



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

Solemn Hearing of the European Court of Human Rights

Strasbourg, 25 January 2019

Speech by Mr Laurent Fabius, President of the French Constitutional Council

To be checked against delivered speech

President of the European Court of Human Rights
Presidents of Constitutional Courts and Supreme Courts,
President of the Parliamentary Assembly,
President of the Ministers' Deputies,
Secretary General of the Council of Europe,
Excellencies,
Judges of the Court,
Distinguished Guests,
Ladies and Gentlemen,

“If I deserve a prize, it is for persistence”. Thus did the eminent jurist René Cassin, member of the Constitutional Council and subsequently President of the European Court of Human Rights (ECtHR), express himself when mention was made in his presence of the Nobel Peace Prize he had received. It is this same virtue of persistence that I should like to emphasise in acclaiming your Court, President Raimondi, as I begin the remarks that - in response to your kind invitation - I am honoured to make before you all.

The ties between our two institutions, the French Constitutional Council and the European Court of Human Rights, both of which will celebrate sixty years of existence within a few months of each other, are almost as old as the institutions themselves.

It is because the European Court and the French Council share a responsibility for protecting and applying human rights in the face of social challenges that it is invaluable to be able to count on the close ties of friendship which bind us.

Admittedly, each of our institutions has followed its own path, but, while the role of the French constitutional judge is not to apply the European Convention in the national legal order, what unites us is clearly more important than our differences. These close ties are confirmed by our desire, recently expressed, to be one of the highest national courts entitled, with the *Conseil d'Etat* and the Court of Cassation, to engage with the European Court under Protocol No. 16.

President Raimondi, at the risk of casting a shadow over this happy occasion, I should like to stress from the outset how vital it is that our judicial human-rights system, a system aptly described by our friend President Voskuhle as “a Calder mobile”, should maintain all its intrinsic ties, so great are the risks that it disintegrate under the weight of threats and challenges. Not only must we preserve the ties between us, but we must rise to the key challenges of our time, or risk being destroyed by them. The threats unfortunately do exist, and they compel us to be as vigilant as those who built our institutions.

The Constitutional Council and the Convention system

I have just referred to our differences. As is well-known, in its 1975 case-law on the Voluntary Termination of Pregnancy Act the French Constitutional Council held that it was not its role to examine whether laws were compatible with the Convention, but rather to assess whether they complied with the Constitution. In consequence, our Council may appear to be less close to the Court than certain of the other courts represented here. In addition, we fulfil roles which are not entirely identical. Ours goes as far as adopting decisions which are not only binding on the parties to the disputes, but have *erga omnes* effects.

Nonetheless, it would be a mistake to consider that the French Constitutional Council could, for these reasons, ignore the remarkable work accomplished by the Court since its creation.

I would add, with regard to the rules governing applications to our respective courts, that there has been a significant rapprochement in our approaches since France adopted the famous Request for a preliminary ruling on constitutionality (QPC) in 2008. As you know, this procedure – which I readily refer to as a “citizen’s request” so as to be understood by a wider public – creates a right to an individual remedy in any dispute against any provision that is considered to be contrary to the rights and liberties guaranteed by the Constitution. It is consistent with the Council of Europe’s endeavours to strengthen the protection of human rights, work that took tangible form through the entry into force in 1998 of Protocol No. 11, which enabled applicants to apply directly to the Court.

The success of the QPC in France is spectacular. Today 80% of the cases we examine come to us through this *a posteriori* remedy. In less than 10 years, thanks to the QPC, we have reached almost as many decisions *a posteriori* as we did *a priori* decisions in 60 years. This move to bring the system for human-rights protection closer to citizens can certainly be strengthened further, through the awareness-raising efforts that are incumbent on us all. For this reason we have decided that, from now on, some of our public hearings will take place in the regions, away from the Constitutional Council’s Paris seat. The first is due to be held in February in Metz, not far from where we are gathered today.

The principles that our role requires us to embody are those described by one of our best lawyers, in comparing them with yours, as “cloned principles”. The questions that we must address are very similar, if not the same, as those facing the European Court of Human Rights. To judge by just a few examples, so are the responses, such as the requirements of judicial independence and impartiality, adversarial proceedings and compliance with the rights of the defence, human dignity, the right to an effective remedy or the scope of the *ne bis in idem* principle.

It was thus natural that the “wordless dialogue” between our institutions, which already took tangible form through our participation in the Superior Court Network, be extended

through the designation of the French Constitutional Council as a national “highest court” for the purposes of Protocol No. 16.

In short, beyond our specificities or differences, what is important is that, together, we are able to protect human rights as well as possible, in a consistent manner and with persistence.

Bearing this in mind, President Raimondi, Presidents of Constitutional Courts and Supreme Courts, I am pleased to inform you that, on the occasion of the French Chairmanship of the Council of Europe, the Constitutional Council, the *Conseil d’Etat* and the Court of Cassation are honoured to invite you to Paris on 12 and 13 September 2019 for a conference of supreme courts, the theme of which will be “dialogue between judges”.

The future role of constitutional courts as they face contemporary challenges

President Raimondi, if, together with my colleagues in the Constitutional Council, I believe that is essential to maintain the closest of ties between our highest courts, this is not with a view to preserving, as Paul Valéry wrote, “that inimitable pleasure one finds only in one’s own company”. Rather, it is because the questions put to us have dimensions which, by their very nature, cannot be adequately addressed by strictly national responses.

Allow me to cite as examples three of the main issues on which the French Constitutional Council was required to rule in 2018, all three of which relate to challenges that, I believe, are common to all of the courts which safeguard fundamental rights and freedoms.

Firstly, with regard to what one might describe as the challenge of technology, we held for the first time, in respect of the legislation adapting French law to the so-called GDPR European Regulation, that not only are the authorities not authorised to use algorithms as the basis for individual decisions on automatized processing of “sensitive data”, but also that no decision can be based solely on an algorithm whose operating principles are not disclosable, and that the use of “self-learning” algorithms was limited by the obligation on the data controller to be capable, at any stage, of providing a detailed explanation of its functioning. In view of technological advances, this question will undoubtedly become increasingly pressing.

Another essential challenge concerns democracy: last year we also took what I believe to be the first decision on a law concerning the dissemination of false information which could affect the integrity of an election. On that occasion, the Constitutional Council held that an urgent-applications judge could only block the dissemination of false information if the “inaccurate and misleading nature” of the content and the “likelihood of [its] affecting the integrity of the ballot” were apparent. This is unfortunately another issue which is likely to come before us all on a more frequent basis.

Lastly, faced with the challenge of citizenship and living together harmoniously, the Council held for the first time that “fraternity”, that superb concept described by Victor Hugo as “the third step of the highest platform”, was a principle with constitutional status, derived, *inter alia*, from the motto of the Republic - “Liberty, Equality, Fraternity”. We found that the “offence of solidarity”, previously enshrined in French law and condemning any person who provided humanitarian assistance to an unlawful migrant, was contrary to the Constitution. This decision has sometimes been read superficially, as happens in my country and, if I understand correctly, in yours. Certain commentators, unintentionally or otherwise, forgot that we had also reiterated that no principle or rule of constitutional rank afforded to aliens general and absolute rights of entry to and residence in France. In other words, aiding unlawful entry and residence continues to be an offence. Here we see the constant search for a balance between freedoms and public order.

President, I should like to add a fourth theme, that of the climate and, more broadly, the environment, which, as we are all aware, threatens the survival of humanity itself. Courts are receiving an increasing number of requests from citizens, associations, NGOs, companies and towns, seeking to ensure that the States comply with their obligations in terms of environmental protection. In the area of climate alone, litigation has developed significantly since the Urgenda ruling by the Dutch courts in 2015. The United Nations Environment Programme counted almost 900 climate cases in 2017, more than a hundred of which were in the European Union. In such disputes, and more generally in the area of environmental protection, what is our role as guardians of fundamental rights? In protecting the environment, we are also protecting human rights, namely the rights to health, safety and, beyond these, human dignity. The European Court of Human Rights has understood this very

clearly. Since its 2009 judgment in the case of *Tatar against Romania*, it has acknowledged the right to live in a safe and healthy environment and, in so doing, has joined a more general movement to enshrine environmental law at the highest level of the hierarchy of laws. As environmental threats worsen and certain politicians demonstrate a lack of ambition, we can all sense that human-rights litigation as applied to the environment will grow in importance, making the courts, even more than they are at present, major players in the construction of environmental justice.

Threats to freedoms and to the rule of law

President, Ladies and Gentlemen – I would add one final point which, over and above any technical considerations, will be my main message today. What, alas, do we see happening in several European countries? An ever-growing catalogue of unacceptable attacks on fundamental rights, be they measures casting doubt on the independence of the judiciary and media freedom, access to the fundamental right to asylum, or the increased instances of arrests of political opponents and homophobic assaults.

Extremism and brutalism are the marks with which some would like to imprint our era.

As judges of fundamental rights, we cannot tolerate any form of extremism whatsoever, as we protect the rights and freedoms guaranteed by the supreme standards with whose application we are entrusted. We must act with unfailing vigilance to strike a harmonious balance between all of the principles and rules that are safeguarded by these founding texts. Equally, we cannot accept that, through the scapegoating of certain individuals, anyone is deprived of his or her fundamental rights.

May I be even clearer? It is no accident that, at the very moment that these threats are growing and merging, attacks on the highest courts are increasing. Under various pretexts and in various forms, those who wish to destroy the rule of law have understood that if their brutalism is to prevail, they must attack precisely these institutions and the judges whose task it is to protect the rule of law.

Through our decisions and our conduct, we, as the guardians of fundamental rights, must stand together to oppose the madness of those Janus-like leaders and States, who show a supposedly liberal face but whose other side is decidedly authoritarian.

We know that freedom without security leads to chaos, but that, inversely, security without freedom leads to totalitarianism. Since Antigone's Letter, we are also aware that resistance to State madness requires constant legal and judicial watchfulness. The survival of the rule of law depends largely on this resistance.

I began by referring to persistence; I would close by adding vigilance and resistance. It is these values in particular that we share, and, since we are still in the period of start-of-year wishes, I wish you this vigilance, this resistance and this persistence: may we all continue to embody them.