, one which is more subtle but nevertheless significant.

Like many titles for papers and speeches which are intended to be clever, today's title "Who Harmonises the Harmonisers?" is an over-simplification and a potentially inaccurate description of one of the issues which is likely to face all courts charged with vindicating human rights over the next 70 years.

I appreciate that not all of the States represented in the Council of Europe and, therefore, on this Court, are members of the European Union. I also appreciate that the term "harmonisation" as used generally in European Union law has a precise meaning which involves making the law in each member state of the Union coincide with that in all other member states subject to whatever discretion may be left to the member states by the terms of certain directives.

In that context I know that the objective of the Convention and of this Court is not to harmonise human rights law in that strict sense but is to ensure that minimum standards for the protection of human rights across the states of the Council of Europe are maintained whilst respecting the plurality of national and international fundamental rights protections. But that too is a form of harmonisation even though States may well be afforded, depending on the circumstances, a significant margin of appreciation and are, of course, also free to provide a higher level of protection for human rights under their national regimes.

But in addition, many of the States who are represented on this Court have subscribed to other international human rights instruments. These include those of general or global application such as the International Bill of Rights, which is comprised of: the Universal Declaration of Human Rights (1948) which proclaimed a "common standard of achievement for all peoples and all nations"; the International Covenant on Civil and Political Rights (ICCPR, 1976); and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976). Other international instruments relate to rights in specific areas or for particular beneficiaries including, for example, UN Treaties such as the Convention on the Rights of the Child (CRC, 1989) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) which are also complemented by the Council of Europe's European Convention for the Protection of Torture and Inhuman or Degrading Treatment or Punishment (1987) and the Convention on Action Against Trafficking in Human Beings (2005).

Finally, it must also be acknowledged that the precise way in which human rights instruments potentially influence the decisions of national courts can vary depending on the national legal order. There are significant differences between the way in which international treaties are applied. In that context my own jurisdiction is I think at one end of the spectrum given that Art. 29.6 of the Irish Constitution expressly states that no international agreement is to be part of the domestic law of Ireland except in a manner determined by the Irish Parliament.

Other states, to a greater or lesser extent, do regard international treaties as potentially forming part of domestic law without parliamentary intervention. On the other hand, for those states which are members of the European Union, the precise status of Union law, so far as national constitutional arrangements are concerned, may, notwithstanding its general primacy, also vary to some limited extent. My State is, again, towards a different end of this spectrum in that the Irish Constitution expressly recognises the primacy of Union law to a significant extent.

I appreciate, therefore, that the precise way in which the many international human rights instruments which potentially influence the outcome of national proceedings can affect the proper determination of those proceedings in accordance with national law can vary quite significantly. However, that does not seem to me to take away from the underlying issue which is that we, as national courts, are now faced with a range of international human rights instruments which have at least the potential, in one way or another, to have a bearing on the result of individual cases and where, therefore, any potential differences, however subtle, between those instruments, may need to be considered.

I conduct that analysis against the background of the fact that, in almost all national proceedings, there must be a single result. A person claiming a breach of guaranteed rights will either win and obtain whatever remedy national law permits or will lose. A person who defends proceedings, perhaps brought by the State or its agencies, on the grounds of a breach of rights will either succeed in that defence or fail.

Where national courts have the competence to annul legislation or other state measures, proceedings will either result in annulment or they will not. While there may, in certain states and in certain circumstances, be types of proceedings which do not give rise to quite such clear cut results, nonetheless national courts are ultimately called on, to a great extent, to come up with a single answer.

It follows that, whatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, the net result at the end of the day has to be a single answer. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of individual cases within the national legal order needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but can I suggest that we do need a coherent and harmonious human rights order.

In analysing those issues it should, of course, first be recognised that the problem should not be exaggerated. It might be described as a first world problem. Most international human rights instruments point in broadly the same direction. The kind of rights recognised are similar. It would be surprising, indeed, if we were to come across a state which had subscribed to two separate international regimes which pointed in different directions.

But those who are involved in regularly having to resolve individual cases know that the most difficult cases, at least from a legal perspective, are those which involve fine judgements, questions of weight and issues of balance. More than one right may be involved and the ultimate question may come down to deciding how to reconcile competing rights. States may have legitimate interests to pursue but the question may come down to whether the manner in which those interests are being pursued is permissible having regard to any diminishment of rights which the State may consider is justified for legitimate ends.

It is here that there may frequently be room for legitimate difference of opinion. While recognising the rights engaged, it may be open to legitimate debate as to how they are to be balanced. Many cases involving state measures come down to an assessment of whether legitimate ends are pursued in a way which is proportionate in the context of the diminution of any rights affected. All such cases are likely to resolve around a judgment involving balance.

Skilled advocates will, therefore, almost invariably seek to present their case, to the extent permissible within the national legal order, by reference to those human rights instruments and, insofar as relevant, decisions of international courts or other bodies charged with the enforcement or interpretation of those instruments, which give the greatest chance of the balance tipping in their favour.

Some human rights cases, of course, turn almost exclusively on their facts. If what is alleged actually occurred, it would undoubtedly represent an infringement of guaranteed rights. In such circumstances access to independent courts protected by the rule of law provides the greatest guarantee of respect for the rights involved. That is why maintaining the independence of the judiciary forms a vital ingredient of the protection of rights generally.

But there are also cases where the facts may not be in particular dispute or may have been resolved by the court having fairly analysed the evidence and where the issues may be ones involving the sort of balancing exercise which I have sought to analyse. In such cases the question is as to how best to ensure overall coherence when faced with a multiplicity of potentially relevant international instruments.

Can I first suggest that there is no magic bullet. National courts must interpret their national human rights instruments in accordance with their own norms. This Court must interpret and apply the Convention. Where relevant the Court of Justice must interpret and apply the Charter. It is also important to recognise that the text of these, and other, human rights instruments is important. Wherever one stands on the very interesting question raised at our earlier seminar by the Vice President of the Council of State of France, which concerned the extent to which it was legitimate to depend on interpretation of text for much of human rights law, I think text must matter at least to some extent even though I fully appreciate the point which you made, Mr. President, about the terms of human rights instruments being usually expressed in very general terms.

States spend a lot of time negotiating the terms of international treaties or considering whether they should accede to them. They do so on the basis of the text of the instrument concerned. The states who subscribe to the Council of Europe have adopted the Convention in the terms in which it stands and can amend it as they consider appropriate. Likewise, the way in which rights are guaranteed in national constitutions or equivalent human rights instruments involves language which the national system itself has chosen. The fact that different language might be used in separate instruments potentially influencing an individual case does not necessarily create problems but it can.

Can I suggest that developing the dialogue which already exists at a number of levels between courts and other relevant institutions provides the best means of ensuring coherence and enhancing an harmonious approach to international human rights. That dialogue can, of course, exist on a range of levels and can be conducted in many different ways.

First, there is the high level dialogue between courts each of which are charged with the cross-border enforcement of rights such as the dialogue between this Court and the Court of Justice. Second, there is the regular vertical interaction between national courts and supra-national courts. This, in itself, can operate on a range of levels.

President Sicilianos, as you know I have had the honour and pleasure of leading a delegation of senior Irish judges to a bi-lateral meeting with judges of this Court under the presidency of your distinguished predecessor President Raimondi. I have also, in the last few years, had the equal pleasure of arranging a meeting between all of the members of the Supreme Court of Ireland with the Court of Justice in Luxembourg. Both the formal, and if I might say equally the informal, aspects of these bi-lateral meetings are an invaluable contribution towards greater understanding of matters of mutual interest.

But there is also that form of dialogue which comes from courts considering each other's judgments. Admissible proceedings only come to be considered in detail by this Court where remedies within the national legal system have been exhausted. It follows that this Court has to consider the way in which national courts charged with protecting human rights have dealt with the case in question. Furthermore, the jurisprudence of this Court will clearly form part of the consideration given by national courts in such cases even if the precise way in which the Convention may apply within the national legal order may vary.

That latter form of dialogue is an inevitable but useful consequence of the way in which we are all required to go about our task of handling those cases which come before our courts.

It might, therefore, be said that the vertical dialogue between national courts and supra-national courts has developed to a reasonable extent. Perhaps the task for the future is both to ensure the continuance and the enhancement of that dialogue. There is a challenge for us all in making the time to engage meaningfully in such dialogue when we are all faced with significant caseloads and where it is natural that our first attention is directed towards what is, after all, our primary role which is to consider and fairly decide those cases which come before us.

Those challenges are potentially even more acute when considering what I suggest is the third, and by far the least developed, pillar of judicial dialogue in the human rights area. That dialogue involves a discussion, whether on a bilateral or multilateral basis, between national courts charged with enforcing human rights and, in particular, courts at the apex of national systems.

There have, of course, often been close contacts between the judiciaries of neighbouring countries and, in particular, those which share similar legal systems and traditions. It is also the case that national legal orders differ on the extent to which it is considered permissible or appropriate to have regard to the jurisprudence of the courts of other States in developing their own case law. But an understanding of how the apex courts of other states have dealt with similar problems can often be useful.

In that context the development both by this Court through the Superior Courts Network and by the Court of Justice through the Judicial Network of the European Union, of shared databases of relevant decisions taken by the higher courts in the national legal orders is, in my view, a most welcome development. So too are significant events such as the organisation by the Court of Justice and the Constitutional Court of Latvia of a meeting between its own members and senior members of national judiciaries which is due to be held in Riga in March. The topic of the conference is to consider, on a multi-lateral basis, the common constitutional traditions within the European Union.

I think it would be fair to say that a broad based horizontal dialogue between higher national courts (beyond the courts of those States which have already close historical links) is only in its infancy. It is a development, however, which, in my judgement, should be greatly encouraged. It can, like the horizontal dialogue with supra-national courts, involve both actual meetings, whether bi-lateral or multi-lateral, or, to the extent permissible within each national legal order, a consideration on a comparative law basis of our respective jurisprudence.

But there are challenges. The first challenge obviously stems from courts having the time and resources to devote to such dialogue. We cannot spend most of our time attending meetings and conferences no matter how interesting, valuable and pleasurable that might be. This is a particular challenge for a small country such as Ireland and one which can only be increased in the light of Brexit. It is also a particular challenge for courts, such as the Irish Supreme Court, which have competence in both constitutional and ordinary legal matters and who therefore have to engage across a wide range of areas and with a significant number of international bodies. However, it is, in my view, a challenge which must be faced.

Exactly how we come to be familiar with the case law of colleagues from other States may vary depending on national legal practice. Some courts have significant research departments which may, where appropriate, allow the Court to inform itself about relevant case law from other states. In the common law tradition from which I come there is an obligation on any advocate representing a party to research and place before the Court any relevant legal materials which might legitimately influence the Court's view of the law. This applies even where the material in question may be unfavourable to that advocate's case. This duty also includes an obligation to place relevant comparative material before the Court but, of course, the sheer volume of potential material now available online must place a practical limit on that obligation.

Perhaps one of the greater challenges stems from context. When we read the judgments of our own courts and of those supra-national courts which have a direct impact on us, we do tend to know the legal context in which those judgments were written. But unless we are familiar with the legal context within which proceedings in another State were conducted there can be a danger of being misled on the true question decided by the Court concerned. While the style in which judgments are written can vary significantly from legal system to legal system we all, I think, usually refrain from stating the obvious.

But what may be obvious to those operating within their own national legal order may not be at all so obvious to someone reading a judgment who comes from a materially different legal system. Superficially issues may appear to be the same but they may be significantly influenced by specific measures within the national legal order or, indeed, by differences between the way in which international instruments impact within that national legal order. I have to say that I have often had to emphasise to advocates appearing in our court that it is important, when referring to judgments of other respected courts from different States, to lay the ground properly by establishing that the Court concerned was really answering the same question that our court was being asked to consider.

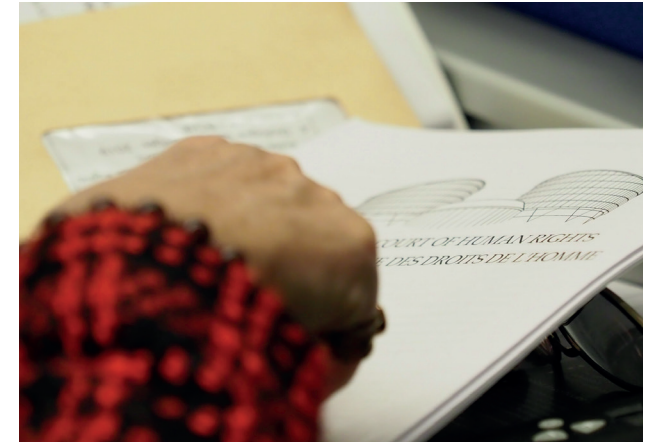
There are, therefore, real challenges involved in seeking to enhance the extent to which we can attempt to establish a coherent and a harmonious human rights order by giving proper consideration to the views expressed in the judgments of colleague apex courts in other States. This does not, however, mean that we should minimise the benefits. The challenges can be overcome, or at least minimised, and the rewards are potentially well worth the effort.

If we consider it desirable that we develop a coherent and harmonious international human rights order which nonetheless respects appropriate national differences, then a deeper understanding amongst the senior national judiciaries of each of our States of the way in which common issues are addressed in colleague courts must surely be to everyone's significant benefit. Save to the extent that we may be obliged to take a certain course of action because of binding international obligations, such as, importantly, the minimum standards imposed on us all by the Convention, then we are, of course, free to differ. But that freedom to differ is, in my view, best exercised with understanding both of how common issues are approached in different States and the reasons why our colleague courts have come to the judgments which they have.

Can I suggest that one of the difficulties involved in building a coherent and harmonious approach to the vindication of human rights must require us to face the undoubted challenges of properly understanding and, where appropriate, applying the reasoning of respected colleagues across our many disparate States. We do not need to be the same but we have sufficient common legal traditions to make it important that we strive to ensure that we also share a coherent and harmonious human rights order.



# PHOTOS





## PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2019
- Dialogue between judges - 2018
- Dialogue between judges - 2017
- Dialogue between judges - 2016
- Dialogue between judges - 2015
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