



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

Solemn Hearing

10 September 2021

Speech by Robert Spano

President of the European Court of Human Rights

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

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

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

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

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

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

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

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

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

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

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

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

So the time has come for a paradigm shift.

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

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

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

The criteria for identification vary.

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

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

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

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

But the challenges facing the Court are not only organisational.

Ladies and gentlemen,

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

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

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

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

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

The rule of law, by requiring that governmental power be regulated by law and not the whims and caprice of men,³ demands that laws are clear and not excessively vague and open to abuse⁴. The rule of law does not allow for unfettered powers to be granted to the organs of Government.⁵ Laws must be interpreted and applied by independent and impartial courts, and that once lawfully constituted courts have rendered final and binding judgments they should not be called into question.⁶

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

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

Our Court has a well-developed body of case-law related to the concepts of ‘independence’ and ‘impartiality’ of judges.⁷ However, for the first time in 2020, the Grand Chamber clarified the scope and meaning of the “tribunal established by law” concept under the Convention’s fair trial provision. This was in the Grand Chamber judgment of *Guðmundur Andri Ástráðsson* against my own country, Iceland⁸. In this judgment, the Court held, unanimously, that the respondent State had violated Article 6 § 1 due to grave breaches of national law in the appointment of a judge to the newly established Court of Appeal in Iceland.

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

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

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

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

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

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

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

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

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

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

But *de jure* independence, that is independence of the judiciary set out in legislation, does not alone guarantee nor secure judicial independence. What is also needed, and perhaps even more crucially, is *de facto* independence. In concrete terms this means that the scope of the 'State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. In particular, *ad hominem* attacks on individual judges for their decisions or attempts at pressuring the judiciary to deliver politically acceptable outcomes is not acceptable in a democracy governed by the rule of law.

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

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

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

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

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

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

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

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

The second case is the decision in *M.N. and Others v. Belgium* from May 2020. The applicants, a Syrian couple and their two minor children, travelled to Beirut where they submitted short-term visa requests to the Belgium embassy to allow them to travel to Belgium to apply for asylum. Their requests were processed and refused by the Aliens Office in Belgium and the applications lodged before the Belgian courts were unsuccessful. The applicants complained that the refusal to grant them visas had exposed them to a risk of ill-treatment for which they did not have an effective remedy. The Grand Chamber declared the application inadmissible finding that the applicants had not been within the jurisdiction of Belgium. The decision examined whether a State exercises control and authority, and thus jurisdiction, over individuals lodging visa applications in embassies or consulates abroad. To be clear, these cases were indeed challenging for the Court, requiring it to carefully balance the State's sovereign right to control entry into their territories and individual rights of peoples in often precarious situations.

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

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

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

Ladies and Gentlemen,

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

Madam President Dineke de Groot,

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

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

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

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

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