



**“The Authority of the
Judiciary
1. Challenges to the
authority of the judiciary
2. Responses to the
challenges”**



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
26 January 2018

*“The Authority of the Judiciary
1. Challenges to the authority
of the judiciary
2. Responses to the challenges”*

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Strasbourg, January 2018

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Guido Raimondi

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

WELCOME SPEECH

Secretary General, Dear Guests, Dear colleagues, Ladies and Gentlemen,

It is my great pleasure to once again welcome you all to Strasbourg today for the activities that mark the opening of the judicial year of the European Court of Human Rights.

I thank you all for making the journey – especially those who have come very far – to accompany the Court as it enters into another year of its work.

Let me point out that this is the 20th year of the new Court. The institution that we know today came into being on 1 November 1998, and we will be marking that important anniversary later on in the year.

I know that many of you are return visitors to the Court, and are familiar with the format and the purpose of the seminar. To our new guests, I would like to explain that this is a very important event for our Court. It is one of the ways that we practice what we preach in relation to judicial dialogue. Those of you who have had the experience of visiting the Court bi-laterally, and of receiving in your own courts visitors from Strasbourg, know that a regular and direct exchange of views among judges is of very great benefit to the task of upholding human rights. Under the Convention, we share that task, we share that **responsibility**. It is therefore natural that we should be in dialogue among ourselves – indeed, it is even a necessity. And in that context, the annual seminar is the crowning event.

This year’s edition takes as its theme a subject-matter that concerns – and is of concern – to all of us who represent the judicial branch. The “least dangerous branch” (in Professor Alexander Bickel’s famous phrase) is faced today, in a number of our countries, with dangers to its authority, its legitimacy, and its effective action as the guardian of the rule of law.

Whence the wish on our part to offer a European forum for discussion to our counterparts from all corners of the continent. I will make some remarks on this subject during my speech at this evening’s ceremony.

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Mr Secretary General, you have put this issue of the authority of the judiciary at the forefront of the agenda of the Council of Europe.

In 2016 you presented to the Committee of Ministers, and they accepted, a plan of action for strengthening judicial independence and impartiality, for implementation over a 5-year period. And in your annual report on the state of democracy, human rights and the rule of law in Europe, you hold up the issues and point to the failings that have to be addressed for the sake of a well-functioning, respected and trusted judicial branch. We will hear your keynote speech with the greatest interest.

Ladies and gentlemen, before I conclude my remarks, I wish to express my thanks to the five judges (from Italy, from France, from Switzerland, from Serbia and from Latvia) who accepted my invitation to be speakers at the 2018 seminar.

I also wish to thank my colleagues in the organising committee who have brought us this year's edition: Judges Faris Vehabović; Ksenija Turković; Branko Lubarda; Yonko Grozev; Iulia Motoc, and, of course, the chair of the committee who is seated beside me, Paul Lemmens.

I am sure that a discussion that is both rich and enriching will be had here this afternoon.

I now pass the floor to Judge Lemmens, to take us into the substance of this year's seminar theme.

Thank you.



Paul Lemmens

Judge of the
European Court of Human Rights

Dear President, dear Guido, thank you very much.

I will not take the floor for too long. We have a full programme before us.

1. I too would like first of all to extend a warm welcome to our guests, particularly our colleagues from the European judicial sphere. From my vantage point up here I can clearly see that the *crème de la crème* of the judicial world have honoured us with their presence. I hope that our seminar will be an opportunity not only for learning from each other but also for renewing the friendships which have grown up among us.

Our President has said that our annual seminar is the expression of our intention to dialogue with our colleagues from the national courts. But this year there is perhaps also another reason for attaching major importance to this event.

The Organising Committee, which I have the honour of chairing this year, has been struck by the increasing numbers of challenges to the authority of our countries' judiciaries. Some of these challenges might better be described as "assaults" on the judiciary, its institutions and its representatives. Our Court's case-law (already) contains a number of examples of such invective. Fortunately attacks are the exception rather than the rule. What is happening to the judiciary should, in a way, come as no surprise. In these post-modern times, authority is in universal decline. Moreover, sincere criticism can be highly beneficial. The judiciary is no exception. However, accusations are not always made in good faith, which is how the judiciary sometimes ends up being targeted by the media, the legislature, the executive, and other groups.

The severity of the attacks on the authority of the judiciary might sometimes lead us to wonder whether the rule of law, of which the judiciary is one of the primary guardians, is still in a position to operate as we expect it to, or will continue to do so in the future. The Secretary General, Mr Jagland, will no doubt mention that link-up with the rule of law, which he highlighted in his last Annual Report on the state of democracy, human rights and the rule of law in Europe.

Furthermore, it is not only the national courts which are undergoing a difficult period. Here in Strasbourg we are very much alive to this problem. We welcome constructive criticism. But we note that some States sometimes have purely political reasons for refusing to accept certain judgments delivered by the Court, and that in such cases prominent politicians tend to disparage the Court as an institution.

We are all in the same boat.

We felt that the time had come to take stock of the authority of the judiciary, of its rights and obligations, and of how it can defend itself against unjustified attacks. This annual seminar at the Court provides an opportunity for holding a kind of "European judicial summit". Not in order to become a European judicial trade union, far from it, but to consider how the courts and the judges can best fulfil their mission in the service of our citizens, endeavouring to honour their fundamental obligation of independence and impartiality.

2. I would now like to explain briefly the structure of our programme.

In a minute, we will hear Secretary General Jagland, who will draw the overall picture from the point of view of the Council of Europe. This is obviously a wider point of view than that of, say, our Court. It is important to see the problems faced by the judiciary in a wider context. We are very happy that the Secretary General has been able to join us.

We will then turn to the two themes of our meeting.

In the first part, we will discuss the *challenges* to the authority of the judiciary.

There are many challenges, but we will focus on those that come from other State actors. The authority of the judiciary is to be preserved in a system based on the *separation of powers*. An old concept, but what does it mean nowadays? How does the judiciary fit into such a system? Marta Cartabia will present a report on this issue.

When we speak of challenges to the authority of the judiciary we are, in a sense, speaking of the “rights” of the judiciary, and of the need to respect those rights. But we should not forget that rights bring with them “obligations”, “duties”, “responsibilities”. The European Court regularly states that “the courts [must] inspire confidence in the public”. This is a task for all the branches of State power, including the courts themselves. The whole idea of subsidiarity, a cornerstone of the European Convention on Human Rights, is also based on the presumption that the domestic courts are functioning properly. But what are the quality standards for courts and the standards of conduct for judges? And can courts and judges be held accountable for their acts? Bruno Pireyre will explore these issues.

For this first theme there will also be a presentation by a judge of our Court. What can our *case-law* offer as regards the position of courts and judges, from the point of view of the rights and expectations of those who make use of the public justice service? Pere Pastor Vilanova will share with us his views on these issues.

After the coffee break we will turn to our second theme: the *responses* to the challenges.

A response is a *reaction* to something that troubles us. But the judiciary is a sector where discretion and restraint are important values. So, is there room for courts and judges to defend themselves against challenges to their authority? Are there institutional mechanisms that can defend courts and judges? And what about the individual judges: can they stand up for the judiciary and, if necessary, for themselves? This is an area in which there have been considerable developments in recent decades. Martin Kayser will explain to us what can be done.

A response is one thing, but maybe the judiciary should also be *proactive*. How does it present itself to the public? We know that we often use language that is difficult for a layperson to understand. And apart from our hearings and our judgments, our work is not performed in the open. Is it surprising then that there are a lot of misunderstandings about what exactly we are doing, and why we decide things in one way and not another? Good communication can perhaps help to avoid such misunderstandings, even to inspire confidence in the public. But do we have sound communication strategies? We will hear about some good practices from Radmila Dragičević Dičić and Dace Mita.

At the end of the afternoon Lawrence Early will inform us about the Superior Courts Network.

3. Dear colleagues, we have many questions to discuss. I would like to encourage the judges from national courts to take an active part in this discussion. This seminar is not one where we want to discuss with you a particular aspect of our case-law and are eager to hear your views on it. Today, we are discussing a topic of truly “common” interest, and we hope that we can learn from each other about how to face the challenges to the judiciary, and ultimately to the rule of law.

I should perhaps say one thing about how we will proceed. The seminar will be recorded, and the video recording will soon be published on our website. This will allow others to benefit from our exchange of ideas.

Some courts have sent us written contributions. You will find them on the USB stick that you received. We very much appreciate these contributions. This format allows the courts to express more than can be said during an oral intervention. I would like to invite all of you to take a close look at these contributions. And I would like to thank the courts that made the effort to provide us with their views and suggestions: the Belgian *Conseil d’État* (which even sent two contributions), the Supreme Court of Cyprus, the Greek Supreme Administrative Court, the Turkish Court of Cassation, the Supreme Court of Ukraine, the Procurator General of Ukraine, and the Supreme Court of the Slovak Republic. We also received a contribution from the International Association of Judges.

Before ending my introduction, I would like to mention a few people who have been particularly helpful in the organisation of the seminar: John Darcy, who coordinated everything in the Registry; Rachael Kondak and Valentin Nicolescu, who drafted the background document containing a presentation of relevant cases from our Court’s case-law – this gives a good overview of the problems encountered by judges and the protection offered by the European Convention; Valérie Schwartz, who is responsible for all the administrative aspects of the seminar; and many others whom I am not able to mention individually. My warm thanks to them on behalf of the organising committee and, I am sure, on behalf of all of you.

And thank you for your kind attention. I am looking forward to a stimulating exchange of views.



Marta Cartabia

**Vice-President
Constitutional Court, Italy**

SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE: CURRENT CHALLENGES

1. The fundamental principles of the separation of powers and judicial independence are considered central tenets of all liberal democracies, everywhere and in every time. And rightly so.

“There is no liberty, if the judiciary power be not separated from the legislative and executive” (C.L. de Montesquieu, *The Spirit of Laws*, Book XI, 6, *Of the Constitution of England*, 1748).

It is no surprise that an adjudicator of individual rights and liberties such as the European Court of Human Rights has drawn attention to the separation of powers and judicial independence. Separation of powers is not only a matter of constitutional architecture, intended to secure the rational organization of powers. It is a matter of liberty for each individual and for society as a whole. It is a basic condition for the effective protection of individual rights and liberties, in order to guarantee to each individual an effective remedy against any breach of her or his rights.

2. Liberty, democracy and the balance of powers are not overnight achievements which can be considered as established once and for all. Much has been done since the time when *The Spirit of Laws* was written, but preserving liberty against the abuse of power remains an endless business. The risks to judicial independence and the separation of powers have always existed: at the time of the Act of Settlement of 1701 and under the constitutional monarchies in the 19th centuries, not to speak of the authoritarian regimes between the two World Wars. During the twentieth century new institutions were set up over time in most European countries in order to defend judicial independence. Many constitutions established Councils of the Judiciary as safeguards against the pressures of other branches of government, and for decades European liberal democracies were free from major attacks.

Over the last decade, however, the overall atmosphere has changed drastically.

To use Montesquieu’s words once again, contemporary Europe is facing the bitter truth that “constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. ... To prevent this abuse, it is necessary from the very nature of things that power should be a check to power” (de Montesquieu, *The Spirit of Laws*, Book XI, 4, *In what Liberty Consists*).

Unexpectedly powerful leaders, supported by strong majorities, have dismantled all restraints; the separation of powers has been eroded, and the rule of law and judicial independence are at risk in many countries and even in certain western liberal democracies. Many international actors – from the European Union’s institutions to the Council of Europe and the Venice Commission – are sounding the alarm and issuing warnings in the form of recommendations, resolutions and other documents.

The value of the separation of powers is evergreen, but it is also always at risk.

3. While the separation of powers is a perennial value, the historical context has changed dramatically since John Locke penned the *Two Treaties of Government* in the late seventeenth century (1690) and Montesquieu expounded upon it in *The Spirit of Laws* in the middle of the eighteenth century. It is important to discuss present-day challenges to the separation of powers and the authority of the judiciary in concrete rather than abstract terms.

The main dividing line to be preserved is, once again, between *political institutions* on the one hand and *institutions of protection* on the other. The historical dichotomy between *gubernaculum* – the government – and *iurisdictio* – the judicial branch – is again topical today: judicial independence is put at risk when the clear duality between *gubernaculum* and *iurisdictio* is blurred.

Times have changed in many respects. Judicial power is today no longer the mute, insignificant power of the nineteenth century. The current dangers for judicial independence are emerging after a period during which the “rise of the judiciary” within the constitutional system, as Mauro Cappelletti described it, was clear. Today, the judiciary plays a much more significant role than that of *bouche de la loi*, or mouthpiece of the law, as described by Montesquieu. In truth, this image of the judge was not much more than a myth, even in the nineteenth century, but in any event it certainly does not correspond to the contemporary reality.

I should like to pause here and elaborate slightly on some (of the many) factors which have brought the judiciary’s role to prominence in contemporary public life: for the sake of clarity I will group my remarks on this point under four headings: judge-made law; the rights revolution; the judicialisation of political issues; and the role of courts in a global world.

3.1. Judge-made law. In 1984 Mauro Cappelletti published an important book entitled *Giudici legislatori?*, or “Judge legislators?” (Le pouvoir des juges in the French translation, issued in 1990), in which he addressed the growing importance of the judiciary in twentieth-century societies in whatever form it may take, whether *judicial legislation* or *constitutional adjudication*. Cappelletti points out that, in reality, the mission of the judiciary overlaps to some extent with that of legislatures. On this basis, in the last decades of the twentieth century and beyond, civil-law and common-law countries were converging as a result of a number of factors, among which one could include at least the following.

First, the introduction of judicial review of legislation, to be conducted by constitutional courts (or equivalent bodies charged with the task of reviewing legislation). Although Kelsen has described them as negative legislators, these courts have also shaped their remedies in such a way that they can fill the gaps in the legal order and occasionally act as positive legislators, for example by means of interpretative decisions, that is, decisions which construe or correct legislation.

Second, a robust *constitutional culture and consciousness* permeates the mentality of all judges, including first-instance judges, and gives them broad discretionary power; this constitutional culture is also disseminated through legal education and the ongoing training of judges by “schools of the judiciary” which has been introduced in many countries.

Third, *judicial empowerment* as prompted by the European courts – both the ECHR and the Court of Justice of the European Union – which has encouraged judges who were previously strictly “subject to the law” (see Article 101 of the Italian Constitution) to disregard the law when appropriate.

Fourth, the success of *new methods of interpretation*, oriented towards avoiding any construction which could lead to results that conflict with higher norms – that is, interpretation in conformity with the national constitution, the European Convention and EU law. Given the poor quality of parliamentary legislation, the interpretative power of judges has expanded hugely, in the form of value-oriented interpretation (N. Zanon-F. Biondi, *Il sistema costituzionale della magistratura* (4th ed.), Zanichelli, Bologna, 2014).

3.2. This brings us to a second feature of our legal habitat: special mention must be made of the *rights revolution* or, if you prefer, the flourishing of a human-rights culture, which stimulates the judiciary to play a more proactive role. Late post-modern constitutionalism is based on the centrality of individual rights. *Iura* has overcome *lex*. Most of the new issues facing society are framed in terms of

individual rights: a number of new rights have stemmed from the right to private life, the right to self-determination, and the right to non-discrimination, and they touch upon new, sensitive, and unsettled issues of our day. Rights can be claimed directly before the courts. Whereas political bodies may be paralyzed by division and a lack of consensus and might be unwilling to deliberate on controversial issues, courts are bound to rule on even the most sensitive cases. New claims concerning bioethical issues, the transformation of family law, multicultural concerns, law and religion, and immigration are part and parcel of the everyday work of courts. In many cases, courts must decide issues relating to new rights without the support of clear legislation. These cases push the judiciary to the forefront of the public debate and keep it constantly under the spotlight.

3.3. The third feature that I would like to highlight is the *judicialisation of political issues*, by which I mean that *political issues are increasingly brought before the courts*.

During his visit to America, the French aristocrat Alexis de Tocqueville was struck by the powerful position of the judiciary in that country’s legal and political system. Among other things he noticed that, “there is almost no political question in the United States that is not resolved, sooner or later, into a judicial question” (*Democracy in America*, New York, Adlard & Saunders, 1838, Book 2, 8).

Nowadays his remark could easily be applied to many legal orders in Europe, although they belong to the so-called “civil-law” or continental tradition. “Judicialisation” of political questions – to borrow from Martin Shapiro and Alec Stone Sweet (*On Law, Politics and Judicialization*, Oxford, Oxford University Press 2002) – is a common trend in many countries: many questions once reserved for politics and legislatures are now handled by the courts. By way of illustration, allow me to mention briefly the two major decisions of the Italian Constitutional Court on electoral laws (no. 1 of 2014 and no. 35 of 2017) through which that Court incisively corrected, and almost re-wrote, legislation that had been approved by Parliament. For a long time, electoral laws were considered the “domain of politics”. For many years, however, political bodies had been unable to reach any agreement on new legislation, and public opinion was growing more and more critical of the legislation in force because of its misrepresentative effects. As a result, the electoral legislation was challenged before the Constitutional Court.

Another example that cannot be overlooked is the famous Miller case, decided by the United Kingdom’s Supreme Court, which required, in the name of parliamentary supremacy, that Parliament have a say on Brexit after the referendum approving withdrawal from the EU.

We see everywhere an “ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy and political controversies” (Ran Hirschl, *Towards Juristocracy*, Cambridge, Harvard University Press 2004, pp. 12 et seq.) Again, this trend really does put the courts under the spotlight.

3.4. Fourth, courts are to be included among the *main actors of legal globalization*. Whereas parliaments, governments and democratic institutions in general do not fit into large systems, courts seem to be suited to the grand scale. This fact is remarkable and almost ironic: it proves that a dramatic change is taking place in the judiciary. After all, the judicial function has traditionally been considered intrinsically “national” or “domestic”. Now, however, courts are more affected by the globalizing process than other branches of government.

A number of judicial or quasi-judicial bodies have been established in the international arena (S. Cassese, *I tribunali di Babele*, Donzelli, Roma 2009).

Moreover, an increasing number of issues brought before national courts have a “global side” (S. Breyer, *The Court and The World*, A. Knopf, New York 2015), so that these courts are more and more frequently called upon to resolve disputes in which international or foreign law is involved: disputes related to individuals’ mobility and immigration; disputes related to foreign investments; disputes involving global and supranational standards on trade, the environment or sports, for example; and disputes involving “individual rights”. The judicial branch appears to be more suitable than the other branches of government to act as a transmission belt between national and foreign legal orders, and courts are at the forefront of globalization.

Strong interconnections are being formed between courts all around the world. They do not necessarily require “formal” procedures, even if these are very important (such as Protocol No. 16 to the European Convention or the preliminary ruling in EU law); they may also occur in “informal” and unspoken ways, like an underground river that emerges from time to time on the surface. Not to mention judicial networks which favour cultural exchanges among judges.

There is no doubt that we are living at a time when the judiciary is thriving. Constitutional courts are not the only ones to have gained importance in Europe and elsewhere. The authority of supranational and international courts has increased. At the national level, the judicial function by and large exceeds the traditional syllogistic implementation of written legal rules. Judge-made law is now a reality, even in countries that can be ascribed to the continental tradition based on written parliamentary legislation. Human-rights adjudicators have multiplied.

Le juge bouche de la loi is an archaeological relic in Europe (if it ever existed at all). The judiciary has gained relevance in public life. It is not at all a “null power”, as it was once considered, but has become, on the contrary, one of the most relevant actors in the constitutional system.

The judiciary can no longer be depicted as “the least dangerous branch”, as Alexander Hamilton wrote in Federalist no. 78, and an air of criticism is spreading, one that often condemns the “political role of the courts”.

Moreover, on a different level, judges in some countries have become much more visible in public debate. They make statements through the media and form an extraordinary pool of experts who are often called to the highest positions of the administration, working next door to political bodies; significant numbers leave the judicial branch to compete in political elections and take seats in Parliament.

4. These are the conditions in which we must consider the present serious attacks on the judiciary.

In some cases, the attacks are *open and large-scale*; in others they are *veiled, disguised and discrete*. They vary in nature and require different kinds of remedies.

It is not my task today to elaborate on these possible remedies. On this point, we will listen to the presentations in the next session. Nor is it my task to present an overview of the situation in each country of the Council of Europe. On this point, the background papers provided for the seminar are excellent and exhaustive.

I will simply mention some areas of vulnerability and some current challenges.

4.1. With regard to the first category of attacks, those that are open and large-scale, we all have a number of countries in mind. Let me simply mention the endemic situation in Poland, which induced the Commission of the European Union to open a procedure under Article 7 of the Treaty on European Union. The Commission noticed that “over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch”. Therefore, “despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has ... concluded that there is a clear risk of a serious breach of the rule of law in Poland”. The Commission believes that the country’s judiciary is now under the political control of the ruling majority and, in consequence, it has proposed to the Council that it adopt a decision under Article 7(1) of the Treaty on European Union to protect the rule of law in Europe.

4.2. In other countries subtler attempts may be underway to control the role of the judiciary.

Let’s start from this simple fact. The judiciary carries out its functions *under the law*. The status, salary, tenure and career of judges, as well as the organization and procedure of judicial bodies, are regulated by law.

The law is a fundamental guarantor of the independence of the judiciary; the law is a shield against arbitrary interference with judicial activity on the part of single personalities. But the law can also adversely affect judicial activity.

Overviews produced by a number of bodies within the Council of Europe enumerate several aspects of judicial organisation and activity that are vulnerable.

The appointment and careers of judges should be regulated by the law on the basis of objective criteria and applied by an independent authority, such as a “council of the judiciary”. However, arbitrary changes in laws concerning the tenure, term, promotion, transfer, and responsibility of judges may affect the independence of the judiciary and render the national Councils for the Judiciary powerless.

Stability of tenure is an essential element of judicial independence. Unexpected and hasty changes in retirement-age rules, arbitrary termination of terms in office of judges, or forced dismissal of judges and prosecutors are just some examples of intrusion by political bodies in the judiciary. Attention should be paid to those positions that are held for a short fixed term (5-6 years) and are renewable at the discretion of the executive branch.

Another weak point may be judges’ remuneration and funding of the judiciary. The enduring economic crises suffered by many member States have required the imposition of severe cuts and the freezing of budgets and salaries for all areas of State administration, included the judicial branch. Whereas temporary sacrifices are inevitable, chronic underfunding can impair the working conditions of the judiciary: lack of appropriate remuneration, security risks, staff cuts, and cuts in peripheral judicial bodies can increase the workload of courts and undermine their ability to decide cases with the necessary quality and care and within a reasonable time. Moreover, cuts in legal aid may be an obstacle to access to justice.

All these (and other) organizational aspects are, generally speaking, regulated by general rules. Written rules are an instrument for protecting judicial independence, but under certain political and cultural conditions they become instruments for taming and curbing the role of the judiciary, through *reforms of the judicial organisation*.

As for *judicial activity as such*, a range of interference by political bodies can occur. An overview of the case-law – especially on Article 6 of the Convention – shows that retroactive legislation can be approved by political bodies in order to interfere with a specific case or a class of pending proceedings; partisan amnesty laws or milder legislation on criminal matters can halt pending trials and can be used to stop judges from imposing sentences or convicting defendants; the rules of procedure are in the hands of political bodies, in that they are regulated by legislation. Moreover, any reform of procedural rules is usually applied immediately – *tempus regit actum* – and can therefore easily encroach upon pending trials. Equally, special attention should be paid to standing: *locus standi* is crucial for a judge’s possibility to act. *The judicial function is a power exercised on demand*. No court can initiate a case; a court is required only to respond to a case that is brought before it. Nor can it broaden the scope of its decision: the parameters of its power are delimited by the plaintiff. Restricting the rules on standing or reducing access to the justice system can neutralize the courts.

5. To sum up, many of the guarantees of judicial independence “depend” on legislation. But what if legislation itself takes an illiberal turn? Many European legal orders have a constitutional court, and it falls to the constitutional court to ensure that constitutional principles – including the separation of powers and the independence of the judiciary – are complied with by all actors. To this end, there are several areas of jurisdiction in respect of which proceedings may be brought before the constitutional courts, according to the rules of each legal system: judicial review of legislation, a direct complaint, and conflicts between the branches of power.

There is much that constitutional courts, and the European Court of Human Rights, can do.

However, since my presentation is focused on challenges – and not on remedies – I am not allowed to conclude on a positive note. Even constitutional courts have weak points. The constitutional courts are the keepers of the Constitution; but they themselves are made up of judges.

And, like all other judges, they may be attacked on tenure, funding, salaries, and procedures, as the Polish experience shows.

Moreover, like all other judges, they do not have the power of the sword: if their decisions are disregarded, or are not implemented, they are mute. They are disabled; their decisions go unenforced or are ignored.

In most cases, in the face of specific or individual challenges to judicial independence, constitutional courts can defend, strengthen and support other courts. Courts are networked and can do a great deal to support one another. However, when the disruptive effect on judicial independence comes from the system, and not from a single piece of legislation – when the culture is permeated by “constitutional bad faith”, as Lech Garlicki puts it (L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Poland? = Disabling the Constitutional Court in Poland?*, in B. Banaszak and A. Szmyt (eds.) *Transformation of Law Systems. Liber Amicorum in Honorem Professor Rainer Arnold*, Gdańsk University Press, Gdańsk 2016, p. 63) – then it would seem that courts are disarmed.

As Kim Scheppele has pointed out, in some European countries the crisis of the rule of law is more cultural than (il)legal. It might be better to say that it was cultural before becoming (il)legal and (un)constitutional. To oppose and prevent this cultural crisis, we the courts can do much to strengthen our authority, even when our powers are under threat. Note: I am using the word authority in the original Latin meaning. *Auctoritas* and *potestas* (or *imperium*) were not equivalent in Roman law, as Giorgio Agamben observes (*Stato di eccezione*, Bollati Boringhieri, Torino 2003; English translation: *State of Exception*, Chicago, University of Chicago Press 2005). *Auctoritas* has to do with reputation, consideration, respect, and legitimacy. Even with similar legal frameworks, judges are more respected in some countries than in others: for this reason, comparative constitutional scholarship sometimes makes a distinction between “strong” and “weak” courts. The powers are the same, but the reputation and effective role of the courts may differ. A number of factors affect – that is, enhance or undermine – the *auctoritas* of judges: respect for *stare decisis*; the credibility of the reasoning and opinions; due consideration for all the arguments brought before the bench; the political exposure of judges; a good relationship with public opinion, and so on and so forth. There are challenges which blatantly and grossly harm judicial independence by means of legislative and constitutional reforms, and others which silently erode the credibility of the judiciary. We, the courts, can do a lot on both levels: protecting the separation of powers as well as enhancing the *auctoritas* of the judiciary in the long term, in the public sphere.



Bruno Pireyre

**Chamber President
Court of Cassation, France**

CHALLENGES TO THE AUTHORITY OF THE JUDICIARY RESPONSIBILITY AND ACCOUNTABILITY OF COURTS AND JUDGES

President of the European Court of Human Rights, Judges of the Court, President of the Court of Justice of the European Union, Secretary General of the Council of Europe, First Presidents and Presidents of Supreme Courts and Constitutional Courts, Dear colleagues, Ladies and gentlemen,

Without neglecting first of all to express my heartiest thanks to President Guido Raimondi and the organisers of this seminar, especially Judge Paul Lemmens, I now have the task, confined to some twenty minutes, of offering to this eminent gathering a few brief observations and questions relating to the theme – which is as profuse as it is elastic – of the responsibility and accountability of courts and judges.

In view of the time constraint I will dwell only on the few aspects which I have found to be the most fundamental. I am sure you will not mind, aware as you are of Voltaire’s wise words, “*the secret of being a bore is to tell everything*”.

INTRODUCTORY EXPLANATIONS

Since our event today – our gathering – extends to the entire continent in which we live, I have deliberately refrained from giving any examples from the domestic law of my own country, or any other, and have purely relied, where necessary, on texts with a European origin and/or scope.

Those texts are as follows – and I will list them now rather than burdening my talk with citations later:

- Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe of 17 November 2010 on judges: independence, efficiency and responsibilities;
- the European Charter (Council of Europe) on the Statute for Judges, 10 July 1998;
- Opinion no. 3 of 19 November 2002 of the Consultative Council of European Judges, for the Council of Europe’s Committee of Ministers, on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality;
- the *Magna Carta of Judges* of the Consultative Council of European Judges, 17 November 2010;
- the Sofia Declaration on “Judicial independence and accountability”, General Assembly of the European Network of Councils for the Judiciary, 5 and 7 June 2013;
- the Report of that Network for 2016-2017, “Independence, Responsibility and Quality of the Judiciary”;
- the “Judicial Training Principles” set out by the European Judicial Training Network at its General Assembly on 10 June 2016;

- the “Declaration of Judicial Training Principles” adopted by the International Organisation for Judicial Training on 8 November 2017;
- lastly, the proceedings of the conference concerning “the Contribution of Inspection Services to the Improvement of European Judicial Systems” held in Paris on 16 March 2017.

The responsibility at issue here is, all at the same time, ethical (to be bound to; to have a duty to), legal (to be answerable for; to have an obligation to) or indeed “public” (to be held to account for). These different meanings were gradually given to the French term (*responsabilité*) in the fourteenth and eighteenth centuries, mainly in the latter and in respect of public authority. The meaning was then influenced by British constitutionalists, conveyed through the speeches, it is said, of British Prime Minister William Pitt. In English there are three related terms: responsibility, liability and accountability. The latter notion refers to the attribution of the underlying substance or conscience of responsibility to the person in whom it is vested.

I. THE JUDGE’S RESPONSIBILITY IS AN INTERACTIVE, OVERARCHING FACTOR WHICH CANNOT BE CONSIDERED ON ITS OWN

All the texts mentioned above – or almost all – present the responsibility of the judge as a “*corollary of the powers and trust conferred by society upon judges*” or as one of the essential conditions, together with their independence, impartiality and competence, of an “*efficient and effective system of justice*”.

On that basis, the responsibility of the judge and the courts – a national paradigm but also a European standard – is part and parcel of the quality of the judicial decision and accordingly of the mutual trust which – as we all know – goes to the heart of the implementation of the principle of mutual recognition, cornerstone of the judicial pillar of the European construction.

It follows that the independence and responsibility of the judge, as of the judiciary, can be regarded as two sides of the same coin. Accordingly, the principle of independence – the bedrock of impartiality – whether it be that of the judge, of the court, or of the justice system as a whole, and whether it is objective or subjective, statutory or functional, circumscribes the scope and the exercise of judicial responsibility. In turn, the judge’s responsibility prevents or curbs the potential repercussions of independence for the legitimate demands of a democratic State or society.

Lastly, as mentioned above, the judge’s responsibility at issue here goes beyond and by far – and quite rightly – the contours of his or her legal responsibility, which will be dealt with in a few lines at the end of this presentation.

In other words, it encompasses everything for which the judge is accountable, even in matters which the judge is not compelled to answer for by the sanction of the law itself. It is precisely in this spirit that the *Magna Carta of Judges* adopted on 17 November 2010 by the Consultative Council of European Judges states: “*Deontological principles, distinguished from disciplinary rules, shall guide the actions of judges. They shall be drafted by the judges themselves and be included in their training.*”

II. A NUANCED DISTINCTION: COLLECTIVE RESPONSIBILITY (INSTITUTIONAL) AND INDIVIDUAL RESPONSIBILITY (OF THE JUDGE)

The responsibility of the judge, taken separately, and that of the courts (or indeed the judicial authority), taken as a whole, have much in common. They can be seen as a mirror image of each other and are bound by strong ties, but nevertheless have quite distinct features. It was on the basis of this distinction that the European Network of Councils for the Judiciary elaborated its table of indicators as to “*objective responsibility*”, clearly separating that “*of the judiciary as a whole*” from that “*of the individual judge*”.

II.1. Responsibility in the person of the judge

Responsibility is underpinned by knowledge and conscience – a word which warrants emphasis – of the (ethical) duties and the obligations (of professional competence, of deontological conformity) which the judge is bound to acquire and indeed to follow in his or her practice and conduct.

Three observations are called for by way of explanation.

II.1.1. While the judicial authority and the bodies dispensing judicial training must be responsible for the conception, content and implementation of judges’ training, it falls within the rights of every judge, as well as within his or her (personal) responsibility, to “*undergo such training*”, and “*to acquire the knowledge and skills necessary for good-quality adjudication*”.

II.1.2. Among the rules that it is the judge’s specific responsibility to observe, special mention must be made of those which guarantee his or her impartiality, in particular those which oblige the judge to foresee or remedy any conflict of interest.

While the judicial authority has a responsibility to adopt and ensure the effectiveness of the appropriate mechanisms in this regard (incompatibility of duties and activities, declarations of interests, procedural mechanisms providing for the abstention or withdrawal of a judge, reasonable suspicion of bias disqualifying a judge from hearing a case), the responsibility lies with the judge when it comes to actively and faithfully ensuring their strict implementation as soon as the judge’s personal situation engages such rules.

II.1.3. In the technical exercise of his or her duties (applying legal rules in accordance with the requisite procedure and – to an extent that will increase over time – making use, where appropriate, of the good practices collectively elaborated by and with other judges), a particular prominence must be attributed, it is submitted, to the duty of judges to “*make the discussions intelligible to the parties*”, and to “*give clear reasons for their judgments in language which is clear and comprehensible*” so that “*the application of the law is visible and the parties can decide whether or not to exercise their right of appeal and, if so, to prepare such an appeal*”. In other words, judges have to be “*conscious of their responsibilities*”, stemming from the fact that “*the confidence of litigants can only exist if the proceedings and the resulting decisions are clear and comprehensible*”.

We can thus gauge the extent to which this responsibility will be bolstered by the universal knowledge, as it were, of the corpus of judicial decisions to which open data will shortly give citizens access, at least those of the Member States of the European Union.

II.2. Responsibility of the courts and of the judicial authority

The subject will be examined under four of the most topical aspects.

II.2.1. It is the responsibility of the public authorities and more specifically of the judicial authority, in addition to the presidents of individual courts, to ensure that at the institutional and regulatory level, but also in terms of effectiveness, “*the independence of each individual judge [must be guaranteed] in the exercise of adjudicating functions*”.

II.2.2. Nevertheless – and I draw your attention to this – in its Recommendation of 17 November 2010 the Council of Europe’s Committee of Ministers was at pains to explain that “*in order to facilitate an effective and efficient administration of justice*” and “[w]ithout prejudice to their independence”, “*judges and the judiciary should maintain constructive working relations with institutions and public authorities involved in the management and administration of the courts, as well as professionals whose tasks are related to the work of judges*”.

This consideration, which is far from trivial, stems in my opinion from the fact that the courts, i.e. the judicial institution, are organs exercising governmental authority – not to be confused with the executive arm of the State – albeit performing a specific mission (justice), with a particular status (independence) and playing their own role in that authority (through the separation of powers).

Therefore, cooperation with other public authorities, at the distance and in the appropriate manner imposed by both the separation of powers and the independence of the justice system, will be justified in so far as, in particular, it contributes to efficient adjudication.

That was precisely what Stephen Breyer, Judge on the US Supreme Court, wrote in his work of 2010, *Making Our Democracy Work: A Judge's View*: “Part of my aim is to show how the Court can build the necessary productive working relationships with other institutions [he had referred to the Congress and the executive branch] without abdicating its own role as constitutional guardian”.

II.2.3. It is the State's duty to provide judges with the necessary resources for the proper performance of their mission and in particular to ensure that cases are processed within a reasonable time. Indeed, its responsibility is to “allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently”. The State should thus provide the “information [the judges] require to enable them to take pertinent procedural decisions”, “a sufficient number of judges and appropriately qualified support staff” and “electronic case management systems and information communication technologies”.

Nevertheless, a balance must be struck between “the right of judges to adequate working conditions and their responsibility for the use of the resources placed at their disposal”.

These imperatives thus naturally and necessarily entail the collective or individual responsibility of judges, as the case may be, to carry out or contribute to their evaluation, as required by the duty of public transparency which is incumbent on the judicial authority as a whole and delegated to each individual court. Thus the *Magna Carta of Judges* of 17 November 2010 proclaims that “[j]ustice shall be transparent and information shall be published on the operation of the judicial system”.

It should not be overlooked that such evaluations must be carried out in conditions, relating to the choice both of the evaluator and of the process followed, which are compatible with the requirement of independence of judges and courts in the exercise of their judicial attributes.

II.2.4. A further area of collective responsibility of the judicial authority and individual courts – one that remains poorly identified and insufficiently explored – concerns the function of case-law, at least as it applies in continental law jurisdictions which, like my own, are not familiar with the common-law principle of *stare decisis*.

These judicial institutions, these courts, are they not responsible at least for promoting – if not for guaranteeing – through procedural rules, certain forms of organisation and good collective practices, a relative stability, and a sufficient convergence of case-law in the application of the same legal rule?

Without excluding the departures from precedent that may be required by the necessary development of the law, such foreseeability, as thus assumed, goes hand in hand with the principle of legal certainty and the protection of the legitimate expectation of citizens that the European Court of Human Rights, describing it as “implicit in the Convention”, has come to regard as “one of the fundamental aspects of the rule of law”.

In these situations too, the above-mentioned judicial “big data” will render these requirements more pressing, while at the same time highlighting the inconsistent solutions which will almost automatically stem from the large-scale dissemination of judicial decisions affecting the general public.

Paradoxically – but in the long run – this same trend towards open data will most probably constitute a powerful instrument for the harmonisation and convergence of legal solutions.

III. THE HIGHLY REGULATED ISSUE OF LEGAL RESPONSIBILITY OF JUDGES AND COURTS

As the relevant rules governing such matters are sufficiently known, I will merely reproduce the following basic principles:

“When not exercising judicial functions, judges are liable under civil, criminal [and administrative] law in the same way as any other citizen” ... “in ordinary law”.

“Judges should not be personally accountable where their decision is overruled or modified on appeal”.

“The remedy for judicial errors should lie in an appropriate system of appeals”.

“Any remedy for other failings in the administration of justice lies only against the State.”

I will now apply these guidelines, broadly speaking, to the three legal forms of responsibility or liability that may be engaged by judges.

III.1. First, the criminal liability of judges

A judge cannot be found criminally liable for acts performed in the course of his duties in the event of an unintentional failing.

III.2. Second, the judge's civil liability

“The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil [or even disciplinary] liability, except in cases of malice [intentional fault] and gross negligence”. The latter issue was addressed by Opinion no. 3 (19 November 2002) of the Consultative Council of European Judges, which set it aside on account of the lack of precision of this notion.

“Judicial failings which cannot be rectified through an appeal (including, for example, excessive delay) should, at most, lead to a claim by the dissatisfied litigant against the State”. It is for the State to “guarantee compensation for harm wrongfully suffered as a result of the decision or the behaviour of a judge in the exercise of his or her duties”.

In situations of this kind where the State has paid compensation, it may, if provided for by the domestic law, claim reimbursement from the judge, within a fixed limit, by way of legal proceedings, in the event of an intentional fault and – while this is a matter of debate, as already mentioned – in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties.

Recourse proceedings of this nature must be brought before a court, with the safeguard that prior agreement should be obtained from an authority that is independent of the executive and the legislature and which has substantial judicial representation, at least half of its members being judges elected by their peers.

III.3. Lastly, the disciplinary liability of judges

Disciplinary proceedings may follow “where judges fail to carry out their duties in an efficient and proper manner”. “In each State, the ‘statute or the fundamental charter’ applicable to judges shall define – as precisely as possible – the misconduct which may lead to disciplinary sanctions as well as the disciplinary procedure”.

That procedure, which must be fully accompanied by the safeguards of a fair hearing, and in particular of defence rights, and must provide for the possibility of an appeal (before a court of law), should be conducted either before a tribunal or before another body (an independent authority) of which at least half should be made up of judges elected by their peers.

The legitimacy of the adjudicating disciplinary body is of central importance. From that perspective it appears natural and logical that the body in question should, both at first instance and on appeal, be made up of a sufficient proportion of elected judges.

Moreover, States “should envisage introducing a specific body or person with responsibility for receiving complaints, for obtaining the representations of the judge and for considering in their light whether or not there is a sufficient case against the judge to call for the initiation of such proceedings”.

Lastly, the sanctions available to such authority in a case of proven misconduct should be defined, as far as possible in specific terms, by the “statute or fundamental charter” of judges, and should be applied in a proportionate manner.

BY WAY OF CONCLUSION ...

It is submitted that the tension – as intense as it is complex – between the independence and the responsibility of judges and courts, a tension which has pervaded this discussion, indeed goes to the heart of a question which is so topical in our twenty-first century democracies, that of the citizen’s trust in the justice system.



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ACCOUNTABILITY OF THE JUDICIARY: SHARED RESPONSIBILITY OF JUDGES AND THE STATE

Presidents, Excellencies, Dear Colleagues, Ladies and Gentlemen,

The task of adjudicating cases usually constitutes a State monopoly. This public-service mission pursues an undoubted aim in the general interest, with citizens as the main stakeholders. They are entitled to demand a fair trial, at the very least, under Article 6 § 1 of the European Convention. Justice therefore represents a true “duty” towards the public.

Acting in the interests of the public, that is to say, contributing to the proper administration of justice, thus becomes one of the key elements of judicial proceedings.

Given that judges are not usually elected by citizens, they may be tempted to look elsewhere for some form of legitimacy or social acceptability. This will be enhanced if their decisions have the support of the majority of people and of the public institutions.

This concern for recognition and accountability of judges underlies the so-called Bangalore principles, which were approved by the United Nations Economic and Social Council in 2006 and advocate ethical standards for judges. Even in the Preamble, it is stated that “... *public confidence ... in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society ... it is essential that judges ... respect and honour judicial office as a public trust ...*”

A number of questions may thus arise:

- How do we improve the acceptability of judicial decisions?
- What factors contribute to judges’ accountability and how can they be put into effect?
- What efforts can be made to ensure that judges have a sense of responsibility in the performance of their duties?
- What are the possible limits of this quest for judicial accountability?

My talk will focus mainly on judges’ accountability. While it seems to me indisputable, and frequently a matter of public order, that judges should have criminal and disciplinary responsibility, I have grave reservations when it comes to their civil liability, which I regard as seriously undermining judges’ independence.

It is impossible to adjudicate cases in a calm manner with the constant threat of being the subject of a tort action. Any errors made by judges need to be rectified, to my mind, by means of the available judicial remedies and, in the alternative, by means of redress from the State budget for the damage caused.

Moreover, are poor judicial decisions not the consequence of a poor choice of judge (*culpa in eligendo*), or of having judges who have been poorly trained throughout their careers, or who are under-resourced or poorly appraised by the State (*culpa in vigilando*)? We might also ask whether an

approach based on upstream judicial accountability might not be preferable to a response *ex post facto*, sometimes of a populist nature, designed to punish judges across the board. According to such an approach, making judges accountable entails first and foremost preventing dysfunctions in the judicial system. It is the result of a rigorous ethical system and a complementary legal framework that requires judges to demonstrate at all times the qualities expected of them. An exemplary justice system is most likely to be achieved by strengthening judicial ethics.

In order to address these issues, I have organised my analysis around two ideas:

(A) judges must inspire public confidence (or how they must be perceived); and

(B) judges must establish their legitimacy in the eyes of the public (or how they must conduct themselves).

(A) JUDGES MUST INSPIRE PUBLIC CONFIDENCE (OR HOW THEY MUST BE PERCEIVED)

The accountability of judges can be achieved through their selection, the transparency of judicial procedure and the guarantees of their independence.

1. THE RIGHT TO A GOOD JUDGE:

– Technical qualities (initial and ongoing training)

High standards for the training and recruitment of judges are vital if they are to have a keen sense of responsibility in performing their professional duties. A very demanding selection process may arguably motivate successful candidates to demonstrate subsequently that the decision to appoint them was not just fortuitous but was wholly justified. Not only should judges demonstrate a high level of legal expertise outside the classroom; there should also be no possibility for judges to invoke a lack of professional competence in order to avoid any form of responsibility.

In numerous countries, ongoing training is not just a right but a duty. Hence, all judges are required to maintain a high degree of professional competence throughout their careers. This requirement sometimes comes into conflict with judges' heavy workload. A balance must then be struck between the need to hear cases within a reasonable time and the essential task of updating and building on knowledge.

– Human qualities

While the process of selecting judges tends to focus on their legal competences, some countries have, by means of domestic legislation or practice, introduced assessments relating to the human qualities of candidates for judicial office, including willingness to listen, common sense, sensitivity, courage, tact and an ability to take decisions with authority. I am willing to bet, Ms Cartabia, that the President of the Italian Constitutional Court would have added imagination to the list! In any event, a failure to demonstrate these qualities may result purely and simply in the elimination of the candidates concerned.

« *Science sans conscience n'est que ruine de l'âme* » ("Science without conscience ruins the soul") said Rabelais. In my view, this applies perfectly to the legal sciences.

While the right to have one's case heard by a good judge is a legitimate aim, it is also necessary to know the judge's identity in order to assess him or her.

2. THE RIGHT TO KNOW THE JUDGE'S IDENTITY

There are two conflicting positions as regards the need to protect the identity of the judges who deliver a judgment.

Some argue that disclosing judges' names helps to make them accountable and to make the justice system transparent. The President of the French Court of Cassation supports this view. In an article written last year, he stressed that "judges should not be embarrassed by the rulings they give".

Those who advocate anonymity stress that identifying judges could make it possible to compile judicial statistics giving names and hence to identify the predominant line taken by individual judges. They argue that access to such data could be a sensitive issue, especially in legal systems where the management of judges' careers depends on the executive. To my knowledge, as far as the Council of Europe member States are concerned, only one Supreme Court preserves the anonymity of the judges who have taken part in a judgment.

Despite the existence of a broad European consensus, a balance remains to be found between the rights of persons coming before the courts to know the identity of the judges and the protection of judges against any attempts at destabilisation that might result from large-scale publicity via the Internet.

But let us take a few moments to look at the example of the European Court. The concern for transparency is near absolute, although some would argue that there is one slight downside to this, as the separate opinions mechanism often reveals, or makes it possible to deduce, which judges voted which way in Chamber and Grand Chamber judgments.

However, the situation is different when it comes to inadmissibility decisions adopted by a Chamber. According to long-standing practice, the operative provisions of the decision merely state that it was adopted by a majority or unanimously. The fact that it is not possible to issue separate opinions means that there is no way of knowing how the majority was formed and which point or points were most keenly debated. This lack of traceability may be open to criticism, especially in sensitive cases where there is only a slim majority, as we all know that inadmissibility decisions cannot be referred to the Grand Chamber.

Disclosing the identity of the judges who voted for or against finding an application inadmissible would not necessarily breach the secrecy of the deliberations. It would not undermine the independence of the other judges or the authority of the decision, in particular because confidentiality concerns the position of the other judges rather than one's own. I realise that this idea has advantages and drawbacks, but they are similar to those raised in the debate about separate opinions.

I would now like to examine the role of the State in guaranteeing judges' independence.

3. THE RIGHT TO HAVE ONE'S CASE HEARD BY AN INDEPENDENT JUDGE

True independence for judges is crucial to the manner in which they approach their duties. For that reason I would like now to address the issue of political interference with judicial authority. It is clearly difficult for a judge who is under State control to show due professional care.

It should be stressed at the outset that the Convention does not impose a strict separation of powers. Consequently, it does not rule out the possibility that the executive may play some role in the appointment, career development and even dismissal of judges.

– Appointment of judges by the executive

In the case of *Majorana v. Italy* ((dec.), no. 75117/01, 26 May 2005), the Court did not call into question the role of a regional authority in the appointment of some judges, once it was clear from the rules governing judges that they must not be subjected to pressure or receive instructions from anyone, and must perform their duties in a fully independent manner. Hence, the Court attaches great importance to all the safeguards that serve to counterbalance the absence of a clear separation between the executive and the judiciary (see *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 78, Series A no. 80; *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 202, Series A no. 102; and *Maktouf and Damjanović v. Bosnia and Herzegovina*, [GC], nos. 2312/08 and 34179/08, § 51, ECHR 2013 (extracts)).

– Dismissal of judges by the executive

Here, the Court takes into consideration the written guarantees but also the way in which the rules are interpreted and the practices followed. The issue that will prompt the Court to find a violation is not the possibility as such of dismissing judges, but the potential use of that power to encroach on their independence (see *Morris v. the United Kingdom*, no. 38784/97, § 68, ECHR 2002-I; *Sacilor Lormines v. France*, no. 65411/01, § 65, ECHR 2006-XIII; and *Eccles and Others v. Ireland*, no. 12839/87, Commission decision of 9 December 1988).

– The disciplinary body for judges should be separate from the executive and the legislature

The corollary to the guarantee of judges' independence is the independence of the body responsible for disciplinary review. A recent report by the Consultative Council of European Judges (CCJE) (3 November 2017) is worth citing in that regard, even though it is still provisional. It stresses one fundamental point, namely that judges should have security of tenure until retirement age (paragraph 17). This implies that a judge's tenure cannot be terminated other than for personal reasons or as a result of disciplinary proceedings. The second of these exceptions (disciplinary sanctions) inevitably raises the issue of the body responsible for disciplinary matters in relation to judges. The CCJE report states that "[o]nly an independent Council for the Judiciary can secure the independence of judges by rendering decisions which fulfil the requirements of 'an independent and impartial tribunal' according to Article 6 of the ECHR" (paragraph 19).

This report does not overlook the case-law of the European Court, and in particular the Court's judgments in *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 112 and 113, ECHR 2013); *Mitrinovski v. the former Yugoslav Republic of Macedonia* (no. 6899/12, § 45, 30 April 2015); *Gerovska Popčevska v. the former Yugoslav Republic of Macedonia* (no. 48783/07, 7 January 2016); and *Baka v. Hungary* ([GC], no. 20261/12, §121, ECHR 2016).

Although depoliticisation of the judges' disciplinary body appears desirable, it has its limits in the possible corporatism stemming from the presence of a large number of former judges within the ranks. A subtle balance is therefore needed in order to avoid these two pitfalls.

Let me move on now to the second part of my address.

(B) JUDGES MUST ESTABLISH THEIR LEGITIMACY IN THE EYES OF THE PUBLIC (OR HOW THEY MUST CONDUCT THEMSELVES)

Carefully reasoned judgments, personal independence and external scrutiny of judges' activity are all factors that help to create bonds of genuine trust between members of the public and their judges and, accordingly, the entire institution of the judiciary.

1. THE ESSENTIAL REQUIREMENT TO GIVE (ADEQUATE AND COMPREHENSIBLE) REASONS FOR JUDICIAL DECISIONS

Stating the reasons for judicial decisions is the essential corollary to the principle of the proper administration of justice (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). It pursues several aims. Firstly, it obliges the person giving the decision to adopt rigorous reasoning founded on objective arguments and based exclusively on the rule of law. This duty of lawfulness is inseparable from the exercise of judicial office. For instance, in the Grand Chamber case of *Taxquet v. Belgium* ([GC], no. 926/05, § 97, ECHR 2010), the Court ruled that the applicant's inability to understand why he had been found guilty meant that the trial had been unfair.

Secondly, stating reasons is a means of demonstrating to the parties that they have been duly heard, which increases the likelihood that they will accept the decision. As Professor Michel Grimaldi puts it: "The right to be given reasons ... is not just the right to know, it is also the jumping-off point for the right to appeal". Our Court reiterated this, for instance, in *Hadjianastassiou v. Greece*

(16 December 1992, § 33, Series A no. 252). In that case the applicant was unable properly to prepare his appeal on points of law because the reasons for the Court of Appeal judgment convicting him had not been made clear to him.

Hence, giving reasons constitutes a genuine qualitative requirement. Reasoning that is standardised, skeletal or vague is therefore tantamount to a denial of justice (see *Georgiadis v. Greece*, 29 May 1997, §§ 42-43, *Reports of Judgments and Decisions* 1997 III, and *Higgins and Others v. France*, 19 February 1998, §§ 42-43, *Reports* 1998 I). One can logically argue that reasoning is one of the fundamental aspects that legitimise judicial intervention in the resolution of disputes. On that basis, should it not constitute a value in its own right within ethical standards, on a par with competence, propriety and equality of the parties to the dispute?

The same issue arises where the law exempts judges from giving reasons for their decisions. For instance, in some countries judges are not required to give reasons when granting leave to adopt a child. We might even add that the fact that no appeal is possible against certain decisions of the civil or administrative courts because there is little at stake is a factor that may discourage judges from taking responsibility.

The requirement to give reasons is one of the best guarantees against arbitrariness. However, the reasoning must be honest and be based on the judge's own analysis, that is to say, it must be free from any interference by third parties with an interest in the outcome of the dispute.

2. A HEIGHTENED REQUIREMENT OF PERSONAL INDEPENDENCE

Principle 1.4 of the Bangalore principles states as follows: "In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make ..."

The CCJE report which I cited earlier stresses the importance of the role played by the presidents of courts and also by those who preside over their different judicial formations. It points out that court presidents are important spokespersons for the judiciary, especially in relation to the executive. The vast majority act completely independently while a few, in exceptional cases, are subject to influence from a political authority or *de facto* powers.

But problems in relation to judges can sometimes arise internally. The CCJE has pointed with concern to another threat resulting from courts' own internal hierarchies (paragraph 51). According to a wide-ranging survey of more than 11,000 European judges, the three main sources of pressure are: the "management" of their own court – including the president – (25%), the parties (24%) and the media (16%). The report reiterates that a court president should never execute his or her duties in a way that puts pressure on a judge or influences him or her to decide a case in a certain way (paragraph 20). This point should not be overlooked. The appointment of court presidents by their peers, for a fixed term, as at the European Court, is perhaps an avenue worth exploring.

Before finishing I must say a few words about the periodic supervision which judges must undergo. This should not be perceived as limiting their independence: on the contrary, it prevents problems from arising and at the same time inspires public confidence.

3. THE NEED FOR EXTERNAL OVERSIGHT

I will look at this issue from two completely different perspectives: on the one hand, the appraisal of judges, and on the other, the recording of interviews, witness examinations and hearings.

The issue of the appraisal of judges is a familiar one. The limits to it are well known. Some people argue that assessing the quality of judicial decisions may undermine judges' independence. Others contend that judges may be tempted to give decisions that will please their appraisers. Perhaps it is time to move beyond the system of unilateral rating towards a more interactive approach in which the primary aim of the appraisal would be to provide feedback on the work of the judge in question, so as to identify possible shortcomings and find lasting solutions.

But this external oversight should not be confined to judges' appraisals or internal "house-keeping" inspections. It may also relate to the way in which trials are conducted as a general rule. The recording of interviews and hearings strikes me as a worthwhile approach. Besides the probative value of each individual's statements and demeanour, it is a means of preventing abuse both on the part of the parties or witnesses and on the part of the members of the judiciary themselves.

In conclusion, it can be argued that judicial accountability is a shared responsibility. It results from the judge's "soft skills" and know-how, but also from the vital contribution of the State, whose task it is to create a coherent legal framework for this purpose.

It is when these two situations converge that judges feel fully responsible for their actions and the public believes in their legitimacy and authority.

Thank you.



Martin Kayser¹

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COUNTERACTING CHALLENGES TO JUDICIAL AUTHORITY

Judicial authority and independence face a number of challenges. Parliaments remove judges from office because they dislike their decisions. Governments cut court budgets. The media attack not only court decisions, but also judges on a personal level. This paper suggests that attacks on judicial independence are not a new phenomenon, but have a long tradition in history. Therefore, by refining their defence strategies judges can learn a lot from the wisdom and boldness of their earlier English counterparts. However, as the challenges today are numerous, one defence strategy alone does not suffice. Thus, this paper compares defending judicial independence to defending a medieval city on three levels. The Council of the Judiciary is the river floating around the city, the presidents of the courts form the outer wall, and the judges form the inner wall. Each of those three players has different tasks. They all have the same aim, namely the preservation of judicial independence.

(1) EARLY POPULIST CHALLENGES

(A) "SO CALLED" JUDGES THEN AND NOW

Courts exercise power. So do governments. Thus, it is only natural that governments should challenge the power of the courts. The phenomenon is not new. Challenges surfaced long before leaders complained about "so-called judges"². They started with the kings and queens of mediaeval England, who granted their courts authority to decide on disputes between individuals. The judges duly decided those disputes. The kings were happy, as they did not have to bother about everyday matters.

The kings, however, had to deal with other matters. One was drainage. England had many swamps at that time. Therefore, the monarchs sent out their servants to clear the swamps by building drains through private property. The landowners were not happy about this. So they went to court³.

Now the judges had a problem. Their jurisdiction extended to civil disputes and criminal law, but there was no such concept as a dispute between a private citizen and the public administration. So what could they do? They had a wonderful idea: what the officers of the King had done was

¹ Dr Martin Kayser and Rahel Altmann, MLaw, Swiss Federal Administrative Court. This article is based on a panel paper for a seminar on the authority of the judiciary at the European Court of Human Rights on 26 January 2018. The authors would like to thank Anna Kotlinski, David Aschmann, Gabriela Medici, Marianne Ryter, Marc Steiner and Michael Beusch for their comments on first drafts of the paper. All the remaining errors are the sole responsibility of the authors. The views expressed herein are personal and do not bind the Swiss Federal Administrative Court in any way.

² See https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.9a6de9821b93.

³ See Louis L. Jaffe and Edith G. Henderson, "Judicial Review and the Rule of Law: Historical Origins", *Law Quarterly Review* (1956) 72 pp. 345, 353.

trespass, they said, and trespassing is illegal. Therefore, the officers would have to leave the private land to its owners⁴. To enforce those judgments the courts derived their authority directly from the Crown. The judges were probably not aware that they were writing history.

(B) WHEN KINGS AND QUEENS ARE NOT AMUSED

At the beginning, the kings of England tolerated what the judges did. However, the courts became bolder. The kings were not amused. They dismissed the boldest judges from the bench. It took a civil war to grant the judges security of tenure.

The absolute powers of the kings of England disappeared. The tasks of the courts remained. It is our job to make sure that governments exercise their powers in accordance with the rule of law. This is something not everyone seems to appreciate. Some populist politicians seem to draw their inspiration from the former kings of England. When they do not like what judges decide, they send them to the remote corners of their country⁵. They make sure that the most unruly ones are not re-elected. Sometimes, they attack them openly. In 2015 the Ukrainian Prime Minister said in a press interview that judges were “incredibly corrupt and [did] not dream of administering justice”⁶. He also suggested replacing all of the 9,000 judges in his country. Others proposed that judges who “confused” the rule of law should be “thrown out of the window”⁷. The examples are numerous⁸.

Just as past and present challenges by populists to the authority and independence of judges are comparable, today’s judges can learn a lot from the boldness of their earlier counterparts who lived under the kings.

Populist leaders tend to think in black and white. Anyone who follows them is their friend. Anyone who stands in their way is their enemy. From a populist perspective, it is rather difficult to acknowledge that administrative judges just have a job to do, for instance checking whether government decisions are lawful. That can of course be rather tedious for government officials. On the other hand, getting rid of judicial review means going back to Tudor times, when kings were free from mind-numbing constraints such as the rule of law.

Boldness is therefore a prerequisite for the three players presented in the next chapters, in order to defend judicial authority and the independence of the administrative courts.

(C) THE “THREE LINES OF DEFENCE” MODEL

It is not only populism which challenges the authority and the independence of today’s judges⁹. There is also the media, Parliament¹⁰ and private actors – to name just a few.¹¹ Therefore, boldness alone does not suffice. In fact, judicial authority and independence need three lines of defence. Accordingly, the defence of judicial authority and independence can be compared to the defence of a medieval city:

4 See Edith G. Henderson, *Foundations of English Administrative Law* (1963), pp. 32–25 and 59-62.

5 See the Sofia Report by the Council of Europe, *Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe*, Document SG/Inf(2016)3rev (24 March 2016), paragraph 182.

6 Sofia Report (footnote 5), paragraph 196.

7 Sofia Report (footnote 5), paragraph 275.

8 See Sofia Report (footnote 5), paragraphs 26-27, see also Eric A. Posner, “Liberal Internationalism and the Populist Backlash”, *Arizona State Law Journal* (2017) 49, p. 795-796.

9 For a definition of populism and its impact on international law see the Report by the Secretary General of the Council of Europe, *State of democracy, human rights and the rule of law (2017)*, *Populism – How strong are Europe’s checks and balances?*, p. 6; see also Eric A. Posner (footnote 8), 796-797, 818.

10 See Attila Bado and Janos Boka, “Access to Justice and Judicial Independence: Is There a Role for the EU?”, in *Strengthening the Rule of Law in Europe* (Werner Schroeder ed. 2016), pp. 46–60.

11 In an interview, Sabine Matejka, President of the Austrian Judicial Association, said that the media and politicians, when they are unhappy with a particular decision, are quick to attack the judicial review system as such; see <https://kurier.at/chronik/oesterreich/wie-sich-richter-verhalten-sollten/303.158.793>.

1. *The Council of the Judiciary* protects the integrity of the judicial system as a whole. It is the first line of defence, the river floating around the city. It guarantees the natural stability and essential functioning of the judicial system as a whole. The nature of its defence is strategic and conceptual.

2. *The presidents of the courts* form the second line of defence, the outer wall. They do the work of mayors, managing their courts by providing appropriate funding but also by coaching judges if needed. Their function can be either tactical or strategic, depending on the task at hand.

3. The third line of defence comprises the *judges*. Together, they form the inner wall. Their primary task is to guarantee their personal integrity and impartiality.

(2) THE COUNCIL OF THE JUDICIARY

Most European countries have a Council of the Judiciary. It follows the French example of the *Conseil Supérieur de la Magistrature*¹². The Council forms the first line of defence, responding whenever judicial authority is under direct attack.

In 2014 the Ukrainian police searched courtrooms, judges and court personnel, with the intention of intimidating them. In the same year judges were locked into courthouses¹³ or assaulted, and court buildings were set on fire. One district judge and members of his family were murdered¹⁴.

Only a strong Council can deal with serious attacks. There are many different types of Council. Despite those differences, three main tasks can be distinguished:

- First, the Council makes sure that Parliament and government appoint judges in a fair way.
- Second, the Council guarantees tenure. Judges have a right to remain in office if they perform their duties correctly.
- Third, the Council is responsible for the effective enforcement of judicial decisions.

(A) PROTECTING APPOINTMENT PROCEDURES

The Council of the Judiciary guarantees fair and transparent appointment procedures. Those who choose candidates for judicial office must be independent from government. In addition, judges must be appointed on merit alone.

Government or Parliament may have a say in appointments. Whoever designates judges, it is the task of the Council to shield appointment procedures from political interference.

In 2015 the outgoing Polish Parliament appointed five judges. The new President of the Republic refused to allow the elected persons to take their oath of office¹⁵. The new Parliament annulled the elections conducted by the previous one. This is a typical situation where the Council of the Judiciary must intervene. It must step in *before* government blocks successful candidates from taking judicial office.

A Council of the Judiciary must also make sure that judges’ salaries are adequate. The right people for the job will be recruited if they are paid well. Opening appointments to fair competition with the prospect of a good salary strengthens independence.

12 There are countless studies on the French Council of the Judiciary. Among the most recent works, see Michel Le Pogam, *Le Conseil supérieur de la magistrature* (2014) and Lea C. Faissner, *Die Gerichtsverwaltung der ordentlichen Gerichtsbarkeit in Frankreich und Deutschland* (2018).

13 Sofia Report (footnote 5), paragraph 275.

14 Sofia Report (footnote 5), paragraph 194.

15 Sofia Report (footnote 5), paragraph 176.

(B) PROTECTING RE-ELECTION PROCEDURES

The Council must not only make sure that the right people get the job: it must also ensure that they remain there.

Dismissal comes in many shapes and forms. In 2011 the Hungarian government contemplated changing the retirement age of judges from 70 to 62¹⁶. In such a situation, the Council of the Judiciary has a preventive role. It must intervene *before* Parliament enacts restrictive laws on court organisation and tenure.

The Council of the Judiciary has one advantage compared with judges' organisations, in that it is the law that grants its powers. However, the power of the Council has to be effective.

In 2011 the Hungarian Council did not have sufficient powers. The President of the Supreme Court, András Baka, tried to overcome the institutional deficit and criticised legislative reforms affecting the judiciary. The new Law forced 274 judges and prosecutors to retire. The government dismissed President Baka from his position. It took a decision by the European Court of Justice¹⁷ to give his colleagues the option to return¹⁸.

The Council of the Judiciary must also intervene during re-election procedures if needed. In some countries, judges must be re-elected after the expiry of their term of office. One such country is Switzerland¹⁹.

In practice, Swiss judges are always re-elected. However, that does not solve the problem. In 2004 judges at the Swiss Supreme Court had to decide whether the singing of racist songs in a hut was a public event or not. They ruled that it was public, meaning that persons who performed racist songs could be punished for inciting hatred²⁰. Many Members of the Swiss Parliament did not like that decision, arguing that the event was a private matter. They also maintained that freedom of speech allowed people to express racist opinions. They punished those judges who participated in the decision by voting against their re-election. In the end, the judges were re-elected, but with a poor result²¹.

From an outside perspective, one might argue that the judges were intimidated. One might even say that Parliament taught those who were re-elected a lesson: "Look at your colleagues. This is what happens if your decisions are not in line with popular opinion". Thus, the *appearance* of judges' independence is at stake. Judges must not only be independent, they must also be seen as independent.

Switzerland is not the only example. Many European countries have reported judges not being reappointed or promoted²². Some governments openly recommend that a particular judge should not be re-elected. Some of those governments contend that their recommendations are based on merit alone. In reality, in most cases the governments concerned simply do not like a judge's decisions and make sure that progressive judges disappear from the bench.

Turkey, Georgia and Ukraine are just a few examples²³. In Ukraine, judges have to go through a "vetting procedure" before they can be re-elected. According to the government, this vetting procedure is designed to make sure that a candidate is still fit for office²⁴. Most observers doubt this official statement. The aim of such a procedure is to make sure that decision-making conforms to the official government line.

In Slovakia, judges have to go through "security clearance". The Slovakian Intelligence Service, the police and the National Security Office can gather information about a judge and his or her family. If a judge is perceived as "unreliable", he or she can be summoned before the Judicial Council, which can dismiss judges from office. Those who are accused of wrongdoing cannot consult the evidence being collected against them²⁵.

The Council of the Judiciary has to make sure that only independent persons can make proposals for re-election. It also has to guarantee that judges are re-elected on merit alone.

The most efficient counter-measure is appointment for life, or appointment for a fixed term as at the European Court of Human Rights. If the Council of the Judiciary cannot convince Parliament to amend the legislation accordingly, it should at least make sure that the government cannot intervene in the re-election procedure.

(C) PROTECTING EFFECTIVE ENFORCEMENT

There is one final task for the Council of the Judiciary: it must ensure that decisions are enforced. If judgments are mere theory, this undermines the credibility and authority of judges²⁶.

On 11 January 2018 the Constitutional Court of Turkey ruled that a journalist should be released from prison²⁷. The criminal court simply refused to implement the decision, claiming that the Constitutional Court had overstepped its jurisdiction.

How can a Council of the Judiciary react? The first step is the introduction of remedies for non-execution. If a judgment is not enforced, any claimant can seek judicial review. A second tool is the training of enforcement officers. Enforcement requires not only an appropriate budget, but also expertise. As a third step, the Council of the Judiciary should ensure that enforcement officers have sufficient independence from politics.

Only a strong Council can make sure that our judgments are enforced and thus safeguard judicial appointments from political pressure. A Council has a strong position if it is independent from the executive²⁸. The members of the Council should all be judges.

(3) COURT PRESIDENTS

The second line of defence are the presidents of the courts. They form the outer wall. They make sure that judges can work in peace and quiet. Court presidents have three main tasks:

- First, they manage budgets and engage in dialogue with Parliament and other actors.
- Second, they act as coaches and mediators, thereby guaranteeing stability.
- Third, they promote the independence and the authority of judges. Therefore, courts presidents must be independent from government.

16 Gábor Halmai, "The Early Retirement Age of the Hungarian Judges", in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Fernanda and Davis eds. 2017), pp. 472-474.

17 Judgment of the ECJ of 6 November 2012, Case C-286/12 *European Commission v Hungary*.

18 Sofia Report (footnote 5), paragraph 166.

19 Gerold Steinmann, "Denkwürdige Wiederwahl der Bundesrichterinnen und Bundesrichter", in *Justice – Justiz – Giustizia* 2015/1, paragraphs 3-5.

20 Official Collection of the Decisions of the Swiss Supreme Court, vol. 130 IV, judgment of 27 May 2004, pp. 111, 119-120.

21 See *Neue Zürcher Zeitung*, *Richterliche Unabhängigkeit unter Druck*, 23 March 2006, <https://www.nzz.ch/articleDOD16-1.20344>.

22 See John Bell, *Judiciaries within Europe* (2006).

23 Sofia Report (footnote 5), paragraphs 180-186 (Turkey), 192-197 (Ukraine), and 269-273 (Georgia).

24 Sofia Report (footnote 5), paragraphs 189-191.

25 Sofia Report (footnote 5), paragraph 199. See European Commission for the Efficiency of Justice, *Report on the efficiency and quality of the Slovak judicial system* (2017), CEPEJ-COOP(2017)14, pp. 55-57.

26 ECtHR, *Oliari v Italy*, applications nos. 18766/11 and 36030/11, § 184, 21 July 2015. See the Report of the Secretary General of the Council of Europe (footnote 9), pp. 25-26; see also CCJE Opinion no. 13 (2010) on the enforcement of judicial decisions.

27 <http://www.france24.com/en/20180112-turkey-government-odds-with-top-court-writers-release>.

28 See the European Network of Councils for the Judiciary (ENCJ), *Councils for the Judiciary Report 2010-2011*, paragraph 1.2, with a definition in footnote 3.

(A) GOOD COURT MANAGEMENT AS A LINE OF DEFENCE

The first task of the president is good court management. If a court is managed well, the government is less likely to interfere in its internal affairs.

In order to manage the court well, the president needs a budget. For that, the president needs to explain to Parliament what his or her court does. Many European countries face budget cuts. Governments also cut budgets. With fewer financial means, judges are not well equipped to deal with a backlog of cases and lack the resources to deal with complex cases appropriately²⁹.

In Belgium, judges report that they are no longer able to maintain their court buildings properly. They also report computer systems not being modernised and reduced working hours of registries. In 2016 the Belgian courts had to postpone cases scheduled for hearing³⁰. At the same time, France reported that experts could not be paid on time³¹.

The judiciary of Malta is chronically under-staffed. One Maltese judge has to do the work of two judges³². Dutch judges say that they do not have enough staff to deliver high-quality work³³. Judges from Albania describe their working conditions as “undignified”³⁴, and Lithuania is not able to provide adequate security in most of its courts³⁵.

Wherever there is insufficient funding, there is the risk of overemphasising “productivity”³⁶. Many observers would say that productivity means producing an enormous number of decisions. In their view, a productive court decides swiftly and a productive judge can hear ten cases in an hour. Those who argue that way forget that some cases need more work than others. They also forget that decision-making is not just about quantity and speed, but also about quality³⁷. Any president must be able to tell that story in simple words. Parliament might just listen.

Judges may frown upon public relations, but in an age of limited funds PR is necessary. It is not enough to say that judges need more funding: every court president must be able to tell Parliament what the court does with the money granted to it each year.

A good president will also explain to Parliament that judges are its natural allies. Parliament enacts laws that are not always observed. Judges make sure that those laws are properly interpreted. Parliament will then recognise that it is the natural ally of the courts. It will grant proper funding if court presidents are able to explain what their court does and why it is important. Therefore, court presidents must explain that role but also listen carefully and provide answers to critical questions. Parliament will only grant courts the appropriate financial means if it understands the tasks and role of judges. This requires a constant dialogue.

29 See Sofia Report (footnote 5), paragraph 236: Slovakia reported on 27 May 2015 that the permanent lack of financial, technical and personal resources and increasing backlogs in the courts at all levels of jurisdiction had led to a strike by senior judicial staff and administrative employees in February 2015.

30 Sofia Report (footnote 5), paragraph 228.

31 Sofia Report (footnote 5), paragraph 230.

32 Sofia Report (footnote 5), paragraph 233.

33 Sofia Report (footnote 5), paragraph 234.

34 Sofia Report (footnote 5), paragraph 295.

35 Sofia Report (footnote 5), paragraph 232; however, see the Report of the Secretary General of the Council of Europe (footnote 9), p. 21, which highlights the overall financial efforts of Malta, Lithuania and other countries. On the other hand, the judicial systems of Ireland, Portugal, Spain and particularly Greece are under considerable budgetary restrictions.

36 See Sofia report (footnote 5), paragraph 25, with further references in footnote 86, and paragraph 72.

37 Sofia Report (footnote 5), paragraph 258; on the problematic consequences for access to justice when the focus shifts from quantity to quality see Janneke H. Gerards and Lize R. Glas, “Access to justice in the European Convention on Human Rights system”, *Netherlands Quarterly of Human Rights* (2017) 35 (1), p. 24.

(B) PRESIDENTS AS COACHES AND MEDIATORS

The second task of a president is coaching. Judges should be able to turn to their presidents for advice when facing challenges. Sometimes, the authority of judges is challenged from outside, by the media or the government. Sometimes, they face challenges from inside, from their own colleagues. A good president can be both: a good coach and a mediator.

Presidents can only be coaches and mediators if they understand their role. They are the first among equals, not the boss. Judges are not their employees but their colleagues. The president’s role is thus comparable to that of the dean of a law faculty. Good presidents are conscious of that fact and lead with natural, not formal authority. At their best, they are self-confident, resilient to failure and proactive while not losing their humility³⁸.

By understanding their proper role, court presidents form the strong outer wall around the medieval city.

(C) GUARDING THE GUARDIANS

Court presidents must be independent from government. It is for a court to appoint its president, not for the government. Still, in many European countries, the government has a say.

A few years ago the Czech High Court was looking for a new vice-president. After an open competition, the court chose a well-respected and experienced judge. The latter had only one problem: the leader of the most powerful party and the Minister of Finance did not like him. The Ministry of Justice decided not to nominate him³⁹. Government interfered in a matter that should have been left to the courts.

The presidents of the courts must have a fixed term which cannot be changed by government. As mentioned above, the President of the Hungarian Supreme Court at the time publicly criticised the new retirement age for judges⁴⁰. The government made sure to change the law so that Judge Baka could no longer be president. He lost his post more than three years before the normal expiry of his term⁴¹. As he had no remedy at the domestic level he filed a complaint with this Court. In 2015 the European Court of Human Rights held that Hungary had violated the right to a fair trial. It also found a violation of freedom of expression⁴².

When sitting on the bench, judges must be free to decide. If they can no longer criticise their governments, the independence of their institutions is at stake. The *Baka* judgement grants that freedom to judges, both as members of the courts and as court presidents.

(4) JUDGES

The last line of defence is formed by judges. Together, they form the inner wall around the city. Their main three tasks are the following:

- First, they have to guarantee their impartiality and use judicial review of legislation only if there is no other way to react.
- Second, they must uphold their personal integrity, accept their limited powers and seek help from their network if needed.

38 See Robert F. Bruner, “The 3 Qualities That Make a Good Dean”, *The Chronicle of Higher Education* (2017), <https://www.chronicle.com/article/The-3-Qualities-That-Make-a-238883>.

39 See the CCJE Situation Report, adopted during the 16th plenary meeting of the CCJE (London, 14-16 October 2015), updated version no. 2 (2015), paragraph 15.

40 See footnote 17.

41 Sofia Report (footnote 5), paragraph 167.

42 ECtHR, *Baka v. Hungary* [GC], no. 20261/12, §§ 168-176, ECHR 2016.

- Third, in order to fulfil the first two tasks, judges must become resilient to attacks. This is the most challenging task, one which lasts a lifetime.

(A) BENDING WHEN LAWS ARE AMENDED

The first example comes from the day-to-day business of judges. They decide on housing, divorce, civil liability and criminal law. Their judgments affect the litigants and perhaps certain sections of the population. Sometimes, however, the context becomes political. In those circumstances, their decisions may not please everyone.

Judges may face protests from government. The latter may claim that judges interpreted the law the wrong way. Most of the time, the government leave it at that. However, sometimes they change the law.

By passing a new law, government and Parliament are saying that the judges got it wrong. In such cases, judges have two options: they can insist on what they decided before the law was changed or they can give in.

Judges can learn a lot from the English judges. Their counterparts were not just bold when challenging the King's authority, they were also smart. They used the law as it stood at the time and applied it to new disputes. On that occasion, it was not about disputes between two private citizens, but about disputes between a private citizen and a public official. The judges simply claimed that the public official was not acting on behalf of the King, but as a private person. Thus, they had jurisdiction and the public official had to comply with their judgments.

When Parliament and government change the law, it makes sense to be smart. In most cases, judges should back down. The new Act of Parliament is often straightforward. Judges can only strike it down by using their most powerful weapon, judicial review of legislation. However, they should be careful not to use that weapon too often. There is no reason to use a sledgehammer to crack a nut. That just provokes tit-for-tat exchanges between Parliament and judges, arguing as to who should have the final say.

(B) TURNING TO THIRD PARTIES WHEN ATTACKED BY THE MEDIA

There are other occasions when judges should do nothing. Challenges originate not only from government – the media, for example, challenge judges too⁴³.

The Daily Mirror attacked the judges who took part in the Brexit decision, claiming that they were “out of touch”. The Daily Mirror put their names and pictures on the front page,⁴⁴ calling them “enemies of the people”.

When judges are being attacked by the media on a personal level, it is of crucial importance that they do nothing. As soon as judges counter-attack by means of press conferences or other means, they only fuel the existing turmoil. It is not the job of a judge to be entangled in political manoeuvring. The strongest weapon of judges with which to face challenges is both the spoken and the written word. Their authority derives from their independence, their credibility and their judgments.

Whenever the media challenge their credibility, it is important that they react with patience and calm. It is the duty of a judge to remain as detached as possible. By emphasising the authority of the written word, judges detach themselves from politics.

It does not help much to cling to the idea that the authority of judges should be undisputed. When the political atmosphere changes, judges tend to react by rejection and fear. That is entirely normal. However, remaining in a mindset of non-acceptance is not helpful. Only when judges embrace challenges to their authority are they capable of reacting in an appropriate way.

When being attacked, judges should turn to their network for help. Their president will help them to manage the situation. The Council of the Judiciary will raise its voice for them. The Council is the river, further away from the inner wall. The Council has the authority and the means to defend judges.

In seeking help, judges can learn quite a bit from their English counterparts mentioned at the beginning of this paper. When the King started to remove judges from office, they aligned with Parliament. Parliament was not happy with the King, neither were the judges. So, roughly speaking, they united in the civil war. At the end of the war, the kings had to grant the judges tenure. From then on, judges could not be removed from office. Hence, it is not a bad idea to make alliances. If judges are unable to seek help, they should stay put and carry on with their work.

It might be argued that judges can rely on their freedom of speech and turn to the media whenever they want to. However, judges have a special role. They must protect not only their independence, but also their impartiality. Being impartial means not taking sides. It means that judges must keep away from politics as best they can.

(C) RESILIENCE AS A LINE OF DEFENCE

To sum up, judges must react in different ways. Sometimes they must act, and sometimes they must not do anything. Judges must react in a flexible way. Architects know about flexibility. When they build a wall, they provide doors to pass through it, and build it in a resilient way.

Resilience is the ability to bend in challenging situations. When judges remain stiff, they break. Therefore they can only address challenges when they are able to react in a flexible way, bending slightly forwards and backwards. A resilient wall adjusts slightly, so it does not break. This approach leaves room for other lines of defence, the presidents and the Council of the Judiciary, if needed.

The concept of resilience includes a number of powerful tools. It can help judges to accept challenges to their authority. By contrast, resilience does not encourage judges to cling to the idea that their authority should be undisputed. They can only change what they first accept.

Once judges accept that their authority may be challenged, it is important to distinguish between what they can change and what is beyond their sphere of influence. When facing challenges, judges often feel helpless and think that the situation is beyond their control. In fact, judges can only guarantee the quality of their own work and their own conduct. Thus, their control is sometimes quite limited. In those situations, it is important to focus on the small things which one can change. Turning to professional or private networks is one way to respond. Staying put is another. Becoming overwhelmed by what one cannot change does not help.

Sometimes, judges must simply focus on their main task, the deciding of disputes. This is what successful athletes do. They zoom in on their role, they focus on what they can control and forget the rest. They build on their resilience, focusing on their long-term goals.

Judges often deal with difficult situations alone in their offices. That is what they are used to. They study the file, they dwell on the arguments of the parties. Much of their work consists of reflecting and deciding. When governments and other actors challenge their authority, they must rethink the way they work. They are not Robinson Crusoe. They must turn to their networks – not just other judges, but also legal officers and court officials. They should also focus on mental toughness⁴⁵. The US Army has introduced resilience training for its officers⁴⁶. Perhaps it is time for the courts to do the same.

⁴⁵ Martin Seligman et al., “HBR’s 10 Must Reads On Mental Toughness”, *Harvard Business Review* (2018), provides a good starting-point.

⁴⁶ Karen J. Reivich, Martin E. P. Seligman and Sharon McBride, “Master Resilience Training in the U.S. Army” (2011), *American Psychologist* (66) 1, pp. 25–34.

⁴³ CCPE Opinion no 8 (2013), 9 October 2013.

⁴⁴ <https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling>.

(5) LEARNING FROM GROUCHO MARX

According to Groucho Marx,⁴⁷ “politics is the art of looking for trouble, finding it everywhere, diagnosing it wrongly, and finding unsuitable remedies”. Many governments find trouble in the courts. This is not surprising. It is the job of every judge to insist on the rule of law. That is not always convenient for governments.

Some governments diagnose the problem not quite correctly. Most of the time, it is not the judiciary that causes the problem. Judges try to do a good job, delivering both quantity and quality. Governments might overlook that fact. Their remedy then is to cut courts’ budgets, dismiss progressive judges from the bench or make sure that their decisions are not enforced. A Council of the Judiciary can explain why these remedies are not the right ones. Together with court presidents, it safeguards the independence and authority of judges by sheltering the appointment and re-election procedures from political interference and defending the budget. Three lines of defence are not always enough, but at least courts can master the art of keeping trouble away. With the help of the right diagnosis, courts can leave the art of looking for trouble to politics and politicians.



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COMMUNICATION STRATEGIES

INTRODUCTION

The goal of the Communication strategies is to strengthen the trust and the respect of the public in the judiciary and strengthen the authority of the Judiciary.

The mission of judges and court representatives is to convey the messages of the court and show citizens that the judiciary, as the third branch of government, plays an extremely important role in their everyday lives. In the democratic societies citizens have the right to be informed about work of the courts. Through good communication courts can have educative role and also, by proper and timely communication with media act on prevention of human rights violations, that are very often seen in sensational reporting in media.

While it is necessary to develop openness towards media, it should be always born in mind that the duty of judicial branch is to protect right of privacy, presumption of innocence, right to fair trial, right of victims. It is therefore necessary to develop balance between legitimate right of public to be informed and to be critical on the work of the courts, and rights of all those involved in judicial proceedings. It is not always easy task and courts very often keep an old traditional attitude – it is safe to be quiet.

In today’s societies, with the great expansion of social media and need for sensational information, communication becomes even more challenging. However, courts need media, and therefore, they need to develop strategies and certain procedures in communication with media. Good strategy should cover everyday informative communication as well as communication provoked by some crisis.

PROACTIVE APPROACH

The main rule of the good communication strategy should be that communication of courts with public should always be proactive. If courts don’t tell their story, someone else will. First story out shapes message, second story is always reactive. We should either work with the press or they will work without us.

If courts and judges do not actively participate in communicating their own story about what they do and how they do it, they risk that the message public is receiving may not be true, positive, or affirmative and very often it will violate the basic human rights. Courts should be constant relevant source of information, or they will have to deal with half information, arbitrary interpretation of the different authors and media scandals.

Good and proactive strategy will build constituency that will support and protect courts.

⁴⁷ The original quote is attributed to Sir Ernest Benn. See Gyles Brandreth, *Word Play: A cornucopia of puns, anagrams and other contortions and curiosities of the English language* (2015).

Public opinion of courts is of the great importance since more public knows about courts it will gain higher trust and confidence. Transparency breeds respect while secrecy triggers mistrust.

Greater public understanding means public more likely to adhere to court rulings.

Courts need to adapt to the stronger influences of the media revolution and a new communication practice.

What core messages should be conveyed?

Courts are fair, impartial, and independent

Courts exist to protect citizens and their rights

Courts are transparent and accessible

Judges are held to the highest levels of accountability

Equal justice under law

HOW TO PREVENT CRISIS SITUATIONS

It has been shown that the greatest interest of the public and media is in criminal cases, especially where is the issue of deprivation of liberty, high profiled cases or acquittal court decisions, when politician very often get involved with inappropriate comments and attacks on judges. Those situations usually provoke some kind of crisis, where judges get disturbed and expect proper reaction of the highest judicial authorities.

Crises are often provoked by:

- absence of proactive communication of a court as a consequence of the absence of a communications strategy
- Insufficient understanding of patterns according to which a crisis situation plays out?
- avoiding the media and media appearances
- reactive, affective, ad hoc communication of judges
- lack of communication skills of judges and courts' leaders

In order to prevent these situations, the goal of a communication's strategy is to define and explain the basic principles of work of courts and long-term actions of courts – its role, duties and all restrictions based on human rights respect, role of prosecutors etc.

Good communication strategy and communication plan should be understood as

- important tool for the coordination of a court's communication activities
- they help the judiciary meet public's expectations when it comes to access and the right to information,
- a tool that strengthen transparency of actions
- an important support for successful management of courts

RULES FOR COURTS TO FOLLOW IN COMMUNICATION WITH MEDIA

The distinction should be made between communication with media by courts as institutions and by judges individually.

Judges can express their opinion as individuals but with well known restrictions. They are not allowed to talk about ongoing cases or cases they are involved with. However, judges can talk on issues of general importance, new legislation and similar. In practice in Serbia there are good

examples of judges talking for media on issues of general importance. For example – about sentencing policy, about deprivation of liberty, role of prosecutors and limitations of courts, division of power, fair trial principles etc.

Courts in their communication approach keep awareness on following:

- Regarding court spokesperson – it is less risky for court manager or spokesperson – also less impactful
- Courts are not the same as other government institutions
- Courts should have strategic approach and have a reason to communicate with media
- Court should not be confrontational or defensive
- Dignity of courts should not be compromised through communications
- Courts have legitimate security and privacy concerns that inhibit certain communications

HOW TO INCREASE FAITH AND TRUST OF PUBLIC IN JUDICIARY

It is important to strengthen trust of public in judiciary. It could be done **by establishing relations with key audiences:**

- the general public, the citizens as a whole,
- the representatives of the other branches (Parliament, the Government, the ministries, local government and relevant institutions),
- court users,
- creators of public opinion – journalists and representatives of media,
- NGOs, professional (academic and judiciary) and business communities (entrepreneurs and their associations)

Also, **by raising public awareness on courts' work and their results, which can be done**

- by informing court users in order to better understand the judicial proceedings and judicial practice
- by educating public how judiciary functions in order to understand its purpose, role, and responsibility
- by training and educating judges and court staff in public relations with an emphasis on relations with media.
- Having well trained Court spokespersons (should they be judges)

Definition and single communication of key messages and key audiences of courts by shaping and conveying the message to the public is imperative – whether it is everyday communication of the court or communication in crisis situations

Coordinated communication of the court and continuous placement of a consistent message: e.g. courts improve the quality of life for citizens and the society as a whole

Courts have to make a serious effort in order to convey the message concerning the importance of their work to the public.

Courts have to put more effort into telling their own, convincing stories.

Courts have to establish direct communication with public and make the role and purpose of the judiciary as the third branch of government clearer to the general public.

The consistent communication of courts with the external public will increase understanding and credibility of the judiciary and decrease the number of wrong interpretations and misunderstandings of the judiciary and courts' rulings.

POSSIBLE COMMUNICATION TOOLS FOR CONVEYING KEY MESSAGES

- press releases – on a regular bases and announcements of important court decisions by short explanation of the reasoning of a given judgment
- comments in media – especially proper and timely reactions with regard to statements and comments of high profiled politicians (Who should do it? High judicial Councils or presidents of courts? Crisis situation)
- answers to public queries
- columns
- court leaders' speeches – role of the Court presidents
- presentations – different periodical materials, courts' bulletins
- brochure – being available in all courts
- blogs – Yes or No
- educational and public material
- social media messages
- Websites

IMPORTANCE OF COMMUNICATING THE ADMINISTRATION OF JUSTICE

- the administration of justice has to be visible to the court users, but also to the community and the general public
- public hearings as provided by law
- broadcasting of high profiled cases (Legija – example from Serbian practice) with the consent of all parties and the right of the presiding judge to allow it or not
- filming of hearings for the educational reasons

POSSIBILITY OF USING NEW TOOLS FOR EXTERNAL COMMUNICATION – SOCIAL MEDIA

Twitter, Face book, YouTube – channels for spreading important information in order for the public to better understand and perceive work of courts.

It is the most prevalent form of communication today. Reaches younger and more diverse audience. Allows court to take a message directly to people. Builds and engages community and increases transparency

Should courts/judges use social media?

New tools of communication enable publicizing important information that is usually not that interesting to the mainstream media: announcements on cases, information how courts work, courts' statistics, court's achievements, new services the court offers, new workplaces, etc. It could be said that it enables the public to see the court from the inside – a different perspective.

“Courts should not be afraid of new communication tools, especially of social media ... new generations of people have grown up, and they have completely different expectations about communication and interaction ... court communication should be as a two-way street.” (Gerret Graff, former editor of “Politico” and author of book “Courts are conversations: An Argument for Increased Engagement by Court Leaders”)

USE OF SPECIAL ADVISERS OR EXPERTS

The strategic communications advisor should be the part of court administration in the highest courts and Judicial organizations. There are many reasons for this:

- helps to develop concepts and plans that will affect courts in the entire country
- responsible for monitoring, guiding and maintaining the strategic communication of courts, provides necessary guidelines, advice, and responses to the court staff, manages the implementation of the strategic plan and coordinates the development of goals and strategies that are important at the national level
- strategic communications advisor could provide valuable help to court staff in all ordinary and specialized courts in the country and guidelines for using various social platforms, develops communication scenarios in different situations, including crisis, identifies required content on the court's website, creates educational material on the topic of communicating (internal, external, crisis), advising on public appearances of judges and court employees for all court levels

WHAT ARE EXAMPLES OF GOOD PRACTICES?

For sure it is the present practice of European Court of Human Rights.

Court's website is largely used and in the country of my region it has been great tool for judges and also it has educational role and has improved the awareness for the respect of human rights.

Use of the Twitter done by the ECHR can be great example esp. for the Supreme or Constitutional Courts

Courts having communication strategy documents

Courts having communication experts

Annual press conferences done by the Court presidents, presenting the statistics, major events and strategic goals

Regular press releases with the short summaries of the decisions

Annual Reports of the Court's case –law (which should be obligatory for Appeal Courts, Supreme and Constitutional Courts

Cooperation with Law faculties and regular visits of law students

EXPERIENCES OF SERBIA

National Strategy for Judicial Reform for the period 2013-2018 has stressed importance of transparency of the work of judicial authorities and courts.

The High Judicial Council and the Supreme Court of Cassation have provided support to courts to improve transparency of work through several strategic documents.

First, in 2013, the Communication Strategy of the High Judicial Council was adopted, which represents the framework and basis for working on more transparent work of the courts. The Communication strategy defines goals, types, modes of communication and activities. The Communication Strategy in 2016 has been updated and improved.

The High Judicial Council in 2014 provided the Courts with the Guidelines on the Establishing of Commissions to increase public confidence in the work of the courts.

INSTEAD OF CONCLUSION

We should always bear in mind that media have a right to information about all state institutions and their work. Work of courts and administration of justice is undoubtedly subject of general interest of great importance for every community. As it was confirmed many times media and journalists play an important public watchdog role.

However, right of media and general public to know should not prevail respect for human rights of all those involved in judicial proceedings. It is the duty of courts to keep balance between conflicting values of these rights and to take due account to fair trial, privacy and dignity, on one hand, and on the other, to the right to information.

The Opinion no. 7 of the Consultative Council of European Judges (CCJE) as very valuable and instructive could be introduced on larger scale, and be used as the strategic material and educational tool.

Moreover, promotion, better understanding and dissemination of judgments of the ECHR should be part of communication strategy of highest courts, which ultimately would enhance legal culture and specifically, understanding of human rights issues.



Dace Mita

**Judge,
Supreme Court, Latvia**

COMMUNICATION STRATEGY IN LATVIA

Before turning to the question of communication by the courts in Latvia, it is necessary to explain the background briefly. On 3 April 2008 the Judiciary Act was supplemented with rules providing for the establishment of a Judicial Ethics Committee. This Committee examines individual complaints and delivers opinions with regard to the professional ethics of judges.

Since judicial ethics may refer to almost any behaviour, the Ethics Committee turned to the question of how and when judges are seen by the public. It was realised that this occurred in exceptional situations, when judges answered questions posed by journalists after court sittings or after pronouncing only the operative part of a judgment. On some occasions refusals by judges to speak with the press had been shown on television, creating a negative attitude among the public, particularly when these refusals were made in an unfriendly manner. This conveyed the impression that judges were hiding from the public. Although such situations were not shown on television every week or even every month, the media failed to provide balance by reporting positive news from the courts. The signal thus conveyed was clear enough – the courts are not willing to talk to the public. The Ethics Committee considered such a situation unacceptable.

For this reason, in 2014 the Ethics Committee drafted the Communication Guidelines for the Courts, which were presented for adoption by the Judicial Council (this is a consultative and coordinating institution, responsible for the development of policy and strategy for the judiciary). The Judicial Council supported the idea and broadened the approach by deciding to adopt three documents in this regard. Firstly – the Communication Guidelines for the Judiciary; secondly – the Communication Strategy for the Courts; and thirdly – a Handbook on Communication. The first two documents were adopted by the Judicial Council on 18 May 2015, and the third is currently being drafted.

Why are these separate documents? The reason is that the Communication Guidelines for the Judiciary concern not only the courts, but also all of the institutions which are represented in the Judicial Council (such as the Parliamentary Legal Affairs Committee, the Ministry of Justice, the Constitutional Court and the Prosecutor's Office). Conversely, the Communication Strategy for the Courts concerns the courts exclusively.

The Communication Guidelines for the Judiciary contain general principles. They set out the aims, tasks and principles of communication, but without specifying the particular persons who are in charge in specific situations. The aims are stated as follows:

- (1) to promote understanding among the judiciary that all of its activities are based on justice;
- (2) to strengthen the authority of the judiciary;

(3) to promote understanding among the public of the work of the courts. The tasks include, *inter alia*, proactive activities and managing communication in crisis situations.

The Communication Strategy for the Courts has two dimensions –general principles and practical guidelines on who should react, and in which situations. It starts by postulating that the courts must deliver justice and that justice must be seen to be done. It is therefore essential to communicate with the public, and particularly with the media, providing society with information which is true, impartial and understandable. This means that the courts must communicate with the public; this must be done not through legal language, but by *stepping into the shoes of a non-lawyer*, in order to reach people’s minds. Otherwise the exercise would be a useless monologue.

There are several types of communication as well as different target groups. Since the mass media is still the main tool for receiving information, the regulation in this area will be considered in more detail.

It must be noted that Communication Departments exist in only two courts in Latvia – the Supreme Court and the Riga Regional Court. The other courts must make use of existing resources which are primarily intended to fulfil other tasks.

There are three main types of communication. The first is the provision of information about a particular case. This includes answering such questions as when the case is due to be adjudicated, by which judge, and when a judgment is expected. This task is fulfilled by the court’s administrative staff. As a rule, there should be a designated person at each court who is responsible for such communication.

The second is the issuing of press releases. The court identifies cases which are already or which could be of interest to the public and makes information available accordingly. This is done by administrative staff together with the judge rapporteur.

The third type of communication is direct communication by judges. This is one of the most important achievements of our communication strategy, and inevitably it was one of the topics that was most discussed during the drafting process. The adopted rules stipulate that each court must have a spokesperson. Depending on the court, there may be more than one. For example, there may be one spokesperson for civil matters and the other for criminal matters. Very often this function is fulfilled by the president of the court.

The concept of spokesperson is based on the fact that not all judges are ready and willing to make public comments. At the same time, while the strategy was being drafted, journalists and other persons from outside the judiciary constantly indicated that the best communication is that from a judge. It does matter who is talking – i.e. whether information is provided by a secretary of the court or by a judge. Judges enjoy the highest authority in the eyes of the public.

The guidelines state that a judge rapporteur may make comments on a case. However, he or she is not obliged to do so. It is pointed out that a judge should bear in mind that communication is particularly welcome in cases where only the operative part of a judgment is pronounced, as well as in cases that are of particular interest to the public.

If a judge rapporteur does not provide any comments but there is a demand from the public for explanations, the principle is that the court cannot remain silent. In such a situation the obligation to communicate lies with the spokesperson.

How does the theory work in practice? Naturally, not all judges are willing to talk in public. There are different reasons for this, starting with the classical argument that a judge has been appointed to adjudicate cases and he or she speaks only through judgments, and ending with psychological resistance.

The Communication Strategy for the Courts was strongly supported by the Judicial Council. It was widely discussed, starting with the presidents of all courts. Initially there was resistance from a majority of judges. Two main arguments helped to diminish this resistance – the idea of the need to communicate so as to promote trust in the judiciary, and the concept of spokespersons, in order to accommodate those judges who were not willing to talk to the public. A few successful examples served as an encouragement for more frequent communication. Last year a survey was carried out

among the regional and national media. It showed that communication has improved and that it has become easier for the media to receive information and comments from courts and judges than it was before the strategy was adopted.

By way of example, the Supreme Court had decided on whether to quash the results of the parliamentary elections, and announced only the operative part of the judgment. A press conference was organised, at which a judge explained the main points of the forthcoming judgment. When the full judgment was published several weeks later, public interest was considerably lower. This was firstly because time had passed and, as we all know, the public is primarily interested in *hot news*, and, secondly, because the main reasons for the Supreme Court’s decision were already known to the public.

Now we are at a stage when the courts in Latvia are responding more often than before, but this is usually *post factum*. There is a need for more proactive communication – this opinion is expressed by journalists on every occasion. It is in the interests of the judiciary that the courts themselves take the initiative and do not wait for the public and the media to formulate their questions. When questions are addressed to the courts, there is frequently a tendency to consider that something has gone wrong.

Nevertheless, there are very good examples of proactive communication. For example, there are judges from courts at all instances who have gained appreciation for their openness and willingness to communicate. The Supreme Court regularly prepares press releases providing information on cases that are important for the public. The Constitutional Court, which is outside the reach of the Communication Strategy, provides another example of proactive communication by means of press releases, press conferences and other activities.

There is one question that has not been included in the Communication Strategy, because it cannot be regulated. Namely, in which situations is it appropriate to communicate? It is not necessary to react to every criticism, or to act like an entertainer. On the other hand, the courts cannot wait until their authority has been seriously dented as a result of heavy criticism. This affects public trust in the judiciary.

To conclude, modern society is an information society. This cannot be ignored and the courts must be sufficiently transparent and responsive. The Latvian example shows that the fundamental principle by which a judge is entitled to speak only through his or her judgments is in the process of being transformed.

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



Guido Raimondi

President of the
European Court of Human Rights

OPENING ADDRESS

Presidents of Constitutional Courts and Supreme Courts, Chairman of the Ministers' Deputies, Secretary General of the Council of Europe, Ambassadors, Ladies and Gentlemen,

I would like to thank you all for honouring us with your presence at this solemn sitting marking the new judicial year of the European Court of Human Rights. We are pleased that you can be with us this evening.

This traditional event is an opportunity to look back, momentarily, at the year 2017, from which many lessons are to be learned, in various respects.

One year ago I was referring, in this very place, to the large number of cases before our Court. We then had 80,000 applications pending.

Twelve months later this figure has fallen considerably and it now stands at 56,000. While this is undeniably a success, we are still a long way from finding ourselves in a satisfactory situation in terms of the backlog.

To give you a full picture of our situation, I would point out that the biggest challenge currently facing us is that of the pending 26,000 Chamber cases. These cases constitute the hard core, so to speak, of our backlog and it is essential for us to give these applications the full attention that they deserve, as they are often significant and raise more serious issues.

Since the beginning of the Interlaken process, we have been continuously finding ways to streamline our working methods to boost our efficiency and productivity. We will be pursuing those efforts and continuing to use our imagination.

However, our creativity has its limits. As you know, the Council of Europe is going through a very difficult period in budgetary terms. Behind the statistics that I mention at the start of every year – behind those thousands of case files – there are applicants who are waiting for an answer. In spite of the current budgetary situation, the Court must be in a position to provide them with that answer in a timely manner. This means that we need to keep our current level of staff, especially at a time when our efforts to streamline our working methods are, I would hope, about to bear fruit. It is perhaps too early to speak of a breakthrough, but I am optimistic. We must not go backwards. I should also mention the probability of Protocol No. 16 entering into force in 2018, thus entailing an additional workload.

From the promising figures I mentioned just now, it could be inferred that the human rights situation has improved on our continent, as fair winds seem to be blowing on the statistics front.

But that is not the whole picture, unfortunately, and those statistics are rather deceptive. What they demonstrate is nevertheless of interest.

One of the reasons for the considerable fall in pending applications is the striking-out of a large number of cases following the *Burmych* case against Ukraine. Those were cases which raised the same questions as those already examined in the *Ivanov* pilot judgment, namely the failure to execute final judgments in Ukraine.

Our Court, as you well know, sometimes has to deal with large-scale complaints which disclose structural or systemic problems. To address such cases it invented the pilot judgment, which is now a tried and tested solution.

Once the principles have been established in the pilot judgment, it will be for the State concerned to legislate or take the necessary measures, and it will do so under the supervision of the Committee of Ministers.

In the *Burmych* case, since the pilot judgment had not been executed, the Grand Chamber had to ascertain whether or not the Court should pursue its examination of the individual applications received in the wake of *Ivanov*.

Our Court took the view that the interests of the current or potential victims of the systemic problem at issue in *Burmych* would be better protected in the context of the execution of the *Ivanov* pilot judgment. It thus decided to strike out over 12,000 pending cases, which were then transmitted to the Committee of Ministers for consideration in the context of the existing execution procedure.

It goes without saying that the statistical repercussion of those strike-outs has been beneficial to the Court, but we are aware that the figures are somewhat illusory as they do not necessarily reflect an improvement in the situation on the ground.

The solution thus adopted does not mean that the Court is failing to assume its responsibilities. Cases which arise from the ineffective execution of a pilot judgment call for solutions of a financial or political nature which do not fall within our remit. They will therefore be dealt with more appropriately by the respondent State and by the Committee of Ministers, whose responsibility it is to ensure that the pilot judgment is fully implemented through general measures and a satisfactory form of redress for the applicants.

At the heart of the *Burmych* judgment thus lies the principle of subsidiarity. Subsidiarity and its corollary, shared responsibility. Each of the stakeholders in the European human rights protection mechanism – the Court, the Committee of Ministers and the State concerned – must fulfil its obligations. That is what makes *Burmych* one of the leading judgments of 2017.

But subsidiarity also comes into play before a case is brought before our Court. To be sure, it follows from this principle that the member States are required to introduce remedies – both preventive and compensatory – which must be exercised by would-be applicants before they turn to Strasbourg.

That is the reason why we dismissed, on grounds of failure to exhaust domestic remedies, over 27,000 applications which were directly related to the measures taken following the attempted *coup d'état* in Turkey or – most recently – 6,000 cases concerning prison overcrowding in Hungary.

In the latter example, the Court observed that a new law introducing remedies had entered into force following our pilot judgment in *Varga*, where the Court had found a general problem with the functioning of the Hungarian prison system. The lodging of applications before those new remedies have been exhausted is thus premature.

And those new remedies, whether in Turkey or in Hungary, must still prove to be effective. Time will tell.

With today's emphasis on subsidiarity and the strengthening of our relations with domestic courts, in applying the European Convention on Human Rights it must be said that a Constitutional Court certainly plays its part.

In that connection, one of the major features of our closer relations is without doubt the Network of Superior Courts, which has been an outstanding success since its creation. Having been launched in this very place with only two courts, the French *Conseil d'État* and Court of Cassation, in October 2015, it can now boast the participation of 64 superior courts. This shows the considerable interest of the highest courts in this exchange of information.

Since I have mentioned the *Conseil d'État* and the Court of Cassation, allow me to thank, from those courts, Vice-President Jean-Marc Sauvé, First President Bertrand Louvel and Prosecutor-General Jean-Claude Marin, for their contribution to the creation of the Network.

I would particularly like to address my regards to Vice-President Jean-Marc Sauvé and Prosecutor-General Jean-Claude Marin, who are attending this event for the last time in their current capacities. Over the years we have built not only institutional relations with these high-ranking figures of the French judiciary, but also a genuine and faithful friendship.

The Network – a forum of permanent exchange – is one of the tools of subsidiarity, pending the application of Protocol No. 16, which will institutionalise our relationship. In fact only two more ratifications are needed for the Protocol to enter into force, so this is one of our wishes for 2018.

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One of the developments towards the end of 2017, which it would be remiss of me not to mention, was the first use of the infringement procedure under Article 46 § 4 of the Convention. This procedure, introduced into the European Convention on Human Rights in 2010, enables the Committee of Ministers to refer to the Court the question whether a State has refused to abide by a final judgment.

The Committee of Ministers decided in December to launch such proceedings against Azerbaijan owing to the authorities' persistent refusal to ensure the unconditional release of Mr Mammadov, an opposition politician, following the Court's 2014 finding that there had been violations of Articles 5 and 18 of the Convention, taken together. The question will be considered by a Grand Chamber and this hitherto unused procedure raises a new challenge for our European system of human rights protection.

In that connection I would emphasise the crucial importance of the execution of our judgments, under the supervision of the Council of Europe's Committee of Ministers, for the whole credibility of our system depends upon it.

This overview of the Court's activities would not be complete without mentioning one of the major innovations of 2017: the introduction of reasoning for single judge decisions.

The requirement of reasoning goes to the heart of the trust that citizens must have in their courts. This was one of the requests put to us at the Brussels Conference. We are glad to have been able to respond, at last, to applicants' expectations, which were both strong and legitimate in this area. The fact that we have managed to do so without increasing the staff assigned to such tasks can be attributed to our efficient IT system, which is another resource that must be maintained at its current level in spite of the budgetary pressure.

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The opening of the judicial year also calls for the usual look at the leading cases over the past year.

In 2017 a number of sensitive and significant issues were once again brought to the Court, which is asked to deal with unresolved and often complex matters. The variety of subject matter illustrates the scope and diversity of the role of the European Court of Human Rights.

The cases that I would like to mention this evening have all received media coverage throughout the world. This is most certainly because they relate to real-life situations and are meaningful to a great many of us.

• • •

The Grand Chamber judgment of *Barbulescu* is one such example. It is illustrative of the ubiquitous nature of new technologies, which have pervaded our everyday lives. They regulate our relationships with others. It was thus inevitable that they should permeate our case-law. As was quite rightly observed by Professor Laurence Burgorgue-Larsen: “New technologies have led to an implosion of the age-old customs based on respect for intimacy”. What is the point of communicating more easily and more quickly if it means being watched over by a third party or if it entails an intrusion into our private lives?

The subject of the *Barbulescu* case was the decision of a private company to terminate the employment contract of one of its staff members after monitoring his electronic communications and accessing their content. Our Court took the view that the national authorities had not properly protected the applicant’s right to respect for his private life and correspondence. The domestic courts had failed to determine, in particular, whether the employee had received prior notice from his employer of the possibility that his communications might be monitored; nor did they have regard to the fact that he had not been informed of the nature or extent of the monitoring, or to the degree of intrusion into his private life and correspondence.

In our Court’s view, the instructions of an employer cannot negate the exercise of the right to respect for private life in the workplace.

While the Contracting States must be granted a wide margin of appreciation in establishing the applicable law on such matters, their discretion cannot be unlimited.

In *Barbulescu* the Court thus lays down a framework in the form of a list of safeguards that the domestic legal system must provide, such as proportionality, prior notice and procedural guarantees against arbitrariness. This is a kind of “*vade mecum*” for use by domestic courts.

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While Grand Chamber judgments, being fewer in number and rendered by our Court’s most authoritative formation, tend to be paid the greatest attention, the same can be said of certain final judgments delivered by Chambers; those which, on account of the subject matter or solution, are also of particular interest to public opinion. I would like to take this opportunity to commend the work accomplished throughout the year by the Court’s five Sections, under the authority of their respective Presidents.

An example of such a Chamber judgment is *Osmanoğlu and Kocabaş* against Switzerland – a new illustration of how religious matters come to the fore in our case-law.

The applicants were Muslims who wanted their daughters to be exempted from compulsory mixed swimming lessons. They brought their case to our Court after the Swiss authorities refused that exemption and they were fined.

In this case, which received significant coverage, the Court emphasised the importance of schooling for social integration, especially in the case of children of foreign origin.

It first pointed out that the children’s interest in a full education, thus facilitating their successful social integration according to local customs and mores, prevailed over the parents’ wish to have their daughters exempted from mixed swimming lessons.

The Court then expressed the view that a child’s interest in attending swimming lessons was not just to learn to swim but more importantly to take part in that activity alongside the other pupils, with no exception on the basis of the child’s origin or the parents’ religious or philosophical convictions.

The Swiss authorities, in refusing to grant an exemption from mixed swimming lessons to the two Muslim pupils, had given precedence to the obligation to follow the full school curriculum and had not breached their right to freedom of religion.

Such a case is representative of the fact that we are seeing an increasing judicialisation of religious matters in our society.

The important thing is not to impose a model that prevails over individual choices but to foster the principles of openness to others and “living together”.

• • •

At a time when technological progress – as I was saying just now – has never been so advanced, how could we not have been shocked, at the end of last year, to see pictures of migrants being sold in Libya on slave markets? They serve to remind us that slavery remains a reality in the twenty-first century.

While forced labour does not reach the same level of intensity as slavery, in certain cases it is not much different. It is also prohibited by the same Article 4 of the European Convention on Human Rights.

The judgment in *Chowdury* against Greece provides an example of forced labour and reminds us that the notion of dignity prevails. Even though it is not expressly provided for in the Convention, the Court has enshrined it as an implicit principle, finding that “*human dignity and freedom are the very essence of the Convention*”.

In the *Chowdury* judgment the Court ruled for the first time on the exploitation of migrants through work. The applicants were 42 Bangladeshi nationals who, without work permits, were subjected to forced labour. Their employers recruited them to pick strawberries on a farm, but then failed to pay them their wages and made them work in unbearable physical conditions, watched over by armed guards.

The Court found that the applicants’ situation amounted to human trafficking and forced labour, explaining that exploitation through work was one of the aspects of human trafficking within the meaning of the relevant Council of Europe Convention and the United Nations Palermo Protocol.

This judgment reminds us that the Court protects the weakest and most vulnerable and that the European Convention on Human Rights is open to all human beings, regardless of nationality or residence.

• • •

Among the highlights of 2017 was most certainly the visit by French President Emmanuel Macron, who kept the promise he had made to me only a few weeks after his election to come to the Court and speak to us.

We heard him describe our Court as “*a unique achievement that does honour to Europe*” and “*a major point of reference for Europe’s citizens*”. It was certainly a historic occasion and the President’s words will ring out for a long time within our walls.

But going beyond those words of praise, which of course we much appreciated, President Macron recalled the most fundamental aspect underpinning the relationship between the States and the Court. “*We have not handed over our legal sovereignty to the Court*”, he said, but rather “[w]e have provided the citizens of Europe with an additional guarantee that human rights will be upheld”.

He compared our Court to “*an essential bulkhead in protecting the nationals of the 47 member States from abuses, totalitarian trends and the dangers that tomorrow’s world will bring with it*”, thus emphasising the weight of the responsibility on our shoulders.

But that responsibility, we are proud and happy to have assumed it for nearly 60 years now, so that we can “*bequeath this institution intact to subsequent generations*” to use the words of the French President. Allow me to add that, for someone of my generation who was born when the horror of the Holocaust was still a recent memory, and for those of us who have known the survivors – I am thinking of Simone Veil, who left us last year, and also of Liliana Segre, who has just been made a life Senator by the Italian President – this takes on a particular significance for me and drives home the duty that we have to transmit these values to our children and grandchildren. They must not lose sight of the origins of the European mechanism for the protection of human rights.

Presidents of Constitutional Courts and Supreme Courts,

Before concluding this ceremony, I would like to turn to you more specifically.

Over the years, this event for the opening of the judicial year of the European Court of Human Rights has become, I believe, a unique and unparalleled gathering, as it brings together the Presidents of the highest courts of Europe. Our guest speaker is always the president of a superior national or international court.

Your presence here is particularly meaningful. The European mechanism for the protection of human rights can only function if you are able to participate in it to the full. Together and collectively we protect human rights.

Without you, the protection of human rights would be incomplete and that is why your presence here is essential for us.

Without you, there can be no common area of protection of rights and freedoms.

Without you, there is no rule of law.

It is indeed noteworthy that the authority of the judiciary was the very theme of the seminar which took place here earlier today and I would mention that, quite exceptionally, one of the speakers was the Council of Europe's Secretary General, Thorbjørn Jagland.

When a democratically elected regime disregards the constitutional limits to its power and deprives its citizens of their rights and freedoms – when democracy becomes illiberal – it is always and mainly you who are on the front line.

Like our Court at the European level, you are indispensable points of reference in your respective countries.

This evening I would like you to tell you solemnly that we stand by you.

• • •

Ladies and Gentlemen,

The time has now come for me to turn to our guest of honour, the President of the Court of Justice of the European Union, Koen Lenaerts.

For the European citizen, the co-existence in Europe of two international courts, the Court of Luxembourg and that of Strasbourg, even though they do not cover the same geographical sphere, and notwithstanding the difference in jurisdiction, may appear surprising or even puzzling.

We are all aware of this and it is the reason why we attach such importance to our cooperation. Our very credibility is at stake.

Over the past few years our exchanges with the Court of Justice have been considerably strengthened, and I believe that the harmonious nature of our relationship today can largely be attributed to the efforts of our guest this evening.

The presence here of the President of the Court of Justice of the European Union, as guest of honour at our solemn hearing, is most certainly an exceptional event.

Ladies and Gentlemen,

The two European courts have, this evening, symbolically come together in Strasbourg.

For me it is an honour, but above all it gives me great pleasure, to welcome here our good friend, President Koen Lenaerts.

We give him the floor!



Koen Lenaerts

President of the
Court of Justice of the European Union

THE ECHR AND THE CJEU: CREATING SYNERGIES IN THE FIELD OF FUNDAMENTAL RIGHTS PROTECTION

President Raimondi, Honourable Judges, Secretary General, Excellencies, Ladies and gentlemen,

Thank you very much, President Raimondi, for that kind introduction. It is a great honour for me to be here with you today at this solemn ceremony, marking the opening of the judicial year of this honourable Court.

It is indeed a great honour because of what the European Court of Human Rights (the 'ECHR') represents not only in the minds and hearts of judges, lawyers and other members of the legal profession, but also in those of European citizens.

The ECHR is a beacon of hope for those who feel that justice has been denied at national level. It is also the protector of a certain idea of European democracy, according to which policy choices made by the incumbent majority of the moment must respect the sphere of individual freedom guaranteed by the Convention. Last, but not least, it is a symbol of our shared European identity and common heritage as nothing unites Europeans more than the feeling that we all belong to a community of values where fundamental rights are upheld.

I would like to take this opportunity to share with you my views on the highly influential role that the Convention, as interpreted by the ECHR, has played, and continues to play, in the EU legal order. In so doing, I would also like to stress the fact that the Charter of Fundamental Rights of the European Union (the 'Charter'), despite its relative youth, has, in turn, influenced the interpretation of the Convention. As the title of my speech reveals, that mutual influence has the potential to create synergies between our two Courts that improve fundamental rights protection in Europe as a whole.

Although both the Convention and the EU legal order are committed to protecting fundamental rights, their respective systems of protection do not operate in precisely the same way.¹ Whilst the Convention operates as an *external* check on the obligations imposed by that international agreement on the Contracting Parties, the EU system of fundamental rights protection is an *internal* component of the rule of law within the EU.

¹ See, in this regard, S. O'Leary, 'Courts, charters and conventions: making sense of fundamental rights in the EU' (2016) 56 *Irish Jurist* 4, at 9.

Even though the EU is not a State,² the logic underpinning its system of fundamental rights protection is closer to that of an EU Member State than to that provided for by the Convention. The same logic applies to the Court of Justice of the European Union (the ‘CJEU’), the guarantor of the rule of law within the EU, whose role is, in effect, to act as both the Constitutional and Supreme Court of the European Union.

Just like any Constitutional Court in Europe, the CJEU ensures that the acts adopted by the EU institutions comply with primary EU law, notably the EU Treaties and the Charter. It is also called upon to rule on the allocation of powers between the EU and its Member States as well as between the EU institutions. Just like any Supreme Court in Europe, the CJEU ensures the uniform application of EU law throughout the territory of the EU Member States, from the Gulf of Finland to the Strait of Gibraltar and from the Atlantic to the Aegean.³ It does so through the preliminary reference mechanism, the keystone of the EU judicial system.⁴

Needless to say, in fulfilling those tasks, the CJEU must uphold the rule of law, of which fundamental rights, as recognised in the Charter, are part and parcel. This means, in essence, that the entire body of EU law – composed of thousands of directives, regulations and decisions – must be consistent with the Charter. That body must be interpreted in the light of the Charter. Nevertheless, where a consistent interpretation is not possible, the CJEU will have no choice but to annul or to declare invalid the EU act in question that constitutes an unjustified restriction on the exercise of a fundamental right. That was exactly what the CJEU did in *Digital Rights* where it declared invalid the Data Retention Directive, on the ground that by ordering the indiscriminate retention of personal metadata contained in electronic communications, that directive imposed a disproportionate restriction on the right to respect for private life as well as on the right to the protection of personal data, enshrined respectively in Articles 7 and 8 of the Charter.⁵

Since the enforcement of EU law is largely decentralised, the implementation of that body of law is, in principle, entrusted to the EU Member States and their courts. Accordingly, such implementation can only take place in compliance with the Charter. For example, in the seminal *Aranyosi and Căldăraru*,⁶ the CJEU held that a Member State may not execute a European Arrest Warrant where such execution entails a violation of Article 4 of the Charter brought about by the conditions of detention in the prison system of the requesting Member State. In the same way, it follows from the ruling of the CJEU in *Bougnouvi and ADDH* that an EU Member State implementing Directive 2000/78 – a directive which seeks to combat discrimination on grounds of, *inter alia*, religion or belief in the work place – must prevent an employer from treating an employee unequally in circumstances where such unequal treatment is grounded in a customer’s refusal to use the services of that employer because the employee wears an Islamic headscarf.⁷

2 CJEU, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 156.

3 J.-C. Bonichot and A. Nußberger, ‘Dialogue entre juges européens’, in B. Bonnet (ed), *Traité des rapports entre ordres juridiques* (Paris, LGDJ, 2016) 1269.

4 CJEU, opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 176.

5 CJEU, judgment of 8 April 2014, *Digital Rights Ireland and Others*, C 293/12 and C 594/12, EU:C:2014:238.

6 CJEU, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C 404/15 and C 659/15 PPU, EU:C:2016:198.

7 CJEU, judgment of 14 March 2017, *Bougnouvi and ADDH*, C 188/15, EU:C:2017:204. See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ 303/16.

Unlike the system set out by the Convention, when it comes to the EU Member States, fundamental rights are not self-standing.⁸ Not all national measures may be examined in the light of the Charter, but only those that fall within the scope of EU law.⁹ Metaphorically speaking, the Charter is the ‘shadow’ of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter.¹⁰ So, where a national measure falls outside the scope of that law, it also falls outside the scope of the Charter. This does not mean, however, that fundamental rights are left unprotected, since the compatibility of that measure with fundamental rights may be examined in the light of the relevant national constitution and the Convention.¹¹

The Charter is, thus, the EU’s ‘Bill of Rights’ and has made a significant contribution to improving the EU system of fundamental rights protection, by giving more visibility to those rights. Quantitatively, since the Charter entered into force in 2009, the number of cases before the CJEU raising questions involving the interpretation of fundamental rights has grown considerably. Currently, in 1 out of 10 cases brought before the CJEU, the Charter is **expressly** mentioned. Qualitatively, the Charter facilitates a more coherent, comprehensive and systemic interpretation of fundamental rights.

That said, it does not follow from the fact that the Charter is centre stage in the EU system of fundamental rights protection that the CJEU is required to adopt an isolationist or ‘EU-centric’ approach. On the contrary, the Charter mandates the CJEU to embrace openness and dialogue, in the field of fundamental rights, with the legal orders that surround the EU. That openness finds concrete expression in the Charter requirements that the CJEU should interpret fundamental rights in harmony with the constitutional traditions common to the EU Member States and, where relevant, that the CJEU should interpret the meaning and scope of those rights in the same way as the rights guaranteed under the Convention. Thus, the CJEU is required to engage in a constructive dialogue with the national courts – notably national Constitutional and Supreme Courts – and, of course, the ECHR.

Consequently, the Charter has not only codified but has also given new impetus to the case law of the CJEU in respect of the general principles of EU law, where it has held that the Convention has ‘special significance’.¹² With the entry into full legal force of the Charter, I am tempted to say that the Convention has now ‘a very special significance’ in the EU legal order.

It is true that, until the EU accedes to the Convention, that international agreement is not incorporated into EU law.¹³ As a result, the CJEU does not enjoy jurisdiction to answer questions that relate, for example, to the relationship between the Convention and the legal systems of the EU Member States.¹⁴ Nevertheless, the Convention provides precious insights and guidance to the CJEU in the field of fundamental rights.

8 Regarding the scope of application of the Charter, see generally C. Ladenburger, European Institutional Report, in J. Laffranque (ed) *The Protection of Fundamental Rights Post – Lisbon, FIDE XXV Congress*, Vol. 1 (Tartu, Tartu University Press, 2012); T. von Danwitz and K. Paraschas, ‘A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights’ (2012) 35 *Fordham International Law Journal*, at 1397; K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375; A. Tizzano, ‘L’application de la Charte de droits fondamentaux dans les États membres à la lumière de son article 51, paragraphe 1’, *Il Diritto dell’Unione Europea*, 2014, n° 3, at 429, and A. Rosas, ‘Five Years of Charter Case Law: Some Observations’ in S. de Vries, U. Bernitz and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Oxford, Hart Publishing, 2015) at 11. See also M. Dougan, ‘Judicial review of Member State action under the general principles and the Charter: Defining the “scope of Union law”’ (2015) 52 *Common Market Law Review* 1201.

9 CJEU, judgment of 26 February 2013, *Åkerberg Fransson*, C 617/10, EU:C:2013:105.

10 K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014) at 1567.

11 CJEU, judgment of 15 November 2011, *Dereci and Others*, C 256/11, EU:C:2011:734, paras 72 and 73. See also CJEU, judgment of 17 January 2013, *Zakaria*, C 23/12, EU:C:2013:24, para. 41.

12 CJEU, judgment of 18 June 1991, *ERT*, C 260/89, EU:C:1991:254, para. 41.

13 CJEU, judgment of 15 February 2016, N., C 601/15 PPU, EU:C:2016:84, para. 45. See, in this regard, J. Malenovský, ‘Comment tirer parti de l’avis 2/13 de la Cour de l’Union européenne sur l’adhésion à la Convention européenne des droits de l’homme’ (2015) *Revue générale de droit international public* 705.

14 CJEU, judgment of 24 April 2012, *Kamberaj*, C 571/10, EU:C:2012:233, para. 62. See, in this regard, G. Raimondi, ‘La relation de la Cour de Strasbourg avec les juges internes’ (2016) 43 *L’actualité juridique: droit administratif*, 2434.

First, as Article 6(3) TEU confirms, fundamental rights recognised by the Convention constitute general principles of EU law, i.e. judge-made principles that enjoy constitutional status.

Second, unlike the EU Treaties themselves which are silent as to the way in which the CJEU is to interpret them, the Charter contains two specific provisions that provide interpretative guidance regarding the interaction between the Charter and the Convention, i.e. Articles 52(3) and 53 of the Charter.¹⁵

Article 52(3) of the Charter states, and I quote, that ‘in so far as [the] Charter contains rights which correspond to rights guaranteed by the Convention [...], the meaning and scope of those rights shall be the same as those laid down by the said Convention’. However, such deference to the Convention ‘shall not prevent [EU] law providing more extensive protection’. This provision is thus intended to ensure the necessary consistency between the Charter and the ECHR, ‘without thereby adversely affecting the autonomy of [EU] law and ... that of the [CJEU]’.¹⁶

The explanations relating to the Charter, which are to be given ‘due regard by the courts of the [EU] and of the Member States’,¹⁷ list those corresponding fundamental rights.¹⁸ To name just a few, this is the case for the prohibition against inhuman or degrading treatment,¹⁹ the right to liberty in the context of extradition procedures,²⁰ the freedom of expression and information,²¹ the right to freedom of conscience and religion,²² the right to respect for private and family life,²³ the right to property²⁴ and the principle that offences and penalties must be defined by law.²⁵

Once that correspondence is established, the CJEU will strive to ensure that the Charter is interpreted so as to provide, at the very least, a level of protection that corresponds to that of the Convention, as interpreted by the ECHR. Allow me to illustrate that point by looking at three recent examples taken from the case law of the CJEU in very different areas of EU law.

To begin with, in *Bougnououi and ADDH*, which I mentioned earlier, the CJEU held, referring to the Convention, that the term ‘religion’ laid down in the Charter was to be interpreted broadly so as to encompass ‘both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public’. In order to ensure consistency with both the Charter and the Convention, the term ‘religion’ set out in the Directive 2000/78 was also to be interpreted in the same fashion.²⁶

The second example arises from the ruling of the CJEU in *Florescu*,²⁷ a case concerning the compatibility with the right to property of austerity measures adopted by Romania in order to implement the conditions that the EU had attached to the grant of financial assistance to that Member State. In that case, the CJEU recognised that the need to rationalise public spending in an exceptional context of global financial and economic crisis constitutes a legitimate limitation on the exercise of that fundamental right. In so doing, the CJEU expressly referred to the ruling of the ECHR in *Ionel Panfile v. Romania*.²⁸

The third example involves an asylum case called *Al Chodor and Others*.²⁹ In that case, the CJEU was called upon to decide whether an EU Member State was under an obligation to define the notion of ‘a significant risk of absconding’ by adopting a binding provision of general application or whether settled case law or a consistent administrative practice were sufficient to fulfil that obligation. That was an important question given that the notion at issue provides the legal basis for the detention of asylum seekers. Indeed, the Dublin III Regulation provides that, in order to secure transfer procedures, an asylum seeker may be placed in detention ‘only where there is a significant risk of absconding’.³⁰ Referring to the ruling of the ECHR in *Del Río Prada v. Spain*,³¹ the CJEU found that in defining that notion, the EU Member State in question had to comply with strict requirements, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness. In that regard, the CJEU held that only a binding provision of general application could meet those requirements.

Moreover, the CJEU takes account of the Convention as the minimum threshold for protection, meaning that the EU system of fundamental rights protection may go above and beyond that threshold. For example, whilst the scope of Article 13 ECHR is limited to guaranteeing an effective remedy against violations of the rights set out in the Convention itself, that of the first paragraph of Article 47 of the Charter, which enshrines the right to an effective judicial remedy, covers not only the rights recognised by the Charter but also the ‘rights and freedoms guaranteed by the law of the Union’. This can be seen in environmental cases, where the CJEU has held that Article 47 of the Charter provides an effective remedy against national measures that violate rights that EU environmental law confers on individuals, including NGOs. That is so regardless of whether other provisions of the Charter are also at issue.³²

For its part, Article 53 of the Charter seeks to coordinate the three different standards of protection that co-exist in the EU Member States, namely those provided by national constitutions, those provided by EU law and those provided by international law, notably by the Convention. That provision of the Charter aims to bring order to pluralism by striking a balance between European unity and national diversity. In *Melloni*, the Court of Justice interpreted that provision as meaning that, where a Member State implements EU law, the application of national standards of protection of fundamental rights must compromise neither the level of protection provided for by the Charter, nor the primacy, unity and effectiveness of EU law.³³

As to the rights recognised in the Charter that correspond to those guaranteed by the Convention, this means, in essence, that an EU Member State may apply its own standards of protection, provided that three conditions are met. First, those standards must comply with the level of protection guaranteed by the Charter which, in turn, guarantees, at the very least, a level of protection equivalent to that of the Convention. Second, national standards may only be applied where the EU has not adopted a uniform level of protection which, needless to say, must itself comply with the Charter. Last, but not least, that higher level of protection must not jeopardise the objectives pursued by EU law.

15 See Article 6(1) TEU.

16 CJEU, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, para. 47.

17 See Article 6(1) TEU and Article 52(7) of the Charter.

18 See the explanations relating to Article 52 of the Charter, [2007] OJ C 303/17, at 32.

19 CJEU, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C 404/15 and C 659/15 PPU, EU:C:2016:198, para. 86.

20 CJEU, judgment of 16 July 2015, *Lanigan*, C 237/15 PPU, EU:C:2015:474, para. 57.

21 CJEU, judgment of 17 December 2015, *Neptune Distribution*, C 157/14, EU:C:2015:823, para. 65.

22 CJEU, judgment of 14 March 2017, *Bougnououi and ADDH*, C 188/15, EU:C:2017:204, para. 29.

23 CJEU, judgment of 5 October 2010, *McB.*, C 400/10 PPU, EU:C:2010:582, para. 53.

24 CJEU, judgment of 13 June 2017, *Florescu and Others*, C 258/14, EU:C:2017:448, para. 49.

25 CJEU, judgment of 5 December 2017, *M.A.S. and M.B.*, C 42/17, EU:C:2017:936, para. 54.

26 CJEU, judgment of 14 March 2017, *Bougnououi and ADDH*, C 188/15, EU:C:2017:204, para. 30.

27 CJEU, judgment of 13 June 2017, *Florescu and Others*, C 258/14, EU:C:2017:448, para. 56.

28 ECHR, decision of 20 March 2012, *Ionel Panfile v. Romania*, CE:ECHR:2012:0320DEC001390211, § 21.

29 CJEU, judgment of 15 March 2017, *Al Chodor*, C 528/15, EU:C:2017:213.

30 See Article 2(n) and Article 28(2) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31 (‘the Dublin III Regulation’).

31 ECHR, judgment of 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, §125.

32 See, e.g., CJEU, judgment of 8 November 2016, *Lesoochranárske zoskupenie VLK*, C 243/15, EU:C:2016:838. Regarding Article 47 of the Charter, see generally M. Safjan and D. Düsterhaus, ‘A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU’ (2014) 33 *Yearbook of European Law* 1.

33 CJEU, judgment of 26 February 2013, *Melloni*, C 399/11, EU:C:2013:107, para. 60.

Allow me to illustrate that point by highlighting the contrast between, on the one hand, the ruling of the CJEU in *Melloni* and, on the other hand, those in *F.*, *Åkerberg Fransson*, and *M.A.S. and M.B.* Whilst in the first of those cases, it was held that EU law did indeed prescribe a uniform level of fundamental rights protection, in the circumstances of the latter cases the opposite conclusion was reached, allowing room for national diversity.

In *Melloni*, the EU legislator amended, in 2009, the European Arrest Warrant Framework Decision with a view to protecting the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States. To that effect, the EU legislator introduced a new provision that lists the circumstances under which the executing judicial authority may *not* refuse execution of a European Arrest Warrant issued against a person convicted *in absentia*. In that regard, the CJEU noted that the new provision complied with Articles 47 and 48 of the Charter – two provisions that are in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the Convention³⁴ – given that it only applied to situations where the person convicted *in absentia* was deemed to have voluntarily and unambiguously waived his or her right to be present at the trial in the issuing Member State. Since the EU legislator had itself struck, in compliance with the Charter, a balance between the protection of those fundamental rights and the requirements of mutual recognition of judicial decisions, the application of higher national standards was ruled out.

By contrast, in *F.*,³⁵ another case relating to the European Arrest Warrant, the CJEU found that there was room for national diversity in the context of the speciality rule. According to that rule, before the issuing judicial authorities prosecute the person concerned for offences other than those for which he or she has been surrendered, they must obtain the consent of the executing judicial authority. Thus, in *F.*, the question was whether EU law prevented the person surrendered from bringing an appeal having suspensive effect against a decision taken by the executing judicial authority by which it gave its consent. In that regard, the CJEU found that the European Arrest Warrant Framework Decision, interpreted in the light of Article 47 of the Charter, neither imposed nor opposed such a right of appeal. Referring to the case law of the ECHR on Article 5(4) of the Convention,³⁶ it noted that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, ‘affords an individual a right of access to a court but not to a number of levels of jurisdiction’. Thus, it was for the constitutional law of the executing Member State – and only for that law – to determine the existence or absence of such a right at national level. That said, if that right did exist, its exercise could not compromise the primacy, unity and effectiveness of EU law. For the case at hand, this meant that the exercise of that right of appeal could not have the effect of preventing the executing judicial authority from adopting a decision within the time-limits prescribed by EU law.

Similarly, there was also room for national diversity in *Åkerberg Fransson*, a case where the CJEU held that, in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. In taking that decision, the national legislator must comply with Article 50 of the Charter, which enshrines the principle of *ne bis in idem*. Accordingly, it is only where an administrative penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that the Charter precludes criminal proceedings in respect of the same acts from being brought against the same person. As to the primacy, unity and effectiveness of EU law, the option chosen by the national legislator had to provide for sanctions that protected the financial interests of the EU in an effective, dissuasive and proportionate fashion.

³⁴ See CJEU, judgment of 26 February 2013, *Melloni*, C 399/11, EU:C:2013:107, para. 50, referring to ECHR, judgments of 14 June 2001, *Medenica v. Switzerland*, CE:ECHR:2001:0614JUD002049192; of 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD005658100, and of 24 April 2012, *Haralampiev v. Bulgaria*, CE:ECHR:2012:0424JUD002964803.

³⁵ Judgment of 30 May 2013, *F.*, C 168/13 PPU, EU:C:2013:358.

³⁶ *Ibid.*, para. 43, referring to ECHR, judgments of 15 November 1996, *Chahal v. the United Kingdom*, CE:ECHR:1996:1115JUD002241493; of 5 June 2012, *Khodzhamberdiyev v. Russia*, CE:ECHR:2012:0605JUD006480910, and of 4 March 2008, *Marturana v. Italy*, CE:ECHR:2008:0304JUD006315400.

More recently, this idea of diversity was again explained by the CJEU in *M.A.S. and M.B.*, another VAT case. There, the CJEU recalled that the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonization, it is for the Member States to adopt the limitation rules applicable to criminal proceedings relating to those cases. This means, in essence, that whilst a Member State must impose effective and deterrent criminal penalties in cases of serious VAT fraud, it is free to consider, for example, that limitation rules form part of substantive criminal law. Where that is the case, the CJEU pointed out that such a Member State must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the Charter which corresponds to Article 7(1) of the Convention.³⁷ Accordingly, even where the limitation rules at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious VAT fraud, the national court is under no obligation to disapply those rules in so far as that obligation is incompatible with Article 49 of the Charter. That does not mean, however, that those limitation rules are left untouched to the detriment of the financial interests of the EU. In the light of the primacy, unity and effectiveness of EU law, it is, first and foremost, for the national legislator to amend those limitation rules so as to avoid impunity in a significant number of cases of serious VAT fraud.

It follows from those examples that neither European unity nor national diversity is absolute, as they must both comply with the level of protection provided for by the Charter. In addition, national diversity must not jeopardise the EU integration project, since it must take due account of the primacy, unity and effectiveness of EU law.

Moreover, the meaning and scope of the rights recognised by the Charter are directly influenced by the Convention. This ‘*esprit d’ouverture*’ shows that the Charter is by no means a rival to the Convention, nor is it intended to impose competing obligations on the EU Member States in the field of fundamental rights. On the contrary, the Charter invites cooperation with Strasbourg.

In the same way, the ECHR has, on several occasions, decided to take account of the Charter. It has done so in order to give new impetus to the dynamic and evolutive interpretation of the Convention, under which that international agreement is to be read as a living instrument. Thus, the Convention, as interpreted and applied by the ECHR, also invites cooperation with Luxembourg.

In particular, the ECHR has relied on the Charter in order to update the content of Convention rights. The Charter was created, in essence, by setting down clearly in one single document a catalogue of fundamental rights stemming from the constitutional traditions common to the EU Member States, the Convention and other international agreements, as those sources of law stood at the beginning of this new millennium. Thus, whilst over the past six decades the Convention has established itself as a more mature system of fundamental rights protection, the ECHR has rightly relied on the Charter – a mere teenager by comparison – in order to reveal the existence of an emerging European consensus as to the standards to be achieved in the field of fundamental rights.³⁸

For example, as you all know, in *Scoppola v. Italy (no. 2)*, the ECHR,³⁹ departing from the previous decision of the European Commission of Human Rights in *X v. Germany*,⁴⁰ ruled that Article 7 of the Convention is to be interpreted so as to include the right to benefit from a more lenient penalty provided for in a law enacted subsequent to the offence. It did so despite the fact that the Convention

³⁷ See judgment of 5 December 2017, *M.A.S. and M.B.*, C 42/17, EU:C:2017:936, para. 55, referring to ECHR, judgments of 15 November 1996, *Cantoni v. France*, CE:ECHR:1996:1115JUD001786291; of 7 February 2002, *E.K. v. Turkey*, CE:ECHR:2002:0207JUD002849695; of 29 March 2006, *Achour v. France*, CE:ECHR:2006:0329JUD006733501, and of 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia*, CE:ECHR:2011:0920JUD001490204.

³⁸ See G. Nicolaou, ‘The Strasbourg View on the Charter of Fundamental Rights’ (2013) *College of Europe, Cooperative Research Paper*, 03/2013, available at: <<https://www.coleurope.eu/research-paper/strasbourg-view-charter-fundamental-rights>>. See also, T. Lock, ‘The influence of EU law on Strasbourg doctrines’ (2016) 41 *European Law Review* 804.

³⁹ ECHR, judgment of 17 September 2009, *Scoppola v. Italy (no. 2)*, CE:ECHR:2009:0917JUD001024903.

⁴⁰ European Commission of Human Rights, *X v. Germany*, no. 7900/77, decision of 6 March 1978, CE:ECHR:1978:0306DEC000790077. That decision was subsequently endorsed by the ECHR in judgments of 5 December 2000 *Ian Le Petit v. the United Kingdom*, CE:ECHR:2004:0615JUD003557497, and of 6 March 2003, *Zaprianov v. Bulgaria*, CE:ECHR:2004:0930JUD004117198.

is silent in that regard. In the course of its reasoning, the ECHR referred to the ruling of the CJEU in *Berlusconi*⁴¹ and to the fact that Article 49 of the Charter expressly recognises that right.⁴² Both findings supported the view that, after the decision in *X v. Germany* was delivered, 'a consensus [...] gradually emerged in Europe and internationally [demonstrating that that right had] become a fundamental principle of criminal law'.⁴³ The ECHR followed a similar approach in *Bayatyan v. Armenia*, where it held that Article 9 of the Convention recognises the right to conscientious objection, a right that is expressly mentioned in Article 10(2) of the Charter. In so doing, it held that that provision of the Charter 'reflects the unanimous recognition of the right to conscientious objection by the [M]ember States of the European Union, as well as the weight attached to that right in modern European society'.⁴⁴

Whilst it is true that, on occasion, our two Courts may adopt divergent approaches on a particular question, I am convinced that, as a matter of principle, both of our courts strive to achieve convergence, as the rulings of the ECHR in *Povse v. Austria* and *Avotiņš v. Latvia*,⁴⁵ and those of the CJEU in *Aranyosi and Căldăraru* and *C.K.*⁴⁶ demonstrate.

This substantive convergence facilitates the application and interpretation of fundamental rights by the national courts which are called upon to operate in the multi-level system of fundamental rights protection that exists in Europe. Most importantly, this convergence is not left to chance but is the result of a constructive and cooperative relationship between the CJEU and the ECHR that is based on comity and mutual respect.

This afternoon's seminar focused on the question of judicial authority and the challenges to that authority. In that regard, I would like to add, if I may, that the judicial authority of both Courts is strengthened when they work together, as such cooperation is mutually reinforcing and creates synergies in the field of fundamental rights protection. In my view, there is no better way to improve the protection of fundamental rights at European level than to enhance citizens' trust and confidence in their two European Courts, by showing that they share the same values and work together, to the benefit of all Europeans.

Thank you very much

PHOTO



41 CJEU, judgment of 3 May 2005, *Berlusconi and Others*, C 387/02, C 391/02 and C 403/02, EU:C:2005:270.

42 ECHR, judgment of 17 September 2009, *Scoppola v. Italy (no. 2)*, CE:ECHR:2009:0917JUD001024903, § 105.

43 *Ibid.*, § 106.

44 ECHR, judgment of 7 July 2011, *Bayatyan v. Armenia*, CE:ECHR:2011:0707JUD002345903, § 106.

45 ECHR, decision of 18 June 2013, *Povse v. Austria*, CE:ECHR:2013:0618DEC000389011, and judgment of 23 May 2016, *Avotiņš v. Latvia*, CE:ECHR:2016:0523JUD001750207.

46 CJEU, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C 404/15 and C 659/15 PPU, EU:C:2016:198, and of 16 February 2017, *C. K. and Others*, C 578/16 PPU, EU:C:2017:127.



PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2017
- Dialogue between judges - 2016
- Dialogue between judges - 2015
- Dialogue between judges - 2014
- Dialogue between judges - 2013
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