



**DIALOGUE BETWEEN JUDGES 2019**

# Strengthening Confidence in the Judiciary



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  
25 January 2019

*Strengthening Confidence in the Judiciary*

1. *Appointment, promotion and dismissal of judges*
2. *Strategies to build confidence and the responsibility of other authorities to enhance and protect the judiciary*
3. *Judgments and Separate Opinions: complementarity and tensions*
4. *Protocol No. 16*

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## Guido Raimondi

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

### WELCOME SPEECH

Dear distinguished Guests, Dear colleagues, Ladies and Gentlemen,

It is my great pleasure to welcome you all to Strasbourg today for this afternoon’s Judicial Seminar. Many of you are very familiar with this event; for others it may be your first time at the Court; you are all equally welcome. I would like to thank you for making the journey to join us for the 2019 edition of the Judicial Seminar.

We are at the start of a significant year for the Convention system. 2019 marks 60 years of the Court and 70 years of the Council of Europe! Last November, we celebrated 20 years of the “new” single Court. These anniversaries are a good opportunity to highlight the importance of the work of the Convention system for hundreds of millions of citizens. As we all here know: the Convention system is our joint enterprise.

It is the national courts, together with the European Court of Human Rights, which ensure the protection of the human rights of the Continent’s citizens. Last April’s Copenhagen Declaration, signed by the 47 Member States to the Council of Europe, underlined the need for dialogue, at the judicial and the political levels, as a means of ensuring a stronger interaction between the national and European levels of the system.

This is why the Judicial Seminar is a very important date in the Court’s calendar. Indeed, I would go so far as to say that, together with the Opening of the Judicial Year this evening, it is the most important date in the Court’s year: it is where we put judicial dialogue into practice in a multi-lateral environment. That is why I am so pleased to see so many of you here today.

Like last year, we have chosen a theme which touches us most personally: the judiciary. However, we will look at the judiciary through a slightly different lens this year: how do we maintain confidence in the judiciary? I hope that the programme this afternoon will allow for an opportunity to hear each other’s views on a theme which is no less relevant today than it was a year ago.

However, our programme is not limited to discussion on the judiciary. We will also hear from Judges O’Leary and Eicke on Protocol No. 16, entered into force last August. You may have some questions about the practicalities of this Protocol in action.

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Ladies and gentlemen, before I conclude my remarks, I wish to express my thanks to the three eminent speakers who accepted my invitation to be participate in this year’s seminar: Professor Jasna Omejec, Professor Augustin Lazăr and Judge Andreas Paulus. My colleague, Judge Kucsko-Stadlmayer, who is moderating the first session, will be presenting them to you shortly.

I also wish to thank my colleagues in the organising committee who have brought us this year's edition: Judges Ksenija Turković (the President of the Committee), Paul Lemmens, Dimitry Dedov, Iulia Antoanella Motoc, and Gabriele Kucsko-Stadlmayer, as well as the Registry's team. Preparation for this event starts more than six months in advance.

Without further ado, I now pass the floor to Judge Turković, to take us into the substance of this year's Seminar.

Thank you for your attention.



## Ksenija Turković

Judge,  
European Court of Human Rights

Ladies and Gentlemen,

I would like to join President Raimondi in extending, on behalf of the organising committee – Judge Paul Lemmens, Judge Dmitry Dedov, Judge Iulia Motoc, Judge Gabriele Kucsko Stadlmayer and myself – and indeed all the judges of the Court, a very warm welcome to you all to this year's judicial seminar. From its inception the seminar was envisaged, and by now is traditionally organised, as a dialogue between judges at the highest level on a topic of particular relevance at this particular moment in Europe.

Last year the seminar took as its theme challenges to the authority of the judiciary. Owing to the complexity of the topic and its considerable relevance for society and for us all we have decided to explore this subject further, with specific emphasis on strengthening confidence in the judiciary. We have fewer speakers this year in order to have enough time for an exchange of views.

In *Morice v. France*, our Court said: "Questions concerning the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties." The Court has emphasised this on many occasions.

In discussing mechanisms for strengthening confidence in the judiciary it is important to identify the factors involved in the public's confidence and the causes of popular dissatisfaction with the administration of justice. Traditionally, it has been emphasised that public confidence involves a belief in the fairness and impartiality of the tribunal, with the judge dispensing speedy decisions in accordance with "the law", and with judges living up to the requirements of integrity and propriety and remaining free from scandal and corruption in all of their activities, both judicial and non-judicial. Confidence is related to the extent to which judges act effectively. Efficiency, quality and independence are key parameters of an effective justice system.

However, these days some courts are facing additional key challenges in preserving the values essential in order to inspire public confidence. Courts, both domestic and international, especially those that can review legislative acts and limit the powers of other branches of government, are increasingly under attack today. Both the structural features of the courts as well as judges themselves may be, and indeed sometimes are, targeted – and no longer only in fragile democracies – through undue political interference by the executive and legislature in judicial appointments, promotions and decisions (with disloyal judges being removed and loyal ones appointed, while others are made loyal), through budget cuts in the face of vastly-increased caseloads, jurisdiction stripping, docket control, changes to the procedural rules or the rules on access to a court, and so forth. The legitimacy and authority of the courts is also eroded through partial or delayed compliance or non-execution of judgments as well as through unfounded criticism of the judiciary. In *Morice* the Court further emphasised that it may prove necessary to protect public confidence in the judiciary against gravely damaging attacks that are essentially unfounded.

Furthermore, the use of social media, digitalisation and other technological developments pose new challenges to the preservation of judicial integrity.

But not only the authority of the judiciary is in danger and under attack. The Western paradigm of human rights is increasingly questioned along the age-long divide regarding the appropriate conceptualisation of human rights as universal or culture-specific. The “war on terror” itself had serious erosive effects on human rights, in addition to xenophobia and the spreading through social media of alternative or fake truths. We are facing nationalistic seclusion and social exclusion, the contestation of constitutional liberal democracy, failed economic policies promoting constant growth, and a lack of solidarity and equality. Of the 113 countries surveyed for the latest (2018) Rule of Law Index published by the World Justice Project, 71 reported that their fundamental human rights had been eroded.

Challenges such as poverty, environmental change, demographic explosion and artificial intelligence can hardly be addressed within existing frameworks based on the overwhelming demand for personal freedom. We are faced with unprecedented and unpredictable factors affecting the welfare of future generations. The environment in which we act and make decisions is increasingly challenging. In the midst of all of this we must not forget that confidence in the judiciary is to a great extent related to the ability of judges to handle complex social problems without applying double standards.

All this makes the judiciary vulnerable and at the same time makes a strong judiciary indispensable. Thus, in the first part of the seminar today we will discuss mechanisms for strengthening confidence in the judiciary. This session will be moderated by Judge Gabriele Kucsko-Stadlmayer, judge in respect of Austria. After the coffee break we will have a session addressing issues related to Protocol No. 16 – the new instrument we now have which broadens the scope for judicial dialogue. This session will be moderated by Judge Dmitry Dedov, judge in respect of Russia.

In your folders, as in previous years, you will find a background paper highlighting the key case-law of the Court dealing with themes related to the topics covered by our speakers. The paper and the speeches will be published on our web page in the coming days.

Each year we are trying to come up with some new ideas. This year for the first time we have created an opportunity for national judges and national delegations to meet with lawyers and representatives of the department for the execution of judgments, if they so wish, in order to discuss issues relevant to their respective countries. I hope that those who used that opportunity had a good experience. If the feedback is positive we will continue to offer that opportunity next year as well.

On behalf of the organising committee and on behalf of all of us present, I would like to thank wholeheartedly the whole team that helped us to put together this seminar – our Registrar, Roderick Liddell, who was closely involved in our discussions all the way through; Rachael Kondak and Valentin Nicolescu, who once again drafted an excellent background document which we hope you will find useful; Valérie Schwartz, who with marvellous ease is taking care of all the administrative issues; Patrick Titiun, who is making sure that all today’s events run smoothly; Loredana Bianchi, Valérie’s right hand; and the interpreters and many others acting in the background to ensure that everyone has a positive experience.

Finally, I would like to encourage you to make good use of this opportunity to share experiences and exchange good practices. Together with my colleagues on the organising committee, I look forward to yet another stimulating seminar filled with fruitful discussions and inspiring ideas. Thank you all for coming and for your attention.



**Jasna Omejec**

**Member of the Venice Commission,  
Professor at the University of Zagreb**

## **STRENGTHENING CONFIDENCE IN THE JUDICIARY APPOINTMENT, PROMOTION AND DISMISSAL OF JUDGES AND ETHICAL STANDARDS<sup>1</sup>**

### **1. INTRODUCTION**

At this 2019 Judicial Seminar we are continuing to hold, in the words of Judge Lemmens, “a kind of European judicial summit”,<sup>2</sup> this year to discuss the mechanisms that can contribute to strengthening confidence in the judiciary. Today, the judiciary has gained relevance in public life as never before, and judges are much more visible than ever in public debate.<sup>3</sup> Thus, the judiciary, above all, must enjoy public support and public confidence in order to be successful in carrying out its mission,<sup>4</sup> especially in these post-modern times when “authority is in universal decline”.<sup>5</sup> Confidence in the judiciary is related to “the legitimacy of the courts, as the latter encompasses the legality (acting according to the law), the shared values (values that are shared by those with authority and those subject to that authority), and the consent (the sense amongst the citizens of a moral obligation to obey the authority) that should characterize the judiciary”.<sup>6</sup>

Public support and confidence, as well as the public perception of judicial independence, are heavily influenced by how judges are appointed, promoted and dismissed. However, the judiciary is not a simple structure. In practice, we must clearly state which courts we are talking about, and the same goes for judges. Not a few differences exist between judges of the ordinary courts, constitutional court judges and judges of the European Court in Strasbourg. For example, issues and controversies relating to promotions or probationary periods for judges<sup>7</sup> do not arise at all in relation to judges of the European courts or those of the constitutional courts and the highest, supreme, courts.

<sup>1</sup> This article is based on a panel paper prepared for the Judicial Seminar on strengthening confidence in the judiciary held at the European Court of Human Rights on 25 January 2019. The author would like to thank the ECtHR judges Gabriele Kucsko-Stadlmayer and Ksenija Turković for their comments on the first draft of the panel paper. All remaining errors are the sole responsibility of the author. The views expressed herein are personal and do not bind the Venice Commission in any way.

<sup>2</sup> Lemmens, Paul, Opening words, Dialogue between judges 2018, Proceedings of the Seminar “The Authority of the Judiciary 1. Challenges to the authority of the judiciary 2. Responses to the challenges” (Strasbourg, 26 January 2018), Council of Europe, European Court of Human Rights, 2018, at 7.

<sup>3</sup> Moreover, Cartabia pointed out that judges in some countries “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”.

<sup>4</sup> “The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties” (ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016).

<sup>5</sup> Lemmens, op. cit., supra note 2, at 7.

<sup>6</sup> Background Document for the Judicial Seminar 2019: Strengthening the confidence in the judiciary, ECtHR Registry, Strasbourg, 2019, at 4. Available at [https://www.echr.coe.int/Documents/Seminar\\_background\\_paper\\_2019\\_ENG.pdf](https://www.echr.coe.int/Documents/Seminar_background_paper_2019_ENG.pdf) (last accessed 15 January 2019).

<sup>7</sup> As regards probationary judges, see *infra* note 35.

Furthermore, constitutional and supreme courts occupy different roles under their countries' Constitutions. Accordingly, a different manner of judicial appointment is required in order to guarantee the specific role of these courts.<sup>8</sup> Judges are the acting force of these courts, and the rules concerning their appointment broadly reflect what constitutional and supreme courts stand for. In the nature of things, candidates for the office of constitutional court judge are most exposed to public scrutiny owing to the political character of their election or appointment. In sum, the constitutional design of the court influences judges in action, who make the court in reality.

This paper will address only the system of ordinary courts, which accounts for most of the career judges in every country.

## 2. MAIN PRINCIPLES OF INDEPENDENCE OF THE JUDICIARY

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") states that "[e]veryone is entitled to a fair and public hearing by an independent and impartial tribunal established by law" (Article 6 § 1). According to the case-law of the European Court of Human Rights (hereinafter "the ECtHR" or "the Court"), the object of the term "established by law" in Article 6 § 1 is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament".<sup>9</sup> Similarly, judges must be independent of other organs of the State, which involves freedom from inappropriate connections with and influence by these organs. This is essential in order to foster public confidence in justice and the rule of law. Consequently, independence also serves as the guarantee of impartiality. Judges should be and should be seen as independent and impartial in the discharge of their duties. The case-law of the ECtHR sheds light on these and many other important aspects of judicial independence. However, by its very nature, the Court does not approach the issue from a systemic point of view, unlike the European Commission for Democracy through Law (the Venice Commission), a consultative body of the Council of Europe in constitutional matters.<sup>10</sup>

The Venice Commission has repeatedly observed that "[t]he independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges, there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself.<sup>11</sup> It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people".<sup>12</sup> In the same report<sup>13</sup> the Commission set out the relevant standards for ensuring the independence of the judiciary, which can be summarised as follows.

- Principles which ensure the independence of the judiciary should be set out in the Constitution or an equivalent text.
- All decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law (see *infra* Section 2.1.).
- An independent judicial council should have a decisive influence on decisions affecting the appointment or career of judges (see *infra* Chapter 3, especially Section 3.2.).
- Ordinary judges should be appointed permanently until retirement.
- The principle of irremovability should be supported in the Constitution.
- The level of remuneration should be guaranteed by law in line with the dignity of judicial office and the scope of a judge's duties.
- Judges should be protected from external influence and, as a result, should enjoy functional immunity.
- Judges should not put themselves into a position where their independence may be questioned, a principle which makes judicial office incompatible with other functions and operates to restrict political activities.
- Judicial decisions should not be subject to revision outside the appeal process.
- The principle of internal judicial independence is incompatible with a relationship of subordination of judges in their judicial decision-making activity.<sup>14</sup>

### 2.1. PRINCIPLES RELATING TO THE APPOINTMENT, PROMOTION AND DISMISSAL OF JUDGES

The judicial branch is the main guarantee of the very existence of the rule of law and a fundamental guarantee of a fair trial. By virtue of its independence, it is not directly accountable to any electorate.<sup>15</sup> Therefore, the principles relating to the appointment, promotion and dismissal of judges, which underlie the independence of the judiciary, are of the utmost importance, especially for the public perception of judicial independence.

In this light, it should be emphasised again that the selection and careers of judges should be regulated in accordance with objective criteria based on merit, having regard to qualifications, integrity, ability and efficiency.<sup>16</sup> The judicial appointment procedure must be transparent and independent in practice. The decisions must be based on the above-mentioned objective criteria, and should not be influenced by any other reasons. There is a general acceptance that political considerations should be inadmissible in the process of appointments of judges. Furthermore, security and stability of tenure are essential elements of judicial independence. Judges cannot be subjected to arbitrary removal from office. When disciplinary proceedings are initiated against a judge, the guarantees in Article 6 of the Convention must be complied with because public confidence in the functioning of the judiciary is at stake. Similarly, growing importance is attached to procedural fairness in cases involving the removal or dismissal of judges, including disciplinary proceedings. Finally, the issue of

<sup>8</sup> See CDL-AD(2007)028 – "Judicial Appointments, Report adopted by the Venice Commission at its 70th Plenary Session" (Venice, 16-17 March 2007), Opinion No. 403/2006, Venice, 22 June 2007, § 7.

<sup>9</sup> See *Zand v. Austria*, no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, at 70 and 80.

<sup>10</sup> See CDL-JD(2008)002 - "European Standards on the Independence of the Judiciary. A Systemic Overview", Study No. 494/2008, Strasbourg, 3 October 2008; and CDL-PI(2015)001 – "Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges", Strasbourg, 5 March 2015.

<sup>11</sup> According to Di Federico, among the civil-law countries with a consolidated democratic system Italy is certainly the one where judicial independence has acquired the highest recognition both in terms of the amplitude of the legal provisions formally intended for its protection and in terms of how those provisions have been interpreted. However, "[t]he Italian case shows that when the value of judicial independence is pursued as an end in itself at the expense of other important values (such as accountability and guarantees of professional competency) a series of negative consequences ensue. In particular, Italy's experience shows that the very provisions intended to protect judicial independence when carried too far may, paradoxically, turn out to be self-defeating, i.e., detrimental to judicial independence." Di Federico, Giuseppe, "Independence and accountability of the judiciary in Italy. The experience of a former transitional country in a comparative perspective" [a modified version of an article that was previously published in Andras Sayo (ed.), *Judicial Integrity*, Leiden, Martinus Nijhoff, Koninklijke Brill NV, 2004]. Available at <http://siteresources.worldbank.org/INTECA/Resources/DiFedericopaper.pdf> (last accessed 28 December 2018).

<sup>12</sup> CDL-AD(2010)004-e – "Report on the Independence of the Judicial System Part I: The Independence of Judges", adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), Study No. 494/2008, Strasbourg, 16 March 2010, § 6.

<sup>13</sup> *Ibid.* This general report on the most important European standards applicable to the judiciary constitutes a key reference for the Venice Commission in the assessment of country-specific legislation regulating the judiciary and the guarantees put in place to ensure its independent functioning.

<sup>14</sup> *Ibid.*, §§ 22, 23, 32, 38, 43, 44, 46, 61, 62, 65-67 and 72.

<sup>15</sup> See Background Document, *supra* note 6, at 4.

<sup>16</sup> The Commonwealth Latimer House Principles recognise that, in order to uphold the rule of law, engender public confidence and dispense justice, the judiciary must be "independent, impartial, honest and competent". The aim of judicial appointment processes should be to provide a reliable means of identifying persons who possess these qualities, and to do so in a manner that is legitimate, in order to sustain public confidence in the judiciary. See "The Commonwealth Latimer House Principles (2003) on the Accountability of and the Relationship between the Three Branches of Government", Abuja, Nigeria, 2003. Source: *The Appointment, Tenure and Removal of Judges under Commonwealth Principles. A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law), London, The British Institute of International and Comparative Law, 2015, Appendix 1, Principle IV, at 114. Available at [https://www.biicl.org/documents/689\\_bingham\\_centre\\_compendium.pdf?showdocument=1](https://www.biicl.org/documents/689_bingham_centre_compendium.pdf?showdocument=1) (last accessed 3 January 2019).

criminal and civil liability and immunity of judges could be addressed in the light of the principles and rules governing judges' professional conduct. All these principles contribute to inspiring public confidence in the judiciary.

## 2.2. STANDARDS OF PROFESSIONAL ETHICAL CONDUCT

The Consultative Council of European Judges (hereinafter "the CCJE") requires that the powers entrusted to judges be strictly linked to the values of justice, truth and freedom. The standards of conduct applied to judges are the corollary of these values and a precondition for confidence in the administration of justice. The methods used in the settlement of disputes concerning the ethical aspects of judges' conduct should always inspire confidence. Consequently, the CCJE, in its Opinion no. 3,<sup>17</sup> sought to answer the following questions. What standards of conduct should apply to judges? How should standards of conduct be formulated? What if any criminal, civil and disciplinary liability should apply to judges?

For the purposes of this paper, it is sufficient to emphasise that a "judicial code of ethics"<sup>18</sup> or "principles of conduct", adopted by representative assemblies of judges, have been introduced for judges in many European countries.<sup>19</sup> According to the CCJE, "they express the profession's ability to reflect its function in values matching public expectations by way of counterpart to the powers conferred on it. These are self-regulatory standards which involve recognising that the application of the law is not a mechanical exercise, involves real discretionary power and places judges in a relationship of responsibility to themselves and to citizens".<sup>20</sup>

Additionally, in order to provide the necessary protection of judges' independence, the CCJE emphasises that any statement of standards of professional conduct should "recognise the general impossibility of compiling complete lists of pre-determined activities which judges are forbidden from pursuing; the principles set out should serve as self-regulatory instruments for judges, i.e. general rules that guide their activities. Further, although there is both an overlap and an interplay, principles of conduct should remain independent of the disciplinary rules applicable to judges in the sense that failure to observe one of such principles should not of itself constitute a disciplinary infringement or a civil or criminal offence".<sup>21</sup>

It is apparent that the independence and impartiality of judges cannot be protected solely by principles of conduct. Statutory and disciplinary rules should also play a part, and standards of professional conduct of judges should be quite distinct from them.

In this light, the approach of the Venice Commission to the professional ethics and disciplinary liability of judges should be mentioned. In its three opinions on the codes of judicial ethics of Kazakhstan, Tajikistan and Kyrgyzstan,<sup>22</sup> the Venice Commission expressed a preference for a code of ethics, which has only the force of a recommendation, not a binding document applicable directly in disciplinary proceedings. The Venice Commission stressed that "... a code of ethics should not be directly applied as a ground for ... disciplinary sanctions. ... The purpose of a code of ethics is entirely different from that achieved by a disciplinary procedure and using a code as a tool for the disciplinary procedure has grave potential implications for judicial independence".<sup>23</sup>

Nevertheless, the Commission is aware that the distinction between discipline and professional ethics is not watertight.<sup>24</sup> Thus, it acknowledged that codes of conduct for judges adopted by the professional associations of judges "may give guidance to disciplinary authorities for their decisions in disciplinary matters".<sup>25</sup> It observed that "there will always be a certain interplay between the principles of ethical conduct and those of disciplinary regulations. In order to avoid the suppression of the independence of a particular judge on the basis of general and sometimes vague provisions of a code of ethics, sanctions have to rely on explicit provisions in the law and should be proportionate to and be applied as a last resort in response to recurring, unethical judicial practice".<sup>26</sup> Thus, the Venice Commission is in favour of enumerating in the law an exhaustive list of specific disciplinary offences, rather than giving a general definition, which may prove too vague.<sup>27</sup>

## 3. SYSTEMS FOR MANAGING THE ADMINISTRATIVE ORGANISATION OF THE JUDICIARY IN EUROPE

The previous section dealt with the main principles of independence of the judiciary, especially those relating to the appointment, promotion and dismissal of judges and the standards of professional ethical conduct of judges. By their very nature, principles are always expressed in general terms. However, it is their actual content, as well as their implementation in any particular State, including the institutional architecture, that is ultimately critical.<sup>28</sup> This brings us to the central topic, namely the systems for managing the administrative organisation of the judiciary, including the appointment, promotion and dismissal of judges (hereinafter "judicial management"), that have been established in European countries in order to achieve these aims in practice. The systems can be divided, roughly speaking, into two main groups.

The first group is based on judicial management by a council for the judiciary or comparable agency as an independent and politically neutral judicial body (hereinafter "judicial council"). According to Voermans and Albers, judicial councils act as intermediaries between the judiciary and the politically responsible administrators in the government or parliament itself, in order to safeguard

17 CCJE (2002) Op. no. 3 – "Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality", Strasbourg, 19 November 2002. Available at <https://rm.coe.int/16807475bb> (last accessed 3 January 2019). This Opinion covers two main areas: the principles and rules governing judges' professional conduct, based on determination of ethical principles, which must meet very high standards and may be incorporated in a statement of standards of professional conduct drawn up by the judges themselves, and the principles and procedures governing the criminal, civil and disciplinary liability of judges.

18 The CCJE considers the word "code" to be inappropriate, since "it is clear that the code does not consist of disciplinary or criminal rules, but is a self-regulatory instrument generated by the judiciary itself." The CCJE suggests that it is desirable to prepare and speak of a "statement of standards of professional conduct", rather than a code. *Ibid.*, points 42 and 46.

19 For example, in Bosnia and Herzegovina, Croatia, Estonia, France, Italy, Lithuania, Kosovo, Malta, Montenegro, the Republic of Moldova, Serbia, Slovakia, Slovenia, the Czech Republic, the Russian Federation and Ukraine. The oldest is the Italian "Ethical Code" adopted on 7 May 1994 by the Italian Judges' Association, a professional organisation of the judiciary.

20 CCJE (2002) Op. no. 3, *supra* note 17, point 45.

21 *Ibid.*, point 48.

22 CDL-AD(2016)013 – "Opinion on the draft Code on Judicial Ethics of the Republic of Kazakhstan", adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), Opinion no. 841/2016, Strasbourg, 13 June 2016. CDL-AD(2013)035 – "Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan", adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), Opinion No. 739/2013, Strasbourg, 10 December 2013. CDL-AD(2014)018 – "Joint Opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic", adopted by the Venice Commission at its 99th Plenary Session (Venice, 13-14 June 2014), Venice Commission Opinion no. 770/2014, ODIHR Opinion-Nr.: JUD-KYRG/248/2014, Strasbourg / Warsaw, 16 June 2014.

23 *Supra* note 22. CDL-AD(2016)013, § 6; CDL-AD(2013)035, §§ 15 and 16; CDL-AD(2014)018, §§ 25-27.

24 CDL-AD(2016)013, *supra* note 22, § 7.

25 CDL-AD(2015)018 – "Report on the Freedom of Expression of Judges", adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), Opinion no. 806/2015, Strasbourg, 23 June 2015, § 23; CDL-AD(2016)013, *supra* note 22, § 31.

26 CDL-AD(2016)013, § 8 with further references; CDL-AD(2013)035, § 31. See *supra* note 22.

27 CDL-AD(2016)013, *supra* note 22, § 8.

28 Bearing this in mind, the primary task of the Venice Commission, namely to provide States with legal advice in the form of "legal opinions" on draft legislation or legislation already in force which is submitted to it for examination, is of particular importance. See Scheppele, Kim Lane, "Courts under Political Pressure: Minimum Criteria for Judicial Independence in Europe", in *Courts, Social Change and Judicial Independence*, organised by Adriana Silvia Dreyzin de Klor, Miguel Poiars Maduro, and Antoine Vauchez, RSCAS Policy Papers 2012/07, European University Institute, Florence, Robert Schuman Centre for Advanced Studies, Global Governance Programme, June 2012, at 51. See also Volpe, Valentina, "Drafting Counter-Majoritarian Democracy. The Venice Commission's Constitutional Assistance", *Heidelberg Journal of International Law*, Vol. 76, No. 4 (2016), pp. 811-843.

the independence of the judiciary or for the efficient management and administration of judicial organisations.<sup>29</sup> These judicial management authorities have different powers in different European countries. Voermans and Albers divide them into two main models.

The first one is the Southern European model (for example, in France, Italy, Spain and Portugal), where the judicial councils are enshrined in the Constitution. They act as boards tasked with the appointment and promotion of judges and with disciplinary action against judges, which means that they fulfil only primary functions in safeguarding judicial independence. The second is the Northern European model (for example, in Sweden and Ireland) in which the judicial councils “have rather far-reaching powers in the area of administration (supervision of judicial registry offices, case loads and case stocks, flow rates, promotion of legal uniformity, quality care etc.) and court management (for example, housing, automation, recruitment, training, etc.) and, in addition to that, play an important part in the budgeting of courts (involvement in setting the budget, distribution and allocation, supervision and control of expenditure, etc.)”.<sup>30</sup> In other words, judicial councils exist in name but form a “court service model”, having a very limited role in the recruitment, appointment and promotion of judges. As a rule, these councils play only a facilitating role in this process and do not exercise disciplinary powers *vis-à-vis* judges either.

Mathieu characterised the judicial councils belonging to the Southern European model as “*les conseils supérieurs de la magistrature*” whose task is essentially, if not exclusively to contribute to the management of judges’ careers, dealing with judicial appointments, promotions and disciplinary proceedings against judges. The judicial councils belonging to the Northern European model (that is, the court service model) are characterised by this author as “*les conseils supérieurs de justice*”, which have broader responsibilities relating to the organisation and functioning of the justice system.<sup>31</sup>

The second main group is based on judicial management by the non-judicial branches of government. The Federal Republic of Germany is an example of this model. Voermans and Albers call it “the undivided model”, in which the task of managing the judiciary is entrusted to the politically responsible government authorities.<sup>32</sup> However, when it comes to the appointment of judges, this does not necessarily have to be done by “the legislature and/or the Head of State or the executive-only appointment system”. Under this model, the political body appoints judges, but in the process of selecting or shortlisting candidates, a judicial council, judicial appointments commission or similar independent public body may be involved. Practices vary greatly.

Under the appropriate conditions, both arrangements (the Southern and Northern European models of judicial councils, on the one hand, and the undivided model, on the other hand), and their many hybrid systems, are equally credible.

### 3.1. DIFFERENCES BETWEEN APPOINTMENT SYSTEMS IN “CAREER” AND “RECOGNITION” JUDICIARIES

In addition to the differences existing between the previously described groups in the sphere of judicial management, the systems for appointing judges also differ between those countries with a career judiciary (mostly civil-law countries) and those with a “recognition” judiciary,<sup>33</sup> where judges are appointed from the ranks of experienced practitioners (mostly common-law countries).

Traditionally, the civil-law judiciaries of continental Europe have been organised along the lines of a bureaucratic, civil service model and do not differ fundamentally from the State bureaucracy, reflecting the old division of law from politics.<sup>34</sup> In the continental European model of a career judiciary, judges start at a low position soon after graduating from law school. Early recruitment is complemented by the strongly hierarchical character of the judicial organisation. “The essence of a career judiciary is that judges are appointed to junior positions and are gradually promoted to senior positions. Senior positions typically include seats on the supreme court and special offices in the supreme court. Junior positions often correspond to judgeships in trial courts of first instance. In some career judiciary structures, junior judges may not sit on trial courts but may assist senior judges. The promotion track includes senior positions entitled to such assistants. The archetype, therefore, of a career judiciary means that judges’ careers start early in the lower courts and that they have a reasonable expectation of being promoted to higher courts, contingent upon their performance. Notably, the life tenure of career judges does not attach to a specific court. Also notable is the great number of supreme court judges”.<sup>35</sup>

By contrast, in the common-law model of a recognition judiciary, judges are appointed late in their careers, after a full career as practitioners or academics. Judges are appointed to specific courts and face very long odds of reaching the highest court. In contrast to the career judiciary, in a recognition judiciary the appointment of judges constitutes, in part, recognition of the judge’s previous career.<sup>36</sup> “The essence of the recognition judiciary is that judicial appointments are made after the candidates have already had their first legal career, that judges have life tenure in a specific court, and that the probability of promotion to a higher court is very small. Appointments may be made either by a combined action of the legislature and the executive or through a direct election, although elected judges usually do not fit the archetype because they do not have life tenure. One might have the impression that most common law jurisdictions have recognition judiciaries, but this archetype is probably representative of much fewer jurisdictions, particularly since most states in the U.S. have an elected judiciary. Moreover, institutional features that produce judicial incentives similar to a career judiciary may influence a system that is nominally considered a recognition judiciary”.<sup>37</sup> Further, a position in the judiciary does not demand any particular previous training or experience as a judge. A recognition judiciary tends to rely on appointment mechanisms that involve the other branches of government and therefore are usually more politicised in nature (including the use of direct election in some States of the US).<sup>38</sup>

When it comes to the appropriate system for judicial appointments in a particular country, the Venice Commission has pointed out that international standards in this respect are more in favour of the extensive depoliticisation of the process. “However, no single non-political ‘model’ of appointment system exists, which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.” In some older democracies or in States with

34 Guarneri, Carlo, “Appointment and career of judges in continental Europe: the rise of judicial self-government”, *Legal Studies*, Vol. 24, Nos. 1-2 (April 2006), at 169 and 170, with further references.

35 Georgakopoulos, op. cit., supra note 33, at 209. Georgakopoulos further pointed out that “[c]areer judiciary systems will most often assign life tenure to judicial positions. Tenure, however, may be awarded after a period during which the performance of the candidate is under review” (at 209). In this light, it is worth mentioning that the Polish Constitutional Tribunal found that the law entrusting probationary judges with adjudicatory functions contravened the principle of judicial independence because they could be removed by the Minister of Justice. Judgment of 24 October 2007, Case no. SK 7/06. See Śledzińska-Simon, Anna, “The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition”, *German Law Journal*, Vol. 19, No. 07 [Special issue — Judicial Self-Government in Europe] (2018), at 1844-1845 and note 22.] Moreover, the Venice Commission has always been critical of probationary periods, stating that “ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence”, since “they might feel under pressure to decide cases in a particular way”, “wishing to please superior judges who evaluate [their] performance”. See CDL-AD(2012)001 – “Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary”, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), Opinion 663/2012, Strasbourg, 19 March 2012, §§ 66-68.

36 Georgakopoulos, op. cit., supra note 33, at 205.

37 *Ibid.*, at 210.

38 Garoupa, Nuno; Ginsburg, Tom, “Hybrid Judicial Career Structures: Reputation Versus Legal Tradition”, *The Journal of Legal Analysis* (2011), at 2-3, with further references. Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1905755](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1905755) (last accessed 10 January 2019).

29 Voermans, Wim; Albers, Pim, Councils for the Judiciary in EU Countries, Council of Europe, European Commission for the Efficiency of Justice (CEPEJ), March 2003, at 14. Available at [https://www.researchgate.net/publication/228153259\\_Councils\\_for\\_the\\_Judiciary\\_in\\_EU\\_Countries](https://www.researchgate.net/publication/228153259_Councils_for_the_Judiciary_in_EU_Countries) (last accessed 5 January 2019).

30 *Ibid.*, at 14.

31 Mathieu, Bertrand, « Réforme des institutions: que prévoit-elle sur le volet Justice? », *Le club des juristes*, 5 April 2018. Available at <http://blog.leclubdesjuristes.com/reforme-institutions-prevoit-volet-justice/> (last accessed 6 January 2019).

32 Voermans and Albers, op. cit., supra note 29, at 12.

33 See Georgakopoulos, Nicholas, “Discretion in the Career and Recognition Judiciary”, *The University of Chicago Law School Roundtable*, Vol. 7, Issue 1, Article 8, (2000), pp. 205-225.

democratically proven judicial systems, in which the executive power has a strong influence over judicial appointments, such methods of appointment are regarded as traditional and effective. Indeed, they may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions which have developed over a long time. On the other hand, new democracies have not yet had a chance to develop these traditions which can prevent abuse. Therefore, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other State powers in the appointment of judges.<sup>39</sup> In these countries, according to the Venice Commission, an independent judicial council should have a decisive influence on decisions concerning the appointment and career of judges.<sup>40</sup>

One particular model of the judicial council, which is advocated by the European Union (hereinafter “the EU”) and the Council of Europe (hereinafter “the CoE”), including the Venice Commission, is the so-called “European model of judicial councils” or “judicial council Euro model”. This model “played a key role in the fourth wave of judicial councils” in Europe in the late 1990s and the early years of the twenty-first century.<sup>41</sup>

### 3.2. THE EUROPEAN MODEL OF JUDICIAL COUNCILS

According to Preshova et al., judicial reforms were not seen as a very important issue for the so-called “old” Member States of the EU. However, the issue became a focus of interest with the accession to the EU of the Central and Eastern European Countries (hereinafter “the CEECs”), and now even more so for the Western Balkan countries (hereinafter “the WBCs”) aspiring to become members of the EU. The EU and CoE-driven processes of institutionalisation of the judicial councils were seen as one of the most important pillars of these judicial reforms. “These reforms, led by the EU, have been characterised by a strong emphasis on the establishment of powerful judicial councils as institutions for judicial self-administration and guardians of judicial independence. This EU approach is the result of a sort of joint effort of both the Council of Europe and the EU, along with a plethora of non-governmental organisations, development agencies and experts in a so-called ‘international rule of law industry’. The end result of this ‘joint venture’ is the ‘European model’ of judicial councils. They have promoted the establishment of a strong judicial council, at the beginning only as a ‘recommendation’ for the CEECs, while later on as a strict requirement and obligation for the countries of the Western Balkans”.<sup>42</sup> The European model of a strong judicial council was for the first time introduced as a compulsory requirement within the EU negotiation framework for Montenegro.

There is no formal document that defines this model. However, Kosař extracted the parameters of this model from various documents originating from different bodies of the EU and the CoE. These documents, together with the institutional dialogue between the relevant bodies of the EU and the CoE, “reveal that there is a mutual agreement on this issue”.<sup>43</sup> Kosař concluded that there are five key requirements of the judicial council Euro-model that may be distilled from the plethora of documents produced by numerous organs and affiliated bodies of the EU and the CoE:

1. Judicial councils should have constitutional status.
2. At least 50% of the members of the judicial council must be judges, and these judicial members must be selected by their peers, that is, by other judges.<sup>44</sup>
3. Judicial councils should be vested with decision-making and not merely advisory powers.

4. Judicial councils should have substantial competences in all matters concerning the careers of judges, including selection, appointment, promotion, transfer, dismissal and disciplining.
5. The judicial council must be chaired either by the President or the Chief Justice of the highest court or by the neutral Head of State.<sup>45</sup>

This set of five criteria is not a definitive list of the requirements and recommendations proposed by the EU and the CoE, but rather the lowest common denominator of what is expected and what the EU and the CoE advocate. Kosař argued that “these five criteria also capture the ‘invisible rationale’ of the Judicial Council Euro-model – to concentrate as much power as possible in one institution that is dominated by judges. This ‘self-government’ of judges is a golden thread running through all five criteria”.<sup>46</sup> Thus, the key feature that distinguishes the European model, as promoted, from its competing alternatives, including other types of judicial councils, is that it centralises competences affecting virtually all aspects of judges’ careers in one place and grants control over this body to the judges.

As such, the European model of judicial councils is only a subset of the various judicial councils that exist in Europe. The composition of the national judicial councils, their competences as well as their power, vary considerably. Consequently, by no means all of the European States which have opted for the judicial council model would meet the criteria of the European model of judicial councils as identified above.<sup>47</sup>

### 3.3. EFFECTS OF THE EUROPEAN MODEL OF JUDICIAL COUNCILS IN THE CEECs AND WBCS

Bobek and Kosař rightly stressed that “the constitutional independence of the judicial power in the form of a judicial council might work in case of mature political environments, where decent ethical standards extant and embedded in the judiciary guarantee that the elected or appointed judges-administrators will put the common good before their own”.<sup>48</sup> This means that the European model of judicial councils is based above all on preconditions relating to legal culture and judicial ethics. It is built “on the premise that judges are reliable, solid actors who know their business and are able to administer it. It is therefore considered wise to insulate the judiciary from the democratic process”.<sup>49</sup>

However, the same constitutional insulation of judicial power in the European transition democracies (the CEECs and, especially, the WBCs) has either been awkward or had outright disastrous consequences for judicial independence and for the state and reform of judiciaries in general in these countries.<sup>50</sup>

Analysing the transformative role of the constitutional courts in the European transition democracies (the CEECs and the WBCs), the author<sup>51</sup> argued that, from the first day of their creation, these States had been extremely socially and politically unstable as a result of the accumulated problems of transition, many of which had to be solved through the courts. At the same time, these countries nurture an “image of a well-ordered society”, a kind of normative expectation, an orientation

<sup>39</sup> CDL-AD(2007)028, *supra* note 8, §§ 2-3 and 5-6.

<sup>40</sup> CDL-AD(2010)004-e, *supra* note 12, § 32.

<sup>41</sup> Kosař, David, *Perils of Judicial Self-Government in Transitional Societies*, Cambridge: Cambridge University Press, 2016, at 126.

<sup>42</sup> See Preshova, Denis; Damjanovski, Ivan; Nechev, Zoran, “The Effectiveness of the ‘European Model’ of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms”, *CLEER Papers 2017/1*, Centre for the Law of EU External Relations, at 7. Available at [http://www.asser.nl/media/3475/cleer17-1\\_web.pdf](http://www.asser.nl/media/3475/cleer17-1_web.pdf) (last accessed 12 January 2019).

<sup>43</sup> Kosař, op. cit., *supra* note 41, at 127.

<sup>44</sup> However, the Venice Commission consistently points out that the overwhelming supremacy of the judicial component in the judicial council “may raise concerns related to the risks of ‘corporatist management’”, CDL AD(2007)028, *supra* note 8, § 30.

<sup>45</sup> Kosař, op. cit., *supra* note 41, at 128-129.

<sup>46</sup> *Ibid.*, at 129.

<sup>47</sup> See Bobek, Michal; Kosař, David, “Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe”, Department of European Legal Studies Research Paper in Law, 07/2013, Bruges, College of Europe, 2013, at 17 and 18. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2351299](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2351299) (last accessed 13 January 2019).

<sup>48</sup> *Ibid.*, at 27-28.

<sup>49</sup> *Ibid.*, at 18.

<sup>50</sup> *Ibid.*, at 28.

<sup>51</sup> Omejec, Jasna, *Novi europski tranzicijski ustavi i transformativna uloga ustavnih sudova* (New European Transitional Constitutions and Transformative Role of Constitutional Courts), in the *Collected Papers from a Round Table: Twentieth Anniversary of the Croatian Constitution* (Zagreb, 16 December 2010), ed. Arsen Bačić, Library: Modernizacija prava, book 12, Zagreb: Croatian Academy of Sciences and Arts, Scientific Council for State Administration, Judiciary and the Rule of Law, 2011, pp. 61-85.

towards the values of a society that does not exist but to which they aspire, and which is formulated in their Constitutions and includes the European model of judicial councils. Thus, life in society in the European transition democracies has been marked by a condition that can be defined, to quote Dimitrijević, as the “drama of opposed imperatives”. Dimitrijević describes this “drama” as “completely specific”. In these countries, it has been necessary to simultaneously “institute and formulate the separate and competing processes of building a modern nation State, developing a market economy, establishing constitutional democracy and protecting social justice. The additional problem is that these countries do not have the tradition of democratic political culture or subjects/bearers of the democratic process as described. Whereas contemporary constitutional democracy is the result of a long process of learning in which people searched ‘step by step’ for various rational answers to the demands that were emerging in the social fabric, post-socialism is expected to implement this democracy as a model for people who have, in social terms, not articulated the need for such a system and about whom no one can be certain that they understand and accept democratic values”. In addition, “for most people, constitutionalism as a political ideology was not an inherently legitimate foundation for the new system. They usually understood freedom as liberation from communism, not as the protection of the individual from all kinds of authority or the readiness to assume responsibility for one’s own destiny within a constitutional framework of basic rights. They did not understand the principle of the separation of powers as forcing objectivity on the political sphere by placing it within the boundaries of the law, but merely as a rejection of one-party dictatorship. They did not see the market economy as the social and economic foundation of democracy but as consumer welfare, and so forth. In short, the new societies lack elementary reflection about the meaning and significance of constitutionalism. An instrumental approach to the constitution functions as a kind of perverted prolongation of the socialist tradition”.<sup>52</sup> In short, the European post-communist States accepted in their new Constitutions the components of the *model* of the desirable future society, but these do not correspond to real life in those States.<sup>53</sup>

All this has had an impact on the EU and CoE-driven judicial reforms in these countries, including the implementation of a European model of judicial councils, where the judges themselves have been assigned a key role. For example, both Slovakia and Romania are prime examples of countries that closely followed the European model of judicial councils. However, both these countries have struggled to cope with the new model. The Romanian Superior Council of Magistrates strengthened the corporatist features of the Romanian judiciary, with all the accompanying negative effects such as the lack of transparency and minimal accountability.<sup>54</sup> The Judicial Council of the Slovak Republic, with the help of politicians, was hijacked by judges who used their powers to capture the judiciary from the inside. These judges used their powers in a manner that helped them to protect their own interests.<sup>55</sup> Further, as regards the Slovenian judiciary, Zobec pointed out that, “[t]he paramount problem of the Slovenian judiciary is the judiciary itself. First of all, the politics residing inside it, which has been preserved as part of the heritage of the totalitarian era in the form of obstinate mental patterns firmly rooted in the old regime, expressing itself in collectivist and corporatist mind-set. There, in the judiciary, this mind-set (as one form of the parallel, concealed, or deep state) thrives and feeds itself in terms of mode de pense, values and worldviews thanks to institutional closure and complacency. In a normal state with established democratic tradition and legal culture, this would engender positive effects – it would foster what would already be there: internally, mentally independent judiciary. Unfortunately, in Slovenia, it is also being fostered what there already is: anything but an intellectually autonomous and independent judiciary. ... The politics

needs to do nothing, it needs not to impact on the judiciary in anything or with anything in order to submit it to itself and to put it under its influence for the time to be. This influence is already there, inside the judiciary, and it has, so to speak, been always there”.<sup>56</sup>

Accordingly, Preshova et al. detected four general negative effects of the European model of judicial councils in the European post-communist States: “**First**, the ‘European model’ is based on assumptions and preconditions relating to legal and judicial culture and mentality that was/is not in place in most of these countries. Therefore, it can be said that the model has been introduced prematurely. **Second**, as a result of this, not only have judicial councils not been able to guarantee judicial independence, but they have opened the door to further threats to it from both internal and external actors, and exacerbated the issue of judicial accountability. The insulation of the judiciary through judicial councils has made it even more prone to political pressure. **Third**, while judicial councils have tried to safeguard judicial independence, individual independence of judges has in certain cases been compromised, as a result of political pressure, mainly through the disciplinary procedure, evaluation of their work and dismissal. Judicial councils have served as an instrument for the disciplining of disobeying and dissenting voices in the judiciary. **Fourth**, despite being one of the goals of judicial councils, increasing the transparency of the judiciary has not been achieved. As a result of the increasing political pressure and existing judicial clientelism as led by the judicial elites, the judicial councils consequently became less transparent and closed to the public in the exercise of their powers and duties”.<sup>57</sup> It is indeed true that, despite its being one of the goals of judicial councils, increased transparency of the judiciary has not been achieved. The judicial councils have become closed to the public. They shut themselves like sea-shells, with no effective external (democratic) control.

To conclude, imposing the European model of a strong judicial council in the typical post-communist transition States is ill-suited to meet the normative values and expectations that were the object of the judicial reforms. The impact of the historical, cultural and institutional legacies, especially the legacies of communist judicial culture, on the dynamics of contemporary judicial reform and the behaviour of judges has hitherto proved too strong. According to Preshova et al., “[o]ne cannot simply establish new institutions amidst an existing judicial culture and mentality, power regimes and personalities, which have psychological ties to the previous regime and expect it to deliver a substantially different result. Consequently, judicial councils have in essence brought changes without reforms”.<sup>58</sup> In the words of Dicosola, “the adoption of reforms introducing completely new rules without a parallel process of transformation of culture risks to be useless or, even worse, to produce an adverse effect”.<sup>59</sup> The same goes for new institutions such as judicial councils established on the basis of principles devised by the EU and the CoE. The “de-communisation” of the judiciary through the European model of judicial councils appears to have been unsuccessful in most of the CEECs and WBCs.

#### 4. CONCLUDING REMARKS

It seems that, at the end of the day, everything comes down to legal culture, of which judicial ethics are an inherent part. Legal culture appears to be extremely important for every aspect of the judicial system, including those aspects relating to judicial councils as well as to the appointment, promotion and dismissal of judges.

52 See Dimitrijević, Nenad: *Ustavna demokratija shvaćena kontekstualno* (Constitutional Democracy Understood in Context), Edicija REČ, Fabrika knjiga, Belgrade 2007, at 110-111, 123-124. Translated by the author.

53 This deep rift between the “ideal” and the “real”, that is, the imbalance between the normative values arising from the doctrine of the substantive law-based State and the positive legal rules, including the way in which they are applied, is a pronounced structural characteristic of all the European post-communist States. Omejec, *op.cit.*, *supra* note 51, at 73.

54 See Selejan-Gušan, Bianca, “Romania: Perils of a ‘Perfect Euro-Model’ of Judicial Council”, *German Law Journal*, Vol. 19, No. 07 [Special issue – Judicial Self-Government in Europe] (2018), pp. 1707-1740.

55 See Spáč, Samuel; Šípulová, Katarína; Urbániková, Marína, “Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia”, *German Law Journal*, Vol. 19, No. 07 [Special issue – Judicial Self Government in Europe] (2018), pp. 1741-1768.

56 Zobec, Jan, *Mehki trebuh slovenskega sodstva. Delo* (8 December 2012), Available at: <https://www.delo.si/mnenja/gostujoce-pero/mehki-trebuh-slovenskega-sodstva.html> (last accessed 14 January 2019). Translated into English by Avbelj, Matej, in “Contextual Analysis of Judicial Governance in Slovenia”, *German Law Journal*, Vol. 19, No. 07 [Special issue – Judicial Self-Government in Europe] (2018), at 1918-1919.

57 Preshova et al., *op. cit.*, *supra* note 42, at 21.

58 Preshova et al., *op. cit.*, *supra* note 42, at 20.

59 Dicosola, Maria, “Judicial Independence and Impartiality in Serbia: between Law and Culture”, *Diritti Comparati*, 17 December 2012. Available at <http://www.diritticomparati.it/judicial-independence-and-impartiality-in-serbia-between-law-and-culture/> (last accessed 15 January 2019).

This simple truth brings to mind the Convention, because more than anything else the Convention reflects the very same philosophy. As Professor Wildhaber, former President of the ECtHR, pointed out, the Convention “is an essential part of our common heritage, an outstanding testimony to European ethical and legal culture ...”.<sup>60</sup> Speaking about the moral principles underlying the Convention (“the ECHR”), Letsas emphasised: “The only consensus that is morally significant is the one entailed by the drafting of the ECHR and the agreement to be legally bound by certain fundamental principles of liberal democracy”.<sup>61</sup> In this light, the CoE Committee of Ministers rightly emphasised that the democratic stability of the continent depends on the Convention, which plays the central role as a constitutional instrument of European public order.<sup>62</sup> Indeed, it seems that the Convention is the main, if not the only, pan-European instrument that has the integrative capacity to create a European legal identity.

Accordingly, the commitment to the set of values enshrined in the Convention, which all European countries can agree to, as well as their effective implementation at the national level, have a stronger “capillary” impact on ensuring the independence of the judiciary and on the general position of judges than anything else. This is because the Convention, unlike the idea of the European model of judicial councils that has been promoted, demands a change of legal mindset as well as acceptance of the specific legal culture. Thus, if the general principles of judicial independence which the ECtHR develops in its case-law are respected and successfully implemented, including those relating to the appointment, promotion and dismissal of judges – processes which have to be free from political influence – and if all three branches of State power are willing to accept and develop the legal culture on which the Convention is based, including ethical principles, then the institutional form of appointment, promotion and dismissal of judges becomes a matter of secondary importance.

In that case, the form chosen does not have to be the same everywhere. Hence, the variety of forms simply demonstrates that Europe is speaking in one language of judicial mission in a modern democratic State governed by the rule of law, but that this language is sub-divided, so to speak, into many different dialects.



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### **CONFIDENCE IN THE JUDICIARY IN THE CONTEXT OF THE JUDICIALISATION OF PUBLIC LIFE**

A veritable *human rights culture* has grown up in contemporary democracies, and as a result much greater importance is now being attached to justice. This is the main thrust of a number of relevant ideas set out in the communication presented by Ms Marta Cartabia, the Vice-President of the Italian Constitutional Court at the seminar on “the authority of the judiciary” which was organised on the occasion of the opening of the 2018 judicial year at the headquarters of the European Court of Human Rights (ECHR) in Strasbourg: “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 .... Whereas political bodies might be paralysed by division and a lack of consensus ... courts are bound to rule on even the most sensitive cases... These cases push the judiciary to the forefront of the public debate and keep it constantly under the spotlight”.<sup>1</sup>

All this is happening at a time when the Strasbourg Court has been emphasising the separation of the powers and the independence of the judiciary. In fact, the ECHR has held that “the notion of separation of powers between the executive and the judiciary... has assumed growing importance in the case-law of the Court”.<sup>2</sup>

In France, Henri Leclerc, the Honorary President of the Human Rights League, tells us that for over two centuries the judiciary has been endeavouring to find its rightful place in the balance of powers. Those in power generally show scant respect for the judiciary; they constantly point to the danger of creating a “Republic of Judges” replacing representative democracy.<sup>3</sup>

Here we might intercalate the views of the well-known political philosopher Pierre Manent, on the subject of the emancipation of rights: “rights are the attributes of every human being ... they are declared and guaranteed by judges who are, or who should be, increasingly independent from the political order”.<sup>4</sup>

In his latest work,<sup>5</sup> Pierre Rosanvallon, a Professor at the Collège de France, refers to a new aspect of our contemporary democracies, which has shifted the public debate into the criminal-law field: *the judicialisation of public life*.<sup>6</sup>

<sup>1</sup> M. Cartabia, *Separarea puterilor și independența judecătorească: provocări actuale*, in Pro Lege no. 1/2018, p. 386.

<sup>2</sup> *Stafford v. the United Kingdom*; *Ov. Predescu*, *Drepturile omului și ordinea mondială*, in Dreptul no. 8/2016.

<sup>3</sup> H. Leclerc, *La justice et le pouvoir*, in “Le monde qui vient. Entre périls et promesses. 2000-2015: un État des droits”, edited and coordinated by G. Aschieri, J.-P. Dubois, E. Tartakowsky and P. Tartakowsky, Ligue des Droits de L’Homme, Ed. La Découverte, Paris, 2016, p. 115, 117-119.

<sup>4</sup> P. Manent, *Cours familier de philosophie politique*, Ed. Fayard, Paris, 2001.

<sup>5</sup> P. Rosanvallon, *Contrademocrația. Politica în epoca neîncrederii*, Ed. Harvard University, 2008.

<sup>6</sup> *Montesquieu și penalizarea vieții publice*, in Legal Point no. 2/2016.

<sup>60</sup> Wildhaber, Luzius, Speech given on the Occasion of the Opening of the Judicial Year, 21 January 2005, in Annual Report 2004, Registry of the European Court of Human Rights, Strasbourg, 2005, at 33.

<sup>61</sup> Letsas, George, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, 2007, at 11.

<sup>62</sup> Declaration by the Committee of Ministers of the Council of Europe, “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, 114th Session, 12 May 2004.

In Romania, specialist research has shown us that the citizens have greater confidence in the judiciary than in the other powers. The perception is that there are no substantive public-policy projects, and that candidates for election are no longer nominated on the basis of their competence and integrity. All of this explains the ordinary citizen's wish to find out who is responsible (or who is criminally liable) for the lack of leadership in the proper management of public finances. For example, the National Anti-Corruption Department (DNA) has recently been investigating and prosecuting a large number of high-ranking public figures, finally convicting them of corruption offences. This has set off shock-waves affecting the balance among the three powers of State, with the judiciary now apparently setting the public agenda. The balance emerging from the constitutional relationships among the public powers stems from the "reciprocal involvement of one power in the area of jurisdiction of the other two, which leads to a balance based on cooperation and supervision".<sup>7</sup> This phenomenon is focusing public attention on reinforcing the role of justice and the force of law in our young democracy.

In the analysis of the issue of reinforcing confidence in the Romanian judicial system as set out in various specialist studies,<sup>8</sup> it has been noted that, under the 2003 amendment to the Constitution, "the separation of powers was expressly incorporated into the text of Article 1 § 4: the separation and balance of powers are the fundamental principles of the organisation of the State 'within the framework of constitutional democracy'". The Constitutional Court (CCR)<sup>9</sup> has been central to most of the progress made in the sphere of separation of powers. The CCR has pointed out "the importance, in the proper functioning of the law-governed State, of cooperation among the powers, which must be conducted in line with the spirit of constitutional fairness, because the latter guarantees the principle of the separation and balance of powers".<sup>10</sup>

The 2004 judicial reform helped strengthen confidence in the institutions, because it was perceived as shielding the Higher Council of the Judiciary (CSM) from any political influence. In that regard, the ECHR has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice – a fundamental value in a law-governed State – must enjoy public confidence in order to discharge its duties successfully.<sup>11</sup>

The setting up and reform of the CSM has influenced the values of judicial performance, that is to say effectiveness, access, efficiency, competence, fairness, etc. The National Institute of the Judiciary selects and trains young judges and prosecutors, provides high-quality teaching and ensures respect for the fundamental rights.

The DNA is considered as the main vehicle for rooting out corruption in society, particularly since the repeated manoeuvring by political leaders to amend legislation in order to scale down the anti-corruption policies.<sup>12</sup>

Among the key factors influencing public confidence in the judicial system, we might mention the independence and impartiality of judges, the length of proceedings, the enforcement of judicial decisions<sup>13</sup> and the political pressure exerted by the media. Thus, following a media campaign, a series of legislative measures were launched to distance the Romanian judicial system from the

European model on the pretence that the "absolute independence of the judiciary from the rest of the Romanian State architecture, including *vis-à-vis* its citizens – which it is called upon to serve – is raising serious issues and adding to the increasing fragmentation of Romanian society".<sup>14</sup>

Despite the serious concerns voiced by the CSM, judicial associations and the European Commission, the laws enacted have retained the new provisions hardening the substantive liability of judges and prosecutors, setting up a special agency responsible for investigating wrongful actions by the judiciary, and altering the system for appointing senior magistrates, and so on – so many threats to judicial independence and effective action against corruption.

Specialist analyses have highlighted the risk of such threats transforming the Romanian judicial system in such a way that instead of a system modelled on European best practice, it might up as a failed European experiment, incapable of imposing the rule of law. On the other hand, if the system gains support and is able to resist, it will reinforce its position as a guardian of judicial independence, including in the fight against corruption.<sup>15</sup>

In its 13 November 2018 report on the Cooperation and Verification Mechanism (CVM), the European Commission (EC) recommended that Romania should, *inter alia*, immediately suspend the application of the laws on justice and their concomitant emergency orders. As the Constitutional Court has also stated, dialogue among the powers and the principle of fair cooperation probably together constitute the optimum solution for the harmonious application of the principle of the separation and balance of State powers.<sup>16</sup>

The judicialisation of public life should not be confined to "the mere issue of institutional 'competition' between the members of the judiciary and those responsible for exercising power".<sup>17</sup> On the contrary, it should above all be analysed from the angle of the proper administration of justice, which is based on the independence and impartiality of judges and prosecutors.<sup>18</sup>

In Romania, under Law no. 303/2004 on the status of judges and prosecutors, judges are independent and subject only to the law, and they must be impartial. It is vital that their impartiality be absolute, because public confidence in and respect for the judicial system are what guarantees its effectiveness.<sup>19</sup>

It is incumbent upon the State, particularly the executive and the legislature, to adopt *optimum strategies to reinforce the confidence which they inspire and the responsibility which they display, with a view to consolidating and protecting the judiciary*. The ways and means of de-judicialising society include recourse to the methods of *Alternative Dispute Resolution* (ADR).

As regards the legislature's contribution to reinforcing the judiciary, it is interesting to note the internal structure of the *common law* system: the courts act as joint law-makers because their case-law is a formal source of law.

Moreover, the reverse effect is easy to discern. The "*stare decisis*" doctrine (or "*super stare decisis*" in its consolidated version)<sup>20</sup> prevents the legislature from issuing standard-setting decisions inconsistent with matters that have been settled under well-established (*longa, diuturna, inviderata*) case-law.

7 I. Muraru, E.S. Tănăsescu, op. cit., pp. 16-17.

8 Bianca Selejan-Guțan, *România: riscurile unui «model european perfect» al Consiliului Judiciar*, German Law Journal Vol. 19 No. 7 (2018), <https://www.germanlawjournal.com/> (the current issue is devoted to judicial self-governance).

9 CCR, Judgment no. 63/2017.

10 CCR, Judgment no. 972/2017.

11 ECHR, *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016.

12 Bianca Selejan-Guțan, op. cit.

13 The ECHR has emphasised that deficiencies in the execution of judicial decisions can undermine judicial authority and consequently public confidence in the judicial system. For instance, in the case of *Broniowski v. Poland* [GC] (no. 31443/96, § 175, ECHR 2004-V), the Court found a violation of Article 1 of Protocol No. 1, stating that "such conduct by State agencies, which involves a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention".

14 Bogdan Dima, Elena Simina Tănăsescu, *Reforma constituțională: analiză și proiecții* (2012), p. 142.

15 Bianca Selejan-Guțan, op. cit.

16 CCR, judgment no. 972/2012. For example, on 27 November 2017 the Romanian Constitutional Court organised a seminar on the theme of "Dialogue of Judges of the Constitutional Court", an open debate geared to developing fair cooperation among the partner institutions and reinforcing the defence of the fundamental values of the law-governed State.

17 P. Rosanvallon, op. cit.

18 *Ibid.*

19 For further details on the independence and impartiality of judges, as well as references in the text to the ECHR's doctrine and case-law on the subject, see M. Udrioiu and O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, Editura C.H. Beck, Bucharest, 2008, pp. 572-593.

20 William M. Landes and Richard A. Posner, *Private Alternatives to the Judicial Process*, The Journal of Legal Studies Vol. 8, No. 2, (March 1979), University of Chicago Press, pp. 235-284.

*In conclusion*, the strategy for reinforcing confidence can be built up by promoting and strengthening the “functional legitimacy” of the judiciary, which means ensuring high-quality judicial services. The criteria for assessing the achievement of this aim are training for judges and prosecutors, the existence of fair trials completed within reasonable timescales, the effective application of European law, the existence of judicial councils working for the community, the effective enforcement of high-quality judicial decisions, the use of information technology, specialisation and evaluation of judges, and proper cooperation with prosecutors and lawyers. If those criteria are met, the judiciary will retain its legitimacy in the eyes of the citizens and maintain their respect, thanks to the efficiency and quality of its work and its accountability for its choices *vis-à-vis* society and the other powers, withstanding all forms of pressure.<sup>21</sup> Regulating and implementing alternative dispute resolution methods provide the wherewithal for de-judicialising public life and relieving the courts of much of their workload in terms of cases.

I shall conclude with a reference to the appeal launched to the Romanians by Mr Antonio Tajani, the President of the European Parliament. During a recent visit to Bucharest, Mr Tajani, paraphrasing the great philosopher Emil Cioran, declared that “in a world undergoing exceptional change, we must not be afraid of the ‘enormity of the possible’”.



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**JUDGMENTS AND SEPARATE OPINIONS:  
COMPLEMENTARITY AND TENSIONS**

## I. INTRODUCTION: SEPARATE OPINIONS AND LEGAL TRADITION

The topic of Judgments and Separate Opinions is one that has fascinated me – in different ways – since the beginnings of my legal career. It was in the school library where I studied the first dissenting opinion ever published of the German Federal Constitutional Court.<sup>2</sup> The dissent dealt with the exception to the separation of powers in Article 10 al. 2 of the German Grundgesetz and that mandates a special parliamentary organ rather than a court with the legal control of telecommunication surveillance. The schoolboy considered the majority judgment an egregious violation of the separation of powers, the very separation he had just learnt to be fundamental for a constitutional democracy and thus not open to constitutional amendment.<sup>3</sup>

*“Nobody can tell whether the first step on the comfortable way undertaken by the change of the constitution to the easing of the existing bonds will be consequential. That is why, in our view, the limiting provision of Art. 79 al. 3 GG should not be interpreted and applied extensively, but strictly and in an unrelenting fashion. After all, the provision is meant to resist the beginning.”<sup>4</sup>*

Resist the beginnings! is also the frequent battle cry in dissent, in particular in a “hard” dissent such as this.<sup>5</sup>

I have to confess: I still love to read dissents: Most of them are clearly argued, consistent in their reasoning, and unforgiving for what they perceive as mistakes within the majority findings. They do not have to build a consensus, but declare why compromise is impossible. Phrases such as my former colleague Gertrude Lübke-Wolff’s “[O]ne ought to refuse being sent on grand desert tours that will not lead to any

<sup>1</sup> Justice of the Federal Constitutional Court (Germany), University of Goettingen/Germany. Presentation at the Annual Seminar of the European Court of Human Rights in Strasbourg on 25 January 2019. I thank President Raimondi and Judge Gabriele Kuscko-Stadmaier, in particular, for the opportunity to present my views. The intervention exclusively reflects the personal views of the author and does in no way bind the Federal Constitutional Court. The oral format has been maintained.

<sup>2</sup> BVerfGE 30, 1 (33), diss. op. Geller, v. Schlabrendorff, Rupp. The ECtHR has however approved the German practice, see *Klass v. Germany*, 6 September 1978, §§ 50 et seq., Series A no. 28; see now ECtHR (First Section), *Big Brother Watch v. UK*, Judgment of 13 September 2018, Applications nos. 58170/13, 62322/14 and 24960/15, para. 320, with further references and discussion (judicial authorization of surveillance “neither ... necessary nor sufficient to ensure compliance with Article 8” ECHR).

<sup>3</sup> BVerfGE 30, 1, 33 (43, 46), diss. op.: „Die Gewährung eines individuellen Rechtsschutzes ist im System der Gewaltenteilung eine Funktion der Rechtsprechung, da sie dem Schutz gegen Eingriffe der beiden anderen Gewalten dient. Die Rechtsschutzorgane gehören daher in den Funktionsbereich der Rechtsprechung. ... Es ist ein Widerspruch in sich selbst, wenn man zum Schutz der Verfassung unveräußerliche Grundsätze der Verfassung preisgibt.“ (In the system of separation of powers, providing individual legal protection is a function of the judicial branch, because it serves the protection against interventions of the two other powers. For this reason, the organs of legal protection belong to the judicial function. ... It is a contradiction in itself to forego for the sake of the protection of the constitution the inalienable principles of the constitution, our transl.).

<sup>4</sup> “[O]b der mit der Verfassungsänderung vollzogene erste Schritt auf dem bequemem Weg der Lockerung der bestehenden Bindungen nicht Folgen nach sich zieht, vermag niemand vorauszusehen. Deshalb sind wir der Auffassung, daß die Sperrvorschrift des Art. 79 Abs. 3 GG – zwar nicht extensiv, aber – streng und unnachgiebig ausgelegt und angewandt werden sollte. Sie ist nicht zuletzt dazu bestimmt, schon den Anfängen zu wehren.”

<sup>5</sup> Cf. the distinction in US practice between a “respectful” and a strong dissent.

<sup>21</sup> For further details see Opinion no. 18 (2015) of the Consultative Council of European Judges (CCJE) on the place of the judicial system and its relationship to the other State powers in a modern democracy.

spring.”<sup>6</sup> or Law Lord Hoffmann’s “The real threat to the life of the nation ... comes not from terrorism but from laws such as these.”<sup>7</sup> are still humming in our ears. In my own practice as a constitutional judge, I have used this tool only rarely, though, not always writing when I disagreed with the majority. Several colleagues have not written or joined a single dissent yet.

In the Anglo-Saxon tradition, the person of the judge appears much more important, and in the past most decisions were attributed to individual judges.<sup>8</sup> Today, however, a lead opinion is pronounced by a specific judge. In such a setting, dissents result much more naturally from the discussion of the lead opinion among individual judges. Some international courts, such as the European Court of Human Rights<sup>9</sup> or the International Court of Justice,<sup>10</sup> allow for separate and dissenting opinions, whereas others, such as the Court of Justice of the European Union, do not.<sup>11</sup> In this view, the unitary result seems more important than the transparency of the reasoning of the Court.<sup>12</sup>

## II. THE FUNCTIONS OF SEPARATE AND DISSENTING OPINIONS

As the role of separate opinions in different legal regimes is varied, the roles of separate and dissenting opinions are also far from uniform.<sup>13</sup> In several instances the question of whether dissenting opinions should be allowed has been raised, with different results: in Germany, they were introduced already in 1971, after a controversial debate pitting academics versus skeptical judges, albeit only in the Federal Constitutional Court. In France, at the end of the 1990s, the continuing exclusion of dissenting opinions was based on the fear of a loss of authority of courts – in the words of the doyen Vedel, a “justice spectacle” –<sup>14</sup> and, in particular, of the secrecy of deliberations.<sup>15</sup> Regarding the Court of Justice of the European Union, separate opinions are considered a threat to the unitary application of the law and the authority of the Court, whereas in human rights courts and treaty bodies, they are admitted at least in substantive decisions, as in the practice of the European Court of Human Rights.<sup>16</sup>

Those arguing in favour of separate and dissenting opinions can point to several factors: First of all, separate and dissenting opinions lead to more transparency of court deliberations in a democratic society. They help to understand the constitutional issues at stake and the reasoning in question. Separate opinions will also challenge the majority to give the best possible reasons for their result. The losing

side can see that its arguments were duly considered, even if they did not win. Not being the result of a compromise, separate opinions may be much more fully reasoned. They also allow a special role for the ad hoc or national judges in explaining the domestic position. The threat of a dissent may also forge compromise within the court, preventing the majority from simply imposing its will on the minority. In other words, dissents have an effect even before they are issued.

At times, dissents may criticize judicial timidity and demand more forceful application of existing jurisprudence. But they may also criticize decisions exceeding jurisdictional or substantive limits. Dissents may question the wisdom of established precedent and mark the beginning of a new line of jurisprudence. Sometimes, this will happen at another time or age. Think of US Supreme Court Justice Harlan’s “Great Dissent” to the infamous Civil Rights Cases of 1883 retracting Reconstruction rights for African-Americans<sup>17</sup> and the *Plessy v. Ferguson* judgment in 1896.<sup>18</sup> Harlan’s powerful words may have lost in court, but won in history.<sup>19</sup> Thus, it is not only one’s own Court that is the addressee of separate opinions. The dissenters may also convince the public that the law needs to change, thus playing the ball back to the legislative branch.<sup>20</sup> Those of you who have watched the 2018 documentary “RBG” chronicling the career of Justice Ruth Bader Ginsburg<sup>21</sup> may remember the Ledbetter Act,<sup>22</sup> named after RBG’s forceful dissent in the case bearing the same name.<sup>23</sup>

Let me add to these functions a few more, without suggesting an exhaustive list. In Courts with several instances or judicial bodies, dissents may help to elucidate differences between the established jurisprudence and a new decision, thereby preventing potential precedents from gaining traction.<sup>24</sup> They may point to alleged differences between the decisions of equal bodies of the same rank, such as recently in the ECtHR case *Big Brother Watch*.<sup>25</sup> Dissents may also help the higher instance to decide on whether to accept lower instance judgments for reconsideration, a recent example being the dissent by Judges Keller and Serghides in *Mutu and Pechstein v. Suisse* that was explicitly directed at the Grand Chamber, but was not successful.<sup>26</sup> Some even regard separate opinions as a sort of running commentary on the Convention.<sup>27</sup>

## III. SEPARATE OPINIONS AND THE AUTHORITY OF INTERNATIONAL COURTS

For all the advantages of admitting separate opinions, for the gains in transparency and fostering judicial dialogue – with other judges, with the other branches of government, with society, and even the future – separate opinions also have important downsides, in particular regarding the topic of today’s seminar: the authority of Courts and their decisions, both national and international.

As we have seen, separate opinions, by not being part of a compromise, may be more convincing than majority opinions. Their rhetoric is often more forceful than the serene tone of the respective judgments. However, at times, they may run into the risk of merely demonstrating vanity and personal offense rather

6 BVerfG, Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 – para. 23 [http://www.bverfg.de/e/rs20140114\\_2bvr272813en.html](http://www.bverfg.de/e/rs20140114_2bvr272813en.html) (Lübbe-Wolff dissenting, official transl.), BVerfGE 134, 366 (419 Rn. 127) (2014): “Nur sollte man sich auf große Wüstenwanderungen, die zu keiner Quelle führen, gar nicht erst schicken lassen”.

7 *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56, paras. 96-7 (partly dissenting opinion of Lord Hoffmann); cf. ECtHR, Grand Chamber, *A. and Others v. UK*, no. 3455/05, judgment of 19 February 2009, paras 179 et seq. (granting a wide margin of appreciation to national governments regarding derogations under Article 15 of the Convention).

8 It was difficult, at times, to find out the common denominator of the ratio decidendi and therefore also the effect of some of the majority decisions. For a famous example, see *UK House of Lords, R. v. Bow Street Stipendiary Magistrate and Others*, Ex parte Pinochet Ugarte (No. 3), 24 March 1999, [1999] 2 WLR 827; 38 International Legal Materials (1999) 581.

9 Articles 45 § 2 and 49 § 2 of the European Convention on Human Rights and Articles 74 § 2, and 88 § 2 of the Rules of the Court.

10 Statute of the International Court of Justice, Art. 57; Rules of Court, Art. 95 para. 2. Cf. Mistry, ‘The different sets of ideas at the back of our head’: Dissent and Authority at the International Court of Justice, 32 Leiden JIL (2019) 293.

11 Cf. Art. 36 of Protocol on the statute of the Court of Justice of the European Union, OJ C 202 of 7 June 2016, p. 218 (not mentioning separate opinions). Cf. Höreth, Richter contra Richter: Sondervoten beim EuGH als Alternative zum „Court Curbing“, 50 Der Staat (2011) 191.

12 However, this effect may be balanced by the broader opinions of the Advocate General; cf. Höreth, op. cit.

13 For a list of practice in different countries, see the overview provided by the ECtHR Research Division and European Commission for Democracy Through Law (Venice Commission), opinion no. 932/1018, 17 December 2018, CDOL-AD(2018)030rev., pp. 18 et seq.

14 Rivière, Les opinions séparées des Juges à la Cour européenne des droits de l’homme (2004), at 20 no. 95.

15 *Ibid.*, at 1, 18 ff.

16 See also the practice of the Inter-American Court of Human Rights, Organization of American States (OAS), American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, entry into force 18 July 1978, 1144 UNTS 123, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 28 January 2019], Art. 66 § 2 (“If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment”) and of the African Court of Human and Peoples’ Rights, Article 28 § 7 of the Protocol on the Establishment of the African Court on Human and Peoples’ Rights, 10 June 1998, available at: <https://www.refworld.org/docid/3f4b19c14.html> [accessed 28 January 2019]. But see also Article 55 § 2 sentence 2 of the 2000 Rules of Procedure of the Inter-American Court of Human Rights, available at: [https://www.oas.org/36ag/english/doc\\_referencia/Reglamento\\_CortelDH.pdf](https://www.oas.org/36ag/english/doc_referencia/Reglamento_CortelDH.pdf): “The said opinions shall only refer to the issues covered in the judgment.”

17 The Civil Rights Cases 109 U.S. 3 (1883) (Consolidating: *U.S. v. Stanley*; *U.S. v. Ryan*; *U.S. v. Nichols*; *U.S. v. Singleton*; *Robinson and wife v. Memphis & Charleston Railroad Company*).

18 *Plessy v. Ferguson*, 163 U.S. 537 (1896), § 39 (Harlan dissenting).

19 Cf. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

20 Cf. BVerfGE 146, 1 (150, 159 § 17) (Paulus and Baer dissenting) – Tarifeinheit (Uniformity of Collective Agreements).

21 Cf. RBG (film), Wikipedia, en.wikipedia.org (accessed 24 April 2019).

22 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. no. 111-2.

23 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) available online: <https://supreme.justia.com/cases/federal/us/550/618> (visited 4 May 2019).

24 Cf. BVerfGE 138, 261, 289 (294 para. 14) - Thuringia’s Shop Opening Hours (Paulus dissenting).

25 ECtHR (First Section), *Big Brother Watch v. UK*, cited above, partly concurring, partly dissenting opinion of Judge Koskelo, para. 4, joint partly dissenting and partly concurring opinion of Judges Pardalos and Eicke, para. 2, both pointing to ECtHR (Third Section), *Centrum för Rättvisa v. Sweden* (no. 35252/08, 19 June 2018); cf. ECtHR (Grand Chamber), *S., V. and A. v. Denmark*, Judgment of 22 October 2018, joint partly dissenting opinion of Judges de Gaetano and Wojtyczek, p. 55. However, the majority explicitly attempts to resolve contradictions in the previous jurisprudence, *ibid.*, p. 36 et seq., para. 108. Both judgments are pending before the Grand Chamber, see Press Release ECHR 053 (2019) of 5 February 2019, <https://hudoc.echr.coe.int/eng-press> (accessed 5 April 2019).

26 ECtHR (Third Section), *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2 October 2018. Nevertheless, the Grand Chamber did not accept Ms Pechstein’s application for referral to the Grand Chamber. See Press Release ECHR 053 (2019), footnote 25 above.

27 Rivière (note 14), at 320 et passim.

than sober and rational argument. They may create expectations of modification and thus prevent effective implementation. At times, the possibility of dissent will hamper the hard labour of forging consensus within the Court.

In systems allowing the re-election of judges, the possibility of dissent may also invite political statements and thus politicize a Court. In a poisoned political atmosphere, dissents may thus weaken the authority of the Court as a body applying the law, not making it, between an original reading and a living constitution – a distinction as problematic in theory as necessary for the maintenance of the separation of powers and the authority of courts in practice. Dissents may also confuse the legal message of the court. If law is considered a simple “on the one side ... on the other side” affair, in which each argument is as good as the contrary one, the authority of the law and of the Courts as its interpreters may be damaged.

#### IV. SOME MODEST PROPOSALS FOR THE USE OF SEPARATE OPINIONS

Thus, dissents expose, for better or for worse, the relativity of the judicial enterprise. If the legislator had already solved the case in question, the court intervention would be pointless. On the other hand, if a Court is making new rules rather than applying the existing ones, it may be charged with political activism. Implementation may suffer.

Nevertheless, when used wisely, occasional dissents will be helpful, not harmful, for the authority of Courts in a democratic society. Such a society will not accept mere claims of authority, but expects judgments removing or restricting democratic legislation to be at least based on a plausible reasoning derived from some basic principle or rule that society has democratically accepted as binding. Such a society must keep an open mind and should be ready to reverse itself occasionally. The minority of today may well become tomorrow’s majority. Separate opinions can thus contribute both to a court reckoning with itself but also to the dialogue with other courts and with society at large.

But to fulfil this task, and to avoid negative consequences for the authority of the Court and the judicial system in question, the downsides of separate opinions should also be cause for some modesty: In my view, dissents should be clear and concise, but not offensive, and be based on legal argument, not hyperbole. This is better for the authority of the Court, and for working with your colleagues in the future. Accordingly, separate opinions should be as brief and crisp as possible, and should center on the law alone. They require a public that accepts that legal determinism is in many cases an illusion, but that legal argument is open to discussion and reversal. While suggestions for legislative improvement are not always out of the question, legislation is not what Courts are generally supposed to do. In my view, it is not necessary to add a dissent at any time one disagrees with the result, even less so with this or that reasoning of the majority.<sup>28</sup> Dissents, and occasional separate opinions, should always serve a function beyond demonstrating disagreement. In general, a dissent that criticizes the Court for not going far enough is more defensible than one that points out that the Court has acted beyond its powers, because the former indicates the potential of future change and does not, in general, deny the authority of the Court in the same way as the latter.

Consider the consequences: Dissents should not aim at the impossible, but demonstrate why, in the opinion of the dissenter, the majority did not faithfully interpret and apply the law in question – of course without impugning malign intent. In particular, the dissent should not be used for demonstrating who is the better judge, but rather what would have been the better judgment. Mere separate opinions may be helpful for explaining the majority opinion, but may also expose arrogance and presumptuousness. Thus, separate opinions should enhance dialogue between majority and dissent,<sup>29</sup> not deepen the wounds between winners and losers of the deliberations. When this dialogue has taken place and the majority has the opportunity to check its own views with those of the minority, separate opinions and dissents may serve as important tools for more transparency of the process of judicial reasoning in a democratic society.



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### SOME REFLECTIONS ON PROTOCOL NO. 16

#### I. INTRODUCTION

On 12 April 2018, France became the tenth High Contracting Party to the European Convention on Human Rights to deposit its instrument of ratification of Protocol No. 16 to the Convention. As a consequence, Protocol No. 16 entered into force on 1 August 2018.<sup>2</sup> Since then, Andorra, Greece and the Netherlands have also ratified the new protocol. The latter extends the advisory jurisdiction of the Court, allowing it to provide advisory opinions, at the request of identified courts of the state’s parties to the Protocol, on “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”.<sup>3</sup> Prior to the entry into force of Protocol No. 16, the Court’s plenary adopted both the necessary amendments to the Rules of Procedure as well as non-binding Guidelines on the implementation of this new procedure. The latter Guidelines are intended to offer practical assistance to those courts and tribunals with competence to submit a request for an advisory opinion on the initiation of the request and the procedure to be followed. At the time of the seminar on the occasion of the opening of the judicial year, the first request for an advisory opinion, lodged by the French Court of Cassation on 16th October 2018, had been accepted and was pending before the Grand Chamber. At the time of writing, the first advisory opinion had been handed down by the Court in that case and a second request had been received from the Armenian Constitutional Court.<sup>4</sup>

<sup>1</sup> Síofra O’Leary and Tim Eicke, Judges elected in respect of Ireland and the United Kingdom. This is an extended version of the presentation at the opening of the judicial year on 25 January 2019. It was previously published in (2018) EHRLR 220-237.

<sup>2</sup> Article 8(1) of Protocol No. 16. The other nine states which have so far ratified the protocol are Albania, Armenia, Estonia, Finland, Georgia, Lithuania, San Marino, Slovenia and Ukraine. A further twenty two states have signed it. Article 6 emphasises that acceptance of Protocol No. 16 is optional (see further below) and the latter does not have the effect of introducing new provisions into the ECHR for those High Contracting Parties that do not accept it.

<sup>3</sup> See below for further discussion of this criterion. Provision for advisory opinions is of course already made in Articles 47-49 of the Convention but both those who can request such opinions (the Committee of Ministers), and the scope of what they may cover, are restricted. Two such requests were made up until 2008 and only one was accepted by the Court.

<sup>4</sup> See the short addendum below for further details.

<sup>28</sup> This is in line with the recommendations of the Venice Commission (supra note 13), opinion no. 932/1018, at 13, para. 42: “The law should treat separate opinions as a right of judges, and not impose on them a duty to disclose their opinion in every case they were not able to join the majority.”

<sup>29</sup> Cf. the criticism by Luzius Wildhaber, *Opinions dissidentes et concordantes de juges individuels à la Cour européenne des droits de l’homme*, Mélanges Valticos (Paris 1999) 529 (530).

This paper focuses on some key issues relating to the entry into force of the Protocol and on questions relating to the nature and effects of future advisory opinions and some procedural questions to which they may give rise. We will first touch briefly on the history and origins of Protocol No. 16 (II), the aims which this new advisory procedure is meant to achieve (III), before proceeding to distinguish between the characteristics of the new procedure (what the Explanatory Report refers to as “key parameters”) (IV) and procedural issues relating to their future treatment within this Court (V).<sup>5</sup>

As serving judges, we do not perceive our role as being in any way to applaud or, on the other hand, criticise the protocol. It is clear that it is for the High Contracting Parties to decide whether and when to sign and ratify the latter. Now it is in force, it will be for the Court to apply it. The paper seeks merely to consider and discuss the protocol’s practical consequences, to alert readers to questions and possible problems before they present themselves and, of course, in the context of an annual seminar dedicated to judicial dialogue, to listen to the points raised by visiting judges.

Finally, by way of an introductory note, we are aware that it may be tempting, when reflecting on the effects of Protocol No. 16, to compare it with the preliminary reference procedure which is the CJEU’s main judicial engine. However, it is important, in this context, to bear in mind the conclusion reached by the Group of Wise Persons in its 2006 Report. Working under the chairmanship of Mr Gil Carlos Rodríguez Iglesias, previously President of the CJEU, the Report noted that:

“In this connection, the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe. The preliminary ruling mechanism represents an alternative model to the judicial control established by the Convention, which requires domestic remedies to be exhausted. The combination of the two systems would create significant legal and practical problems and would considerably increase the Court’s workload.”<sup>6</sup>

So while the two procedures may bear some similarities, and there is no doubt that the procedural and judicial lessons learned with reference to the established Luxembourg procedure may be useful when developing the Strasbourg one, the two procedures are by no means identical, nor were they intended to be. Cross references to the Luxembourg procedure should not be interpreted as an indication to the contrary.

## II. HISTORY

Before considering the detail of the substantive provisions of the Protocol, it may help to take a brief look at the origins and the major steps in the history of the idea of empowering the Court to give advisory opinions at the request of national courts.

The aforementioned *Report of the Group of Wise Persons* to the Committee of Ministers first suggested that:

“[...] it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto. This is an innovation which would foster dialogue between courts and enhance the Court’s ‘constitutional’ role.”<sup>7</sup>

That 2006 Report went on to suggest that:

“84. [...] to enhance the judicial authority of this type of advisory opinion, all the States Parties to the Convention should have the opportunity to submit observations to the Court on the legal issues on which an opinion is requested.

<sup>5</sup> Note that preliminary draft amendments to the Rules of Court were submitted to Governments and interested NGOs in 2015, inviting them to comment by the end of November 2015. Comments were received by two governments and from certain NGOs in a collective response.

<sup>6</sup> Report of the Group of Wise Persons to the Committee of Ministers, Document CM(2006)203 ([https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d7893](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893); last accessed 23 September 2019), § 80.

<sup>7</sup> *Ibid.* § 81.

85. The Group is aware of the repercussions which the proliferation of requests for opinions might have on the Court’s workload and resources, since the requests for opinions and the member states’ observations would also need to be translated. In addition, providing such opinions would not be the Court’s principal judicial function. Accordingly, the Court’s new advisory jurisdiction should be subject to strict conditions.

86. It is proposed in this connection that:

- a) only constitutional courts or courts of last instance should be able to submit a request for an opinion;
- b) the opinions requested should only concern questions of principle or of general interest relating to the interpretation of the Convention or the protocols thereto.
- c) the Court should have discretion to refuse to answer a request for an opinion. For example, the Court might consider that it should not give an answer in view of the state of its case-law or because the subject-matter of the request overlaps with that of a pending case. It would not have to give reasons for its refusal.”

The next step appears to have been a joint proposal by the Dutch and Norwegian experts in January 2009 to extend the Court’s jurisdiction to give advisory opinions:<sup>8</sup>

- a. A request for an advisory opinion could only be made in cases revealing a potential systemic or structural problem.
- b. A request could only be made by a national court against whose decision there is no judicial remedy under national law.
- c. It should always be optional for the national court to make a request.
- d. The Court should enjoy full discretion to refuse to deal with a request, without giving reasons.
- e. All States Parties to the Convention should have the opportunity to submit written submissions to the Court on the relevant legal issues.
- f. Requests should be given priority by the Court.
- g. An advisory opinion should not be binding for the State Party whose national court has requested it.
- h. The fact of the Court having given an advisory opinion on a matter should not in any way restrict the right of an individual to bring the same question before the Court under Art. 34 of the Convention.
- i. Extension of the Court’s jurisdiction in this respect would be based in the Convention.”

In February 2012, in preparation for the Brighton Conference in April that year, the Court issued a *Reflection Paper* on the proposal to extend its jurisdiction to provide such advisory opinions.<sup>9</sup>

The Brighton Declaration of 20 April 2012 stated that:

“[...] the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions

<sup>8</sup> Summarised in document CDDH(2012)R74 Addendum I, Appendix V (<https://rm.coe.int/090000168045fdc5>; last accessed 23 September 2019).

<sup>9</sup> [http://echr.coe.int/Documents/Courts\\_advisory\\_jurisdiction\\_ENG.pdf](http://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf); last accessed 23 September 2019.

for the other States Parties; invites the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it.”<sup>10</sup>

The proceedings of the Brighton Conference record the head of the Dutch delegation as stating that:

“We are particularly pleased to see a reference to an optional protocol on advisory opinions. We believe this will strengthen the dialogue between the Court and domestic legal orders and reinforce the principle of subsidiarity. By introducing advisory opinions, we aim to alleviate the Court’s work load in the long term.”<sup>11</sup>

The drafting of the Protocol having been completed, on 6 May 2013 the Court adopted its “Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention”<sup>12</sup> and Protocol No. 16 was opened for signature on 2 October 2013.

### III. AIMS AND OBJECTIVES OF THE ADVISORY OPINION PROCEDURE

The extension of the Court’s advisory jurisdiction is, according to the preamble of Protocol No. 16, to enhance the interaction between the Court and national authorities with a view to reinforcing the implementation of the ECHR in accordance with the principle of subsidiarity.<sup>13</sup> As can be seen from its history and origins, the advisory opinion procedure is intended to be a further, concrete manifestation of that principle.

Subsidiarity is of course a two-sided principle. The Court’s supervisory role is subsidiary because it is the primary responsibility of the Member States to protect human rights within their jurisdiction. Advisory opinions are thus intended to provide assistance to Member States so as to avoid future violations, facilitate the correct interpretation of the Convention within national legal orders and, in this context, enhance judicial dialogue. In the process, it is hoped advisory opinions might alleviate the Court which, despite a remarkable decrease in its stock of cases in recent years due to the introduction of new procedures and working methods,<sup>14</sup> is confronted by an untenable number of individual applications and decreasing financial resources to deal with them.

The aim of the procedure is not to transfer the national dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when it subsequently determines the case before it. This is reflected in the procedural requirements discussed further below. Presumably, it is thought that if superior courts follow the advisory opinion of the Court, the interpretation of the Convention provided by the latter will gain more traction within the domestic legal system as lower courts will be bound (whether as a matter of fact or law) to follow the lead of their superior courts.

### IV. KEY PARAMETERS OF THE ADVISORY OPINION PROCEDURE

Articles 1 and 5 of the protocol establish what the key parameters or characteristics of the procedure will be.

#### 1. WHICH COURTS CAN REQUEST AN ADVISORY OPINION?

Advisory opinions can be requested by the “highest courts or tribunals [...] as specified by [the High Contracting Party] under Article 10”.<sup>15</sup>

Use of the term “highest”, as opposed to “the highest”, as well as enabling/requiring High Contracting Parties to specify the domestic courts who may request an advisory opinion from the Court suggest a more generous approach than initially envisaged (whereby limiting such a right to “national courts against whose decision there is no judicial remedy under national law” was envisaged). The intention appears to have been to permit the inclusion of those courts or tribunals that, although inferior to the constitutional or supreme court, are nevertheless of especial relevance on account of being the “highest” for a particular category of case. The idea was also to allow the necessary flexibility to accommodate the particularities of forty seven different national judicial systems.

By restricting the courts which can request advisory opinions, the intention is not only to reflect the exhaustion of domestic remedies rule but also to avoid a proliferation of requests and to identify the appropriate level at which the intended judicial dialogue should take place. As the declarations lodged thus far reveal, High Contracting Parties vary considerably in their approach. Finland, for example, has declared that the Supreme Court, the Supreme Administrative Court, the Labour Court and the Insurance Court may all request advisory opinions.<sup>16</sup> In contrast, Estonia and the Ukraine have declared that only their Supreme Courts may request advisory opinions,<sup>17</sup> while Romania, which has signed but not ratified the protocol, has designated fifteen courts of appeal, the High Court of Cassation and Justice and the Constitutional Court.

#### 2. OPTIONAL NATURE OF THE ADVISORY OPINION PROCEDURE – REQUEST AND WITHDRAWAL

Relevant courts or tribunals may request the Court to give an advisory.<sup>18</sup>

Several interesting questions may develop despite the optional nature of the procedure. Could, for example, the highest court with jurisdiction to refer a request be obliged to reason any refusal to do so if one of the parties to the domestic proceedings had explicitly urged the national court to request an advisory opinion? An analogy which could be drawn is with the Court’s Article 6 case-law requiring national courts whose decisions were not open to appeal under domestic law to give reasons, based on the applicable law and the exceptions laid down in CJEU case-law, for their refusal to refer a preliminary question on the interpretation of EU law.<sup>19</sup> However, there are of course important distinctions – not least the obligatory nature of the EU preliminary reference procedure for

<sup>15</sup> See Article 1(1) of Protocol No. 16. According to Article 10(2) of the protocol, the declaration designating courts or tribunals for the purposes of Article 1(1) may be modified by the High Contracting Party at any later date.

<sup>16</sup> Declaration contained in the instrument of ratification deposited on 7 December 2015.

<sup>17</sup> Declarations contained in the instrument of ratification deposited on 31 August 2017 (Estonia) and 22 March 2018 (Ukraine) respectively.

<sup>18</sup> See Article 1(1) of Protocol No. 16 and Rule 92(1) of the Rules of Court. This is the first and major difference to be noted with the EU preliminary reference procedure. See, in particular, the judgment in *Cifit and Others*, 283/81, EU:C:1982:335, paragraph 21: “In accordance with the third paragraph of Article 267 TFEU, a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of EU law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt”. In addition, preliminary references on the validity of EU legislation must be referred: “courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. [...] On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. [...] where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.” (*Foto Frost*, 314/85, EU:C:1987:452, paragraphs 14, 15 and 17). On withdrawal of a preliminary reference, see below for a temporal restriction.

<sup>19</sup> See, variously, *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, 20 September 2011; *Dhahbi v. Italy*, no. 17120/09, 8 April 2014; *Schipani and Others v. Italy*, no. 38369/09, 21 July 2015; *Baydar v. the Netherlands*, no. 55385/14, 24 April 2018 and *Repcevirág Szövetkezet v. Hungary*, no. 70750/14, 30 April 2019.

<sup>10</sup> Paragraph 12 (d) of the Brighton Declaration. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805caa07>; last accessed 23 September 2019.

<sup>11</sup> <http://rm.coe.int/high-level-conference-on-the-implementation-of-the-european-convention/1680695a9c>; last accessed.

<sup>12</sup> [http://www.echr.coe.int/Documents/2013\\_Protocol\\_16\\_Court\\_Opinion\\_ENG.pdf](http://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf); last accessed 23 September 2019.

<sup>13</sup> Note that, with Protocol No. 16 entering into force before Protocol n° 15, this would mean that the first explicit reference to subsidiarity in the ECHR would derive from the former and not the latter and be the consequence of ratification by a reduced number of Contracting States.

<sup>14</sup> Numbers (rounded up) of cases allocated to a judicial formation of the ECHR: 150,000 in 2011; 65,000 in 2015; 80,000 in 2016; and 30,500 between 1 January and 31 August 2019.

courts of last resort (subject to certain well-defined exceptions) or the importance of the preliminary reference procedure in the context of the presumption of equivalence which the Strasbourg court operates in relation to the protection of fundamental rights in the EU.<sup>20</sup>

The advisory opinion procedure is not only optional but the requesting court may, according to the Explanatory Report, withdraw its request. Rule 92(2.3) of the Rules of Court provides that it must notify the Registrar in the event of withdrawal, upon receipt of which the Court shall discontinue the proceedings.

There is no indication whether a request must be withdrawn within a specific time-limit. For example, if the Court has set a date for the pronouncement of an advisory opinion could a requesting national court withdraw its request at that late stage?<sup>21</sup> One approach would be, by analogy with contentious proceedings before the Court, that withdrawal should be possible at any stage until pronouncement by the Grand Chamber. Time alone will tell if a restriction on the entitlement to withdraw after a certain time-limit becomes necessary.

Withdrawal also raises issues regarding notification of the discontinuance of the advisory procedure by the Court under Rule 92(2.3). Should the Court be responsible for notifying the Member State from which the request originated, the parties, the third party interveners etc.? Will a specific type of order or act, announcing a strike out or discontinuance be required? If so, its form and language will have to be worked out. These may seem mundane questions but considering the Court’s docket and increasingly limited resources they may be of some considerable administrative relevance depending on the judicial “traffic” which the new protocol generates.

### 3. WHAT TYPE OF QUESTIONS FALL WITHIN THE SCOPE OF THE ADVISORY OPINION PROCEDURE?

As indicated previously, pursuant to Article 1(1), advisory opinions may be requested on “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”. The language of the latter provision reflects that of Article 43(2) ECHR on referral to the Grand Chamber although the two procedures are, of course, very different.

The definition of what comes within the scope of the advisory opinion procedure will be a matter for the Court, and in particular the Panel established under Article 2(1) of the Protocol, when deciding whether to accept a request for an advisory opinion. It is to be expected that a line of case-law will develop – on the basis of the Panel’s reasons for refusal of such requests – on criteria for determining what questions fall within and without the scope of Protocol No. 16. This is certainly what has occurred at the level of the CJEU, where there is extensive case-law both on questions of the limits to the jurisdiction of the Court and the admissibility of requests for preliminary references.<sup>22</sup> It should be noted however that the Court itself envisaged in 2013 that “such reasons [for refusal] will normally [not] be [...] extensive”.<sup>23</sup>

The development of such case-law may also be of subsequent interest for those applying to the Grand Chamber referral panel under Article 43(2) and for the work of the referral panel itself. As the latter does not give reasons when it accepts or refuses a referral request,<sup>24</sup> there is no established case-law on what constitutes, within the meaning of Article 43(2), “a serious question affecting the interpretation or application of the Convention or Protocols thereto, or a serious issue of general importance”. Guidance on this issue has so far had to be deduced from the type of cases accepted by the panel for referral (insofar as possible) and from the Explanatory Report on Protocol No. 11, which refers to important questions on the interpretation and application of the ECHR, to cases where there may be a reason to revise well-established case-law and to cases raising an important matter of general interest.

### 4. WHEN CAN AN ADVISORY OPINION BE REQUESTED?

An advisory opinion can only be made in the context of a case pending before the requesting court or tribunal.<sup>25</sup> The procedure is not intended to allow for abstract review of legislation.

The question arises whether, again drawing from the TFEU preliminary reference procedure, the Strasbourg Court will have to develop case-law to “police” this requirement. In the context of a procedure designed to enhance judicial dialogue and based, implicitly, on a principle of loyal cooperation, albeit not a formally established principle, a high degree of confidence will have to be accorded to the requesting court. However, even the existence of a recognised principle of loyal cooperation under EU law has not prevented the Luxembourg court on some, albeit rare, occasions from refusing to provide a preliminary ruling in circumstances where it considered the pending case to be fictitious or where a dispute was not really pending.<sup>26</sup> In addition, since the 1990s, that court has developed an extensive line of case-law examining whether the admissibility requirements in Article 267 TFEU, the Statute and the Rules of Procedure have been fulfilled. In short, just as the CJEU has insisted on its right and its duty to control the limits of its own jurisdiction, once Protocol No. 16 is in force, the ECtHR will need to consider – no doubt over time and informed by practical experience – whether and how far it needs to “police” compliance with this requirement and how far it can rely on a, if not express, at least implicit equivalent principle of loyal cooperation.

On the exclusion of requests involving abstract review of legislation from the scope of Protocol No. 16, the debate in France in the context of preparation for ratification of the protocol may be of some interest. The draft law authorising ratification of the protocol was put before the Assemblée nationale on 20 December 2017. It designates the Conseil d’État, the Cour de Cassation and the Conseil Constitutionnel as the three highest courts which can seize the Strasbourg Court by virtue of Protocol No. 16. The designation of this latter court, whose task is to control the conformity of legislation with the French constitution has given rise to questions relating to whether a request for an advisory opinion by the Conseil Constitutionnel would comply with the criterion established

24 See paragraph 105 of the Explanatory Report to Protocol n° 11.

25 Article 1(2) of Protocol No. 16.

26 See, for example, *Foglia v. Novello*, 244/80, EU:C:1981:302, paras. 18-20: “the duty assigned to the Court by Article [267] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of [EU] law which do not correspond to an objective requirement inherent in the resolution of a dispute. [...] Whilst the spirit of cooperation which must govern the performance of the duties assigned by Article [267] to the national courts on the one hand and the Court of Justice on the other requires the latter to have regard to the national court’s proper responsibilities, it implies at the same time that the national court, in the use which it makes of the facilities provided by Article [267], should have regard to the proper function of the Court of Justice in this field”. See also the judgment of the ICJ in *The Case concerning the Northern Cameroons (Cameroon v United Kingdom)(Preliminary Objections)* judgment [1963] ICJ Reports 15, 37 where the Court indicated that “[...] even if, when seized of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, [...], that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so”. For a recent expression of the EU principle of sincere cooperation see *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117.

20 See, in particular, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 160-65, ECHR 2005-VI; *Michaud v. France*, no. 12323/11, §§ 112-115, ECHR 2012; and *Avotiņš v. Latvia* [GC], no. 17502/07, § 110, ECHR 2016.

21 The Rules of Procedure of the CJEU were amended in 2012 to avoid this possibility – see Article 100(1): “The withdrawal of a request [for a preliminary ruling] may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons”.

22 See the digest of relevant CJEU case-law (in French), accessible at [https://curia.europa.eu/common/recdoc/repertoire\\_jurisp/bull\\_3/tab\\_index\\_3\\_04.htm](https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_3/tab_index_3_04.htm); last accessed 23 September 2019.

23 ECtHR, Opinion of the Court on Draft Protocol No. 16 to the Convention extending its competence to give advisory opinions on the interpretation of the Convention, Strasbourg, 6 May 2013, Paragraph 9, [https://www.echr.coe.int/Documents/2013\\_Protocol\\_16\\_Court\\_Opinion\\_ENG.pdf](https://www.echr.coe.int/Documents/2013_Protocol_16_Court_Opinion_ENG.pdf); last accessed 23 September 2019.

by the protocol requiring a request for guidance in a concrete case, excluding abstract review.<sup>27</sup> The answer to this question is no doubt to be found in domestic law. However, the debate reveals the extent to which views on which domestic courts should be able to refer is likely to vary considerably from one State to the next.

## 5. THE NATURE AND JURISPRUDENTIAL EFFECTS OF AN ADVISORY OPINION

As is clear from Article 5 of the protocol, advisory opinions are not binding.

In the context of the judicial dialogue in which they are handed down, it is the requesting court which decides on the effects of the advisory opinion in the domestic proceedings pending before it.

In addition, the handing down of an advisory opinion would not prevent a party to the case subsequently exercising their right of individual application under Article 34 ECHR. Where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it could be expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out. It is also possible, however, that the approach the Court would take with regard to such an application may be different, since the individual application is likely to address the challenged national interpretation of the Court’s advisory opinion rather than the Court’s interpretation of the Convention as such. This question remains open of course for the time being.

However, and here we signal quite personal views, the introduction of the advisory opinion procedure presents the Court with both tremendous opportunities and tremendous challenges.

On the one hand, it has the possibility, given the more “constitutional” nature of the new procedure<sup>28</sup> to express, clarify or develop general principles in a context broader than the individual facts of an individual case may permit. The Article 34 individual applications vehicle is subject to the risk – in certain cases, in certain circumstances and with reference to certain Convention questions – of obfuscating those general principles given the degree to which the relevant judicial formation concentrates on their application in the circumstances of a concrete case.<sup>29</sup>

The challenges posed by Protocol No. 16 will, in our view, be many, but two in particular are worth highlighting.

a) The Court will first hand down an advisory opinion setting out the general principles to be applied as regards the interpretation and application of the ECHR but, in any subsequent individual application following the conclusion of the same case at national level, it will have to remain coherent and consistent both in terms of the expression of those same principles and their application to the facts of the case. A good example of the difficulties which may arise is provided in the *Schatschaschwili v. Germany* case on the inability to examine absent witnesses, whose testimonies carried considerable weight in the applicant’s conviction. As is clear from the joint dissenting opinion, the minority judges who were in favour of finding no violation agreed, however, with the majority as regards the general principles the judgment established. They only parted company with the majority as regards the application of the relevant principles to that case.<sup>30</sup> One is also reminded in this context of the formula oft-used by the Court, in particular, in Article 10 cases, where it states that “the Court would require

strong reasons to substitute its view for that of the domestic courts”.<sup>31</sup> It remains to be seen whether this will also be the preferred approach in such double adjudication situations, either in relation to certain Convention articles or across the board.

b) The second challenge goes to the legitimacy and standing of the Court in the eyes of its national interlocutors. If national superior courts consistently or regularly decide not to follow the terms of an advisory opinion, the resulting problems are obvious.

As regards the jurisprudential value of advisory opinions, they will form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention contained in such advisory opinions would, one imagines, be analogous in its effect to the interpretative elements set out by the Court, sitting in a Grand Chamber formation, in judgments and decisions. This would mean, however, that even if an advisory opinion does not bind the requesting national Court when resolving the case before it, the interpretation of the Convention provision(s) provided by the Court is nevertheless an authoritative one. In addition, even for those Member States which decide not to ratify Protocol No. 16, it is difficult to avoid the conclusion that any opinions handed down on that basis will carry equal weight in cases involving them.<sup>32</sup>

An alternative view, if other Member States are not involved or do not involve themselves in the procedure, would be that the resulting advisory opinion is addressed only to the requesting court. However, Member States (and the public in general) are already alerted via the Court’s Hudoc database of all communicated cases. A decision not to intervene when informed of a pending advisory opinion procedure should not detract from the generality of the guidance provided by the Court. Both the formation chosen to provide advisory opinions and the nature of the questions which can be the subject of requests suggest that limiting the value of the opinion handed down to the requesting court only is to misconstrue the nature and intent of the protocol and the procedure it provides for.

Given that they are decided by the Court sitting in Grand Chamber formation, the question will inevitably arise whether advisory opinions should not equally be given higher precedential value than judgments of chambers and committees, despite their non-binding nature for the national requesting court.<sup>33</sup>

## V. PROCEDURAL ISSUES

### 1. THE CONTENT OF A REQUEST FOR AN ADVISORY OPINION

The procedural requirements which a request for an advisory opinion must fulfil are set out in Article 3(1) of Protocol No. 16 which provides that the requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

As the Explanatory Report highlights, these requirements serve two purposes:

- the requesting court or tribunal must have reflected upon the necessity and utility of soliciting an advisory opinion of the Court, so as to be able to explain its reasons for doing so.

<sup>31</sup> See, for example, *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012.

<sup>32</sup> Especially as Article 46(1) of the Convention, by definition, does not apply to advisory opinions under Protocol No. 16; see below under Hearings and Interventions on the right of other States Parties to intervene.

<sup>33</sup> A related issue is how to cite advisory opinions so that they can be easily distinguished from individual and interstate applications.

<sup>27</sup> See, for example, P. Cassia, «Le Conseil Constitutionnel et la procédure d’avis devant la Cour de Strasbourg», 9 January 2018 (<https://blogs.mediapart.fr/paul-cassia/blog/080118/le-conseil-constitutionnel-et-la-procedure-d-avis-devant-la-cour-de-strasbourg>; last accessed 23 September 2019). For discussion in a recent Strasbourg case of the type of review exercised by the Conseil Constitutionnel see *Charron and Merle Montet v France* (dec.), no. 22612/15, 16 January 2018, §§ 26-29.

<sup>28</sup> References to the Court’s so-called “constitutional” role are absent from most official documents relating to Protocol No. 16. See, however, the reference to such a role in the 2006 report of the Group of Wise men where the origins of the proposal leading to Protocol No. 16 can be traced.

<sup>29</sup> See, in this regard, the comments by our colleague, Judge Koskela in XXVI FIDE conference, Copenhagen, 2014, pg. 152.

<sup>30</sup> App. no. 9154/10, judgment of 15 December 2015; see also *Merabishvili v. Georgia* [GC], no. 72508/13, ECHR 2017 (extracts).

- the requesting court or tribunal must be in a position to set out the relevant legal and factual background, thereby allowing the Court to focus on the question(s) of principle relating to the interpretation or application of the Convention or the Protocols thereto. In its Opinion on the draft protocol the Court stressed:

“[...] the need to allow the Court to focus on the question of principle before it. The Court should not be called upon to review the facts or the national law in the context of this procedure.”<sup>34</sup>

As regards the legal and factual background, according to Rule 92 (2.1) of the Rules of Court, the request for an advisory opinion should include:<sup>35</sup>

- The subject matter of the domestic case and its relevant factual and legal background;<sup>36</sup>
- The relevant domestic legal provisions;
- The relevant Convention issues, in particular the rights or freedoms at stake;
- If relevant, a summary of the arguments of the parties to the domestic proceedings on the question;
- If possible and appropriate, a statement of the requesting court or tribunal’s own views on the question, including any analysis it may itself have made of the question.

The overarching aim must be that the requesting court or tribunal places the Court in the most informed position possible in order to enable it to respond meaningfully to the concerns expressed and questions raised by the requesting court or tribunal as regards the application of Convention law to the domestic proceedings.

Further, the Guidelines approved by the Plenary Court in September 2017 reiterate that in order for the Court to be in a position to provide clear interpretative guidance to the requesting court or tribunal, a request should be set out as prescribed in the Protocol and Rules of Court and should be complete and precise.

The Explanatory Report to the Protocol does not address the extent, if any, to which the parties to the procedure can or should be involved in the initiative to request an advisory opinion or in the formulation of any request. The Guidelines note that the requesting court or tribunal has a degree of discretion to determine whether it is “relevant” to include a summary of the arguments of the parties on the subject matter of the request. To some extent this absence of detail mirrors the position in EU law but, as we know, the CJEU has developed case-law on the subject, emphasising that the right to request a preliminary ruling is not an individual right of the parties but rather is a right (and sometimes a duty) of the national court.<sup>37</sup> The extent to which parties are involved in the formulation of any request for an article 267 TFEU ruling varies greatly between Member States. The Guidelines, however, do note that depending on the position in domestic law, it may well be the case that one or both parties can take the initiative to ask the domestic court to make a request for an advisory opinion in their grounds of appeal against the decision of an inferior court. Nonetheless, it is emphasised that in any event the final decision on whether or not to request an advisory opinion rests with the appellate court or tribunal insofar as it has been designated as a court which may make such a request for the purposes of the Protocol.

A further point of note is the recommendation that the requesting court include “where possible and appropriate” its views on the Convention question raised and any analysis it may have made in this regard. The NGOs consulted in 2015 expressed concern that this might lead to the outcome of the domestic proceedings being prejudged.<sup>38</sup> Questions of national procedural law aside, we do not, personally, see where the problem lies. The views expressed are clearly not binding but they may be of tremendous assistance to the Court. It will be under pressure to provide an answer in an expedited procedure in order not to delay domestic proceedings.<sup>39</sup> The Guidelines point out that what is important is that the requesting court or tribunal, in the exercise of its judgment, places the Court in the most informed position possible in order to enable it to provide the interpretative guidance sought.

Finally, while there was no indication in the protocol or the Explanatory Report of any limit to the written comments or documents submitted, the Guidelines will provide detailed practical instructions for the presentation of a request. According to these Guidelines, the page limit, in principle, for a complete request should not exceed twenty pages. The economy and relevance of documents submitted in connection with a request for an advisory opinion is plainly an important consideration given both linguistic and time constraints.

## 2. PROCEDURE FOR DECIDING ON THE ACCEPTANCE OR REJECTION OF A REQUEST

This procedure is set out in Article 2(1) of Protocol No. 16 which makes clear that the Court has discretion regarding whether to accept or refuse a request but that the latter must be reasoned.<sup>40</sup> This contrasts with the referral procedure where the five judge referral panel, as indicated previously, does not reason the refusal of a referral request. Once again, this difference could be regarded as entirely in accordance with the nature of the judicial dialogue which the advisory opinion procedure seeks to enhance. Nevertheless, it is worth emphasising that both the original 2006 report of the Wise Men and the Court in its own 2012 Reflection Paper proposed no obligation to reason in order to preserve the Court’s flexibility and limit the additional workload which processing requests for advisory opinions might entail.

It should not be presumed that the referral and the advisory opinion panels would be the same or identical in their composition. After all, Article 2(3) of the Protocol requires that the panel “shall include ex officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains”; a requirement that does not apply to the referral panel, the composition of which is governed by Rule 24(5) of the Rules of Court. In fact, Rule 24(5)(c) expressly provides that “No judge elected in respect of, or who is a national of, a Contracting Party concerned by a referral request may be a member of the panel when it examines that request”. The composition of the five judge advisory opinion panel is governed by Rule 93 of the new Chapter X to the Rules of Court. It will consist of the President of the Court, two Section Presidents designated by rotation, the judge elected in respect of the Contracting Party to which the requesting court or tribunal pertains and a judge designated by rotation from among the other Section judges serving on the panel for a six-month period.

The amended Rules of Court provide in Rule 93(2) that requests for advisory opinions shall be processed as a matter of priority in accordance with Rule 41 of the Rules of Court. However, there is no formal time-limit expressed, either in the Guidelines or in binding form, within which the Court should adopt a decision to refuse a request for an advisory opinion.

<sup>34</sup> Opinion adopted by the Plenary Court on 6 May 2013.

<sup>35</sup> The detail derives not from the Protocol itself but from the amended Rules of Court and, previously, from the *Explanatory Report to Protocol No. 16 to the ECHR*, CM (2013) 31, 2 April 2013. The similarity between this list and that in Article 94 of the CJEU’s Rules of Procedure which details what a request for a preliminary ruling must contain, are striking. The amended Rules of Court reproduce the detail in the Explanatory Report; detail which is given further flesh in the Guidelines discussed below at Section V.

<sup>36</sup> The wording of the relevant part of the Explanatory Report and Rule 92(2.1)(a) differs. Rule 92(2.2) specifies that the requesting court or tribunal shall also “submit any further documents of relevance to the legal and factual background of the pending case”.

<sup>37</sup> See, for example, judgment in *T-Mobile Czech Republic et Vodafone Czech Republic*, C-508/14, EU:C:2015:657, paragraphs 28-29: “Under Article 267 TFEU, it is for the national court, not the parties to the main proceedings, to bring a matter before the Court of Justice. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties may not change their tenor”.

<sup>38</sup> See the legal briefing of the Open Society, March 2016, reference provided below.

<sup>39</sup> See, similarly, paragraph 24 of the CJEU’s non-binding *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, OJ 2012 C 338/01, remembering that a preliminary ruling is, moreover, binding.

<sup>40</sup> See also Rule 93(4).

As indicated previously, it can be expected that the advisory opinion panel will, over time, clarify what is meant by “questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto”.

We express a note of caution, again a personal one, in relation to the need for the panel to clearly reason in terms of jurisdiction or admissibility.<sup>41</sup> A close reading of the case-law of the CJEU under Article 267 TFEU reveals that these issues are sometimes treated as synonymous and sometimes not. In general, the CJEU has refused to provide preliminary rulings where the domestic case is hypothetical, where the question referred bears no relation to the facts and subject matter of the case before the national court, where the facts or legal framework are insufficiently clear (even though the Court can also make further inquiries of the national referring court in both regards) or where the questions do not involve an interpretation of EU law.<sup>42</sup>

The terms of decisions to refuse a request will and should provide guidance to domestic courts and tribunals when considering whether to make a request and will and should thereby help to deter inappropriate requests which will consume precious Court resources.

In this context, it is necessary to insert a further note of caution (a personal *obiter* no doubt) in relation to the statement in the Explanatory Report to the effect that:

“It is to be expected that the Court would hesitate to refuse a request that satisfies the relevant criteria by (i) relating to a question as defined in paragraph 1 of Article 1 and (ii) the requesting court or tribunal having fulfilled the procedural requirements as set out in paragraphs 2 and 3 of Article 1.”<sup>43</sup>

After all, this statement describes an untested procedure which will require the Court to extend its jurisdiction to a perhaps very different judicial exercise than those which it currently performs under Article 34 and without any prior knowledge of how many States will consent to the protocol or the frequency, complexity and clarity of their requests if and when they do.<sup>44</sup> The Court’s initial reflection paper on advisory opinions spoke of cases which might not require further clarification or where Strasbourg case-law is sufficiently clear, implicitly referring to something along the line of the CJEU’s *acte clair* doctrine. The Court will of course have to be deft when explaining to a national court which thinks the case-law is unclear why, in contrast, the Court considers it is. Another scenario envisaged by the Wise Persons’ Report was the rejection of a request where its subject-matter overlaps with that of a pending case. It will surely be possible for the Court to refuse a request even if the subject matter falls within the scope of Protocol No. 16 and basic procedural requirements are complied with. Certainly, the Report of the Group of Wise Persons referred to previously stated that the new advisory jurisdiction should be subject to strict conditions and the provision of such opinions would not constitute the Court’s principal judicial function. By implicating the Grand Chamber in all requests deemed admissible, Protocol No. 16 could otherwise have not insignificant consequences for the workload of that judicial formation. It may require, in the short or medium term, adaptation of that formation’s working methods.

41 Already one can see some potential “false friends” in the protocol and the Explanatory Report, where the former refers in the preamble to an extension of the Court’s “competence”, while the latter talks about an extension of its “jurisdiction”.

42 This case-law is accessible via the CJEU digest of case-law at [https://curia.europa.eu/common/recdoc/repertoire\\_jurisp/bull\\_3/tab\\_index\\_3\\_04.htm](https://curia.europa.eu/common/recdoc/repertoire_jurisp/bull_3/tab_index_3_04.htm).

43 See paragraph 14 of the Explanatory Report.

44 Since the questions which can be the subject of an advisory opinion have some parallel with those which can be the subject of a referral request, it is worth reproducing the number of such requests accepted in recent years: 7 (2012), 10 (2013), 18 (2014), 15 (2015), 14 (2016) and, 10 (2017).

### 3. THE NATURE AND FORM OF AN ADVISORY OPINION

It is the Grand Chamber of the Court that shall deliver advisory opinions following acceptance of a request by the five-judge panel and reasons shall be given (Articles 2(2) and 4(1) of the protocol).<sup>45</sup>

This was considered appropriate given the nature of the questions on which an advisory opinion may be requested and the fact that only the highest domestic courts or tribunals may request it, along with the recognised similarities between the present procedure and that of referral to the Grand Chamber under Article 43 of the Convention. Time alone will tell whether this choice was wise. A specialised advisory opinion Chamber might, alternatively, have allowed any subsequent individual application (alleging non- or incorrect application of any opinion) to be relinquished rapidly and where necessary to the Grand Chamber.

While the draft Explanatory Report referred explicitly to the possibility of the Grand Chamber reformulating the questions in the request, the text as adopted does not expressly tackle this issue. If reformulation or reclassification of the advice sought were an option, which the Court’s case-law on the reclassification of complaints suggests it might be,<sup>46</sup> then the Court’s advisory opinion might address articles of the Convention not the subject of the request in addition or even instead of those which are. Reformulation of questions is a well-established technique in Luxembourg preliminary references albeit, it should be added, not one always or universally welcomed by national courts.<sup>47</sup>

It remains to be seen to what extent the new procedure will entail significant additional work for the Grand Chamber and how easy it will be for that composition to reconcile its workload under Articles 33 and 34 of the Convention with this new advisory workload. It cannot be excluded that the new procedure will warrant some changes to the Court’s internal working methods in Grand Chamber cases.

As indicated previously, if a request is accepted, the composition of the Grand Chamber will be determined by Rule 24(2)(a), (b), (e) and (h) of the Rules of Court. It shall include *ex officio* the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains or, failing that, an *ad hoc* national judge.<sup>48</sup>

Not only will advisory opinions be reasoned; they may be accompanied by separate concurring and dissenting opinions or a bare statement of dissent (Article 4(1) and (2) and Rule 94 (8)). In its Opinion on the draft Protocol the Court noted that:

“This is in keeping with the Rules of Court on advisory opinions under the current system (Rule 88 § 2) although it has been the practice of the Court when issuing advisory opinions to endeavour to speak with one voice.”<sup>49</sup>

45 There is no similar provision under the TFEU or the Rules of Procedure of the CJEU requiring references from superior courts or courts of last resort to be dealt with by the Grand Chamber of that court. Member States or EU institutions can request, however, that a case be dealt with by the Grand Chamber (see Article 60(1) of the CJEU’s Rules of Procedure).

46 See, by analogy, the Court’s approach in contentious proceedings, where it has repeatedly indicated that “being master of the characterisation to be given in law to the facts of the case (see *Castravet v. Moldova*, no. 23393/05, § 23, 13 March 2007; *Marchenko v. Ukraine*, no. 4063/04, § 34, 19 February 2009; and *Berhani v. Albania*, no. 847/05, § 46, 27 May 2010) [it] is not bound by the characterisation given by the parties”: *Gatt v. Malta*, no. 28221/08, § 19, ECHR 2010.

47 See, for example, the CJEU judgments in *Campina*, Case C-45/06, EU:C:2007:154, paragraphs 30 and 31, and *Fuß*, EU:C:2010:609, paragraph 39: “[I]n the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts”.

48 Article 2(3) of the Protocol and Rule 24(2)(b).

49 § 11 of the Opinion, cited above (emphasis added).

This leads to the inevitable question, raised we understand in the context of the Dutch Senate consideration of draft ratifying legislation, whether and how a judgment of the Grand Chamber in such proceedings can be seen as a correct/authoritative ruling on the “question of principle” raised by the requesting court where, in the context of contentious proceedings, judgments of the Court regularly contain dissenting opinions both in Chamber judgments as well as in Grand Chamber judgments.<sup>50</sup> Personally speaking we consider that, if the advisory opinion is to fulfil the function for which it was intended – enhancing judicial dialogue with national judges with a view to reinforcing implementation of the Convention – the Grand Chamber will be put to the collegiate test in future and must seek to minimise the occasions on which, on questions of legal principle, it is highly divided.<sup>51</sup>

#### 4. PRIORITY TREATMENT

The Explanatory Report referred to the need to avoid “undue delay” without specifying what is meant by undue delay?

Rule 93(2) of the Rules of Court sets out that requests for advisory opinions shall be processed as a matter of priority in accordance with Rule 41 thereof. Section XI of the Guidelines will provide further detail on the priority to be accorded to requests, and makes provision for ‘urgent’ examination over and above the priority status normally to be accorded to all such requests.

In such urgent cases, the Guidelines will provide that the requesting court or tribunal should indicate, giving reasons, whether there are any special circumstances which would require an urgent examination of the request and a speedy ruling by the Court. It will be for the Court to determine whether the reasons put forward by the requesting court or tribunal are such as to justify an expedited treatment of the request. The Court can also decide of its own motion to treat a request according to an expedited procedure.

The Explanatory Report had made clear that priority status for requests for advisory opinions should apply at all stages of the procedure and to all concerned, namely the requesting court or tribunal, which should formulate the request in a way that is precise and complete, and those that may be submitting written comments or taking part in hearings,<sup>52</sup> as well as the Court itself.

In recent years, the average times for judgments or decisions before the Grand Chamber following referral or relinquishment respectively were as follows: 2015: 15.6 months/17.5 months; 2016: 17.1 months/17.4 months; 2017: 15.9 months/17.8 months and 2018: 17 months/22 months. The speed of put through is clearly affected by the number of cases pending before that formation and entry into force of the protocol may, as stated previously, increase the pressure.

Looking to the Luxembourg court for some additional statistical guidance, the 2016 annual report of that Court reveals the following:

- on average, it took 15 months to dispose of a preliminary reference.
- as regards a subset of the Article 267 TFEU procedure, the urgent preliminary ruling procedure, 12 urgent preliminary rulings were requested in 2016 but the Court chose to apply the procedure in 8 cases. It took, on average, 2.7 months to dispose of these cases, up from 2.1 in 2015.

Although referring to a quite distinct court and judicial procedure, these statistics reveal that the Strasbourg Court is highly likely to be faced with decisions and challenges regarding what is meant by “no undue delay” and what, in practice, priority means. As the CJEU knows only too well, the time taken to dispose of a preliminary reference – which at its peak in 2003 reached 25.5 months – at times influenced the decision by certain national courts on whether to refer.

<sup>50</sup> See the deliberations of the Eerste Kamer on 5 September 2017.

<sup>51</sup> A good case in point may be the *Bélané Nagy v. Hungary* [GC], n° 53080/13, 13 December 2016.

<sup>52</sup> See also Article 3, discussed below.

If “undue delay” is interpreted to mean less than the present Grand Chamber average which, as we will see below, the treatment of the first French request suggests is the case, this can be expected to have a knock on effect on the work of the Court generally and on the work of the Grand Chamber in particular.

#### 5. HEARINGS AND INTERVENTIONS

Hearings are clearly not excluded but neither are they obligatory.<sup>53</sup> According to Rule 94(6) of the amended Rules of Court, the President will decide on whether or not to hold a hearing at the close of the written procedure.

Most Grand Chamber cases (referrals and relinquishments) are organised with an oral procedure.<sup>54</sup> If the procedure is both written and oral the time taken for the advisory opinion to be communicated to the requesting court will of course be longer.

The Member State from which the request originates may submit written comments or appear at any hearing but is not obliged to do so. The President of the Court may also, pursuant to Article 3 of the Protocol and in the interest of the proper administration of justice, invite any other Member State or person to submit written comments or take part in any hearing.

As regards who can intervene and how they do so, a number of issues were initially relatively vague and, even after the amendment of the Rules of Court and the development of Guidelines, some remain so.

It was not initially clear whether the parties to the proceedings at the domestic level would be notified of a request and/or invited to intervene if that request is accepted or, in certain cases, in the initial processing of the request? The Explanatory Report indicates that this is expected but the text of the Protocol left the question open. Rule 94(3) provides that the President of the Grand Chamber may invite these parties to submit written observations and, if appropriate, to take part in an oral hearing. It has been observed that were parties allowed to submit their memoranda automatically, the borderline between adversarial procedure and the advisory opinion procedure would become blurred.<sup>55</sup> There are of course counter-arguments in this regard, not least the fact that the Court will hand down its opinion in the context of a pending dispute between two or more parties at domestic level. The Guidelines provide that with regard to notification about progress in the proceedings, it is for the requesting court or tribunal to keep the parties to the domestic proceedings informed, except in the event that one or both parties have been invited to intervene in the proceedings, in which case the Court shall assume this function.

Will the Court and its President be as inclusive as they are now, in some Grand Chamber cases, regarding requests for third party interventions under Article 36 § 2 and Rule 44?<sup>56</sup> The new Rule 44(7) will apply the provisions on third-party intervention *mutatis mutandis* to the advisory opinion procedure.<sup>57</sup> The same criterion – acceptance in the interests of the proper administration of justice – applies. Careful consideration of this issue is required given the different nature of the advisory procedure, the fact, as stated above, that it is occurring in the context of a pending case between identified parties, the fact that it is not intended as a vehicle for abstract review of Member State legislation or policy and the time component highlighted above. It is useful to refer again

<sup>53</sup> See the terms of Article 3 of Protocol No. 16. See also paragraph 21 of the Explanatory Report which provides that it will be for the Court to decide whether to hold a hearing on an accepted request.

<sup>54</sup> See Rules 63 and 71. Most Chamber cases are processed without a hearing.

<sup>55</sup> See K. Dzehtsiarou and N. O’Meara, “Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?” (2014) *Legal Studies* 18.

<sup>56</sup> See, variously, P. Harvey, “Third party interventions before the ECtHR: A Rough Guide, 24 February 2015; W. A. Schabas, *The European Convention on Human Rights*, OUP, 2015, pgs. 788 – 795 and L. van der Eynder, “An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the ECtHR” (2013) 31 *Netherlands Quarterly of Human Rights* 271-295.

<sup>57</sup> Note that, pursuant to Rule 94(5), copies of third-party interventions shall be transmitted to the requesting court or tribunal and the latter shall have the opportunity to comment on them. It remains to be seen how useful or necessary provision for this opportunity will prove to be.

to the Article 267 TFEU procedure, where intervention extends only to the parties to the domestic proceedings, EU institutions (where appropriate), Member States and the European Commission as a sort of *amicus curiae*.<sup>58</sup> In Luxembourg, in cases before the Grand Chamber and even at chamber level, extensive use of this intervention is made by Member States depending on the legal and political importance, and to some extent novelty, of the questions raised in the pending preliminary reference.<sup>59</sup> In contrast, to date, Member States have more often than not availed themselves sparingly of their opportunity to intervene in Strasbourg Grand Chamber cases.<sup>60</sup> Given the proposed jurisprudential effects of future advisory opinions handed down by the Grand Chamber, it is worth considering whether Contracting Parties, even if they have not ratified Protocol No. 16, should not pay greater attention to the question of third party interventions in future. In the run up to the 2018 Copenhagen conference on the future of the Court and the Convention system, there was much discussion of the different form – judicial and political – which dialogue with the Court should take. The Court, in its Opinion on the draft Copenhagen Declaration, stressed that in relation to the development of its case law, the appropriate mechanisms for dialogue take the form of domestic court decisions and third party interventions before the Court. It noted that the latter mechanism can be relevant to different stages in the examination of a case by the Court, including the admissibility stage, the stage of seeking referral of a case under Article 43 of the Convention, and ultimately that of the Grand Chamber’s consideration of the case. According to the Court, used well, interventions by third parties in proceedings are helpful for the Court, giving it the benefit of additional perspectives on the issues to be decided in the case. It noted that this mechanism of engagement by States with the Court’s judicial function does not appear to be used to its fullest potential and that, once Protocol No. 16 has entered into force, this mechanism may become even more significant. We would underline the Court’s position in this regard.<sup>61</sup>

While § 13 of the Explanatory Report expressly envisaged that the Court “would be able to receive requests in languages other than English or French, as it does at present for individual applications” no mention is made in either the Protocol itself or the Explanatory Report of the language of written submissions and interventions. Rule 44(6), which applies *mutatis mutandis* to third-party interventions in an advisory opinion procedure, requires them to be in an official language. Rule 94 (3) is silent on the language of the submissions of any parties to the domestic proceedings.

Finally, judicial dialogue, in order to be enhanced, also has to be nurtured; particularly when what is at issue is a new, untried procedure. Even when dealing with accepted requests, it cannot be excluded that the Court would wish to engage its judicial interlocutor further. The new Rule 94(2) provides that after a request is accepted, the President of the Grand Chamber may invite the requesting court or tribunal to submit any further information which is considered necessary for clarifying the scope of the request or its own views on the questions raised by the request. Similarly the Guidelines will envisage the possibility to seek supplementation of the request where it is considered to be ‘deficient’. The terms of Rule 94(2) could be read as presupposing that the conditions for the admissibility of a request provided for in Rule 92(2.1) are to be strictly applied and have been met. Guidelines aside, the strictness or flexibility in the application of the 92(2.1) procedure will be closely watched by national courts one would imagine. Depending on the number of requests received, it may also determine the extent of the Court’s additional advisory workload.

## 6. LANGUAGE OF REQUESTS AND OF ADVISORY OPINIONS

While the Court has only two official languages,<sup>62</sup> requests for advisory opinions may be addressed to the Court in the national official language used in the domestic proceedings in accordance with Rule 34(7). If the language used is not an official language of the Court, the Rules will provide that an English or French translation must be submitted within the time-limit fixed by the President of the Court.

As regards the request itself, this means that the immediate access of most Judges to the request, except where the language is a well-known one, may only be through the national judge and the registry lawyers until or unless a translation is available. On the one hand, one could argue that this is entirely in keeping with the Court’s existing working methods – or rather the existing constraints under which it works – when dealing with individual applications. On the other, it could be argued that this method is ill-suited to a procedure which has, as its purpose, the enhancement of judicial dialogue and where any delay will have a knock on effect on the still pending domestic proceedings.

The Explanatory Report emphasised the sensitivity of the language issue but only as regards the resulting advisory opinions; not as regards the initial processing and subsequent treatment of requests by and within the Court. It provides that:

“It is important to bear in mind that in most cases advisory opinions will have to be admitted to proceedings that take place in an official language of the High Contracting Party concerned that is neither English nor French, the Court’s official languages. Whilst respecting the fact that there are only two official languages of the Court, it was considered important to underline the sensitivity of the issue of the language of advisory opinions. It should also be taken into account that the suspended domestic proceedings can in many legal systems be resumed only after the opinion is translated into the language of the requesting court or tribunal. In the event of concerns that the time taken for translation into the language of the requesting court or tribunal of an advisory opinion may delay the resumption of suspended domestic proceedings, it may be possible for the Court to co-operate with national authorities in the timely preparation of such translations.”<sup>63</sup>

In the absence of increased budgetary resources, it is difficult to foresee how the issue of translation can be tackled. The Court, in its Opinion on the draft protocol, expressed grave concern on this issue both in terms of workload and cost.<sup>64</sup>

## VI. WHERE DO WE GO FROM HERE?

As indicated previously, the Court worked for some considerable time to prepare itself for the entry into force of Protocol No. 16 on 1 August 2018. As part of this process, amendments to the Rules were adopted by the Plenary in September 2016 and non-binding Guidelines were approved by the same formation in September 2017. The operation of the latter will be kept under periodic review.

The new procedure has been the subject of various but not extensive academic and judicial comment.<sup>65</sup> Legal academia is, understandably, more reactive than predictive when it comes to a new, untested judicial procedure. The paucity of commentaries will no doubt change in due course.

<sup>58</sup> See Article 23 of the Statute of the CJEU.

<sup>59</sup> In the seminal CJEU case on the scope of application of the Charter of Fundamental Rights of the EU, for example – Åkerberg Fransson C-617/10 EU:C:2013:105 – nine Member States and the European Commission intervened. In recent ground breaking data protection cases, the number of Member State interventions was also very high – see, for example, Digital Rights C-293/12 and C-594/12 EU:C:2014:238 (eight Member States, European Parliament and the European Commission) or Tele 2 Sverige C-203/15 and C-698/15 EU:C:2016:970 (fifteen Member States, European Parliament, Council and Commission).

<sup>60</sup> For example, out of a grand total of nineteen judgments and one decision delivered by the Grand Chamber during the course of 2017, Member States intervened in a maximum of five cases.

<sup>61</sup> Opinion of the ECtHR on the draft Copenhagen Declaration, adopted by the Bureau in light of the discussion in the Plenary Court on 19 February 2018 ([https://www.echr.coe.int/Documents/Opinion\\_draft\\_Declaration\\_Copenhagen%20ENG.pdf](https://www.echr.coe.int/Documents/Opinion_draft_Declaration_Copenhagen%20ENG.pdf), last accessed 23 September 2019), § 16; see now also paragraphs 33 to 41 (“Interaction between the national and European level – the need for dialogue”) of the Copenhagen Declaration as adopted on 13 April 2018.

<sup>62</sup> Rule 34.

<sup>63</sup> See § 23 of the Explanatory Report.

<sup>64</sup> See paragraph 14 of the Opinion, cited above.

<sup>65</sup> See variously L.-A. Sicilianos, «L’élargissement de la compétence consultative de la Cour européenne des droits de l’homme – A propos du Protocole No. 16 à la Convention européenne des droits de l’homme, 2014/97 *Revue trimestrielle des droits de l’homme* 9-29; D. Ritleng, “Le renvoi préjudiciel communautaire, modèle pour une réforme du système de protection de la CEDH?” (2002) 3<sup>e</sup> année, n° 7 *L’Europe des libertés : revue d’actualité juridique* 3-7; P. Gragl, “(Judicial) love is not a one-way street: the EU preliminary reference procedure as a model for ECtHR advisory opinions under draft Protocol No. 16” (2013) 38 *ELRev* 229-247; J. Gerards, “Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the ECHR” (2014) 21 *Maastricht Journal of European and Comparative Law* 633; J. Callewaert, “Protocol No. 16 and EU law” in *Mélanges en l’honneur de Dean Spielmann*, WLP, 2015, pp. 57-63; Open Society Justice Initiative, *Implementing ECHR Protocol No. 16 on Advisory Opinions*, March 2016 and Dzehtsiarou and O’Meara, cited above.

Particular concern relating to the protocol has been expressed in some EU circles. In Opinion 2/13 on the accession of the EU to the ECHR, the Court of Justice referred to Protocol No. 16, noting that:

“[...] since [after accession] the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No. 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, [...] is the keystone of the judicial system established by the Treaties.”<sup>66</sup>

Many commentators have criticised the CJEU’s own criticism of the failure in the draft accession agreement to make any provision in respect of the relationship between the mechanism established by Protocol No. 16 and the preliminary ruling procedure provided for in Article 267 TFEU. On the one hand, when the CJEU was deliberating, the protocol was not yet in force, nor was it foreseeable when it would be. On the other hand, commentators point out that misuse by national courts of Protocol No. 16 in order to circumvent the preliminary reference procedure and refer questions on substantive EU fundamental rights law to the Strasbourg court could be sanctioned in different ways, not least by the introduction of infringement proceedings.<sup>67</sup> Furthermore, it should be recognised that in some cases the problem may not necessarily be the decision to request a non-binding opinion from Strasbourg but the decision to refrain from seeking a binding one from Luxembourg. In *Melki and Abdeli*, the CJEU examined the priority nature of an interlocutory procedure for the review of the constitutionality of a national law (known as the “question prioritaire de constitutionnalité” or QPC in French law). The CJEU held in that case that:

“[...] Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents — both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question — all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.”<sup>68</sup>

In contrast, Article 267 TFEU was judged not to preclude such national legislation, in so far as the other national courts or tribunals remain free, *inter alia*, to refer to the CJEU for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary. As the advisory opinion procedure is both facultative in terms of its use and non-binding in terms of the resulting opinion, it is questionable to what extent a *Melki and Abdeli* type instruction would be required to deter or prevent national courts of EU Member States from having recourse to the advisory

opinion procedure under Protocol No. 16. Given the terms of Article 52, paragraph 3 of the EU Charter and indeed the very reason for its existence, it is clear that some questions referred under the advisory opinion procedure may, indeed will, have indirect consequences for the interpretation for the corresponding provisions of the Charter. As the President of the CJEU emphasised in his speech at the opening of the 2018 Strasbourg judicial year:

“the CJEU takes account of the Convention as the minimum threshold for protection”, even if, of course, the EU system of fundamental rights protection may go above and beyond that threshold.”

That does not mean, however, that the advisory opinion procedure, as such, should pose a problem for the autonomy and effectiveness of the EU judicial order or for the latter’s exclusive competence when it comes to the interpretation of EU law, including the Charter. Indeed, in Opinion 2/13, the CJEU stressed the mutually interdependent legal relations linking the EU and its Member States and the fact that the EU’s legal structure “is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected”.<sup>69</sup> Given these essential characteristics of the EU legal order it is difficult therefore, from a Strasbourg perspective, to see why EU Member State courts would systematically or regularly have recourse to the ECHR seeking answers to questions which, in reality, concern EU law. That being said, the advisory opinion panel and the Grand Chamber when seized of a request, will have to adhere faithfully to the Court’s well-established case-law according to which, under the terms of Article 19 and Article 32 § 1 of the Convention, the Court is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention.<sup>70</sup>

Suffice it, for our present purposes, to say that the CJEU’s foray into an examination of Protocol No. 16 in Opinion 2/13 underlines the interest and sensitivity which the protocol excited in some quarters, the need for the new procedure to be well explained and, when it comes into force, the need for the Strasbourg Court to carefully delimit its jurisdiction when accepting/refusing requests and handing down advisory opinions. What is clear is that Protocol No. 16 was not intended as an invitation to forum shop but rather as a means to enhance judicial dialogue regarding the interpretation and application of the Convention.

## ADDENDUM

As indicated previously, when the judicial year 2019 was opened, the first request for an advisory opinion, which concerned the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, had already been lodged by the French Court of Cassation. Some of the features of the procedure which led to the advisory opinion, handed down on 10 April 2019, are worth noting.<sup>71</sup> Firstly, no oral hearing was held in the case. Secondly, written submissions were received from the applicants in the domestic proceedings, the French Government, three intervening governments and seven other third party interveners. While it took the Court almost two months to process the request at panel level, the advisory opinion was handed down within six months. In terms of the form and content of the opinion, it was shorter than traditional Grand Chamber judgments and did not reproduce in detail either the written submissions lodged with the Court or comparative and international law and

<sup>66</sup> Opinion 2/13, EU:C:2014:2454, paras. 196-199.

<sup>67</sup> See further, within the CJEU, the View of Advocate General Kokott in the proceedings leading to Opinion 1/2013, EU:C:2014:2475, paragraphs 139-141: “[the CJEU’s] role in relation to the interpretation of the ECHR within the EU could, however, be jeopardised by the fact that the highest courts and tribunals of the Member States which have ratified Protocol No. 16 to the ECHR might be tempted, in application of its provisions, to refer questions concerning the interpretation of the ECHR to the ECtHR rather than to the Court of Justice. Ultimately, this phenomenon would not, however, be a consequence of the accession of the EU to the ECHR. Even without the proposed accession of the EU, courts and tribunals of Member States which have ratified Protocol No. 16 can turn to the ECtHR with questions on fundamental rights relating to the interpretation of the ECHR, instead of referring to the Court of Justice questions that are identical in substance but relate to the interpretation of the Charter of Fundamental Rights. In order to solve this problem, it is sufficient to refer to the third paragraph of Article 267 TFEU, which imposes on the Member States’ courts and tribunals of last instance a duty to refer matters to the Court of Justice for a preliminary ruling. The third paragraph of Article 267 TFEU takes precedence over national law and thus also over any international agreement that may have been ratified by individual Member States of the EU, such as Protocol No. 16 to the ECHR. It follows from this that the Member States’ courts and tribunals of last instance are required — in so far as they are called upon to determine a dispute within the scope of EU law — to refer questions concerning fundamental rights primarily to the Court of Justice and to respect primarily the decisions of that court.”

<sup>68</sup> *Melki and Abdeli*, C-188 and C-189/10 EU:C:2010:363. On the QPC in Strasbourg case-law see *Renard e.a. v. France* (dec.), no. 3569/12, 9145/12, 25 August 2015.

<sup>69</sup> See Opinion 2/13, §§ 167-168 and

<sup>70</sup> See, for example, *Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014, § 110.

<sup>71</sup> Advisory opinion requested by the French Court of Cassation, Request no. P16-2018-001, 10 April 2019 [GC].

material of relevance.<sup>72</sup> It is also noteworthy that, through a series of preliminary considerations, the Court sought to emphasise the distinct nature of the new procedure but also to delimit its judicial task and the questions to be addressed thereunder. In particular, it stressed that the aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it. In addition, it observed that the opinions it delivers under Protocol No. 16 must be confined to points that are directly connected to the proceedings pending at domestic level.<sup>73</sup>

At the time of writing, a second request for an advisory opinion has been lodged by the Armenian constitutional court and is pending before the panel of five judges which will determine whether the requirements of Article 1 of Protocol No. 16 have been fulfilled and whether therefore to accept the request.<sup>74</sup>

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

<sup>72</sup> In § 34 of the advisory opinion, the Grand Chamber stressed that its task is not to reply to all the grounds and arguments submitted to it or to set out in detail the basis for its reply. Under Protocol No. 16, the Court's role is not to rule in adversarial proceedings on contentious applications by means of a binding judgment but rather, within as short a time frame as possible, to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it. It should be noted that the first request, which followed on from a previous judgment in an individual application involving the same applicant family, is unusual in the sense that the Grand Chamber was able to cross refer to material already published in its judgment in that context. See *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).

<sup>73</sup> *Ibid.* §§ 25-34

<sup>74</sup> <http://hudoc.echr.coe.int/eng-press?i=003-6476599-8537053>.



## Guido Raimondi

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

### OPENING ADDRESS

Presidents of Constitutional Courts and Supreme Courts, President of the Parliamentary Assembly, Chair of the Ministers' deputies, Secretary General of the Council of Europe, Excellencies, Ladies and Gentlemen,

I would like to thank you personally and on behalf of all my colleagues for kindly honouring us with your presence at this solemn hearing for the opening of the judicial year of the European Court of Human Rights. In keeping with tradition, I also wish you a happy new year for 2019.

I would particularly like to welcome the representatives of the local authorities, whose support has been valuable. Our Court is known throughout the world as the "Court of Strasbourg". So when Strasbourg comes under attack, as was the case on 11 December, the European Court of Human Rights stands by the people of this city. It is important for me to emphasise this point.

This hearing is a particularly significant one for me. It is the last time I will be addressing you on such an occasion. Next year you will be hearing my successor speak to you from this very rostrum. For my part, although I will have returned to Italy, it will always be a source of pride to have presided over this Court and I will remain eternally grateful to the judges who elected me and helped me to fulfil my mission.

It is not my intention today to take stock of these past three years, but I would nevertheless like to share some personal thoughts.

As usual, I will begin by giving you some statistics about the Court's activity. I will start with a reminder: in January 2016, when I spoke here for the first time as President of the Court, nearly 65,000 applications were pending. At the end of 2018, that figure stood at around 56,000 – down by about 14%, which is clearly a satisfactory result. I would add that in 2018 the Court ruled in over 42,000 cases. This is the result of the efforts made by all the judges and members of the Registry, to whom I express my thanks.

Over 70% of pending cases concern just six countries. Among them, the high number of applications lodged against the Russian Federation (almost 12,000) should be highlighted in view of the current situation in the Council of Europe. I will return to this matter shortly, but the significant volume reflects, in my view, the degree of trust shown by Russian nationals in the European mechanism for the protection of human rights and the importance it represents for them.

A closer analysis of these figures reveals that the Court's workload is made heavier particularly by structural situations in certain countries, thus generating a considerable volume of applications. We have developed working methods, including automated processes, which have proved very efficient. Nevertheless, it is mainly at domestic level that these cases must be resolved, in accordance with the subsidiarity principle. More generally, the weight of the case-load emanating from a given country is an indicator of the effectiveness of Convention implementation in that country. Once again, for subsidiarity to function properly, the national authorities must play their full role as stakeholders in the Convention system.

Among all the pending applications, we have over 20,000 which are prioritised. To be clear, many of these cases are actually repetitive in nature, as they concern individuals complaining about prison overcrowding. However, they raise questions under Article 3 of the Convention, which justifies their priority status. Moreover, this is a very good example of a problem which can only find a long-term solution if efforts are made at national level.

In actual fact, the biggest challenge for the Court is undoubtedly the volume of Chamber cases which cannot be dealt with by a committee on account of their complexity or the novelty of the question raised. Our aim is to ensure that the Court can devote enough time to the most important and most complex of these cases so that they can be processed as soon as possible.



In 2019 we will be celebrating the sixtieth anniversary of the European Court of Human Rights. You will have seen, in the entrance hall, the exhibition we have organised on this occasion, with the support of the Finnish authorities, whom I would like to thank; it was inaugurated this week by the President of Finland, Sauli Niinistö.

So for 60 years now our Court has been contributing to the harmonisation of European standards concerning rights and freedoms. This collective guarantee mechanism emerged from the willingness of Europeans who, having been traumatised by the atrocities of the Second World War, expressed, in adopting the European Convention on Human Rights, their attachment to democracy, to freedoms and to the rule of law. Above all, they set up a Court to ensure that their own obligations would be complied with.



Throughout this sixty-year period, the Court has interpreted the Convention dynamically in the light of living conditions, which have evolved considerably. Europe in the 1950s and the world we now live in are very different places. Our ways of life and moral standards are no longer the same. Science, medicine and biology have seen outstanding progress. The collection and retention of data concerning individuals, and the appearance of the Internet, with the extraordinary but also worrying consequences of these developments, have had a radical effect on our lives but also on the relations between the State and individuals, and between individuals themselves.

At worldwide level too, the changes have been far-reaching: migratory flows and environmental problems, not to mention the threat of terrorism, have altered our perception of the world and how we live.

I believe that the Court has been able to face up to the challenge of these upheavals.

Taking account of all these technological and societal developments, the Court has enabled the European Convention on Human Rights to remain relevant.

At a procedural level, the Court, which was set up in 1959, adapted itself to a new mechanism which represented a change of model, that of a single and full-time Court which radically transformed the original system. In 2018 we celebrated the twentieth anniversary of the “new” Court; twenty years during which period the Court has delivered a judgment or decision in over 800,000 applications. It now enjoys worldwide renown and is seen as a model for others. I would even say that it is a beacon which lights the way for all those, throughout the world, who seek to strengthen the principles of the rule of law and democracy.

Our Court enjoys close and cordial relations with the other regional human rights courts. In 2018 we signed a joint declaration, known as the “San José Declaration”, with the Inter-American Court of Human Rights and the African Court on Human and Peoples’ Rights. This text is testament to our accomplishments and to the significance of the links now established between our courts.

Nevertheless, in spite of all these achievements, there is no longer much cause for optimism – first of all, because of the serious and unprecedented crisis in the Council of Europe. It is both political and budgetary. On a budgetary level, let me be clear: if we want to pursue the progress that

we have made for several years now, in fact since the start of the Interlaken process, our resources must be maintained. We have constantly strived to become more efficient and we are succeeding. On that point, we are launching, this year, a new process intended to bring about a significant increase in the non-contentious solutions so as to lighten the Court’s workload. However, as you know, we have no control over the volume of incoming cases and, if jobs are cut in 2019, this will inevitably have an impact on our processing capacity.

But the crisis is not only a financial one. What is at stake today is the possibility afforded to all Europeans – those of the Greater Europe – thanks to the European Convention on Human Rights, to be able to live on a continent where their rights and freedoms are recognised and protected: “from the Atlantic to the Urals”, to use the much-quoted phrase, particularly pertinent in the present circumstances. The departure of a member State – and I am obviously talking about the Russian Federation – would be “a huge setback for human rights” not only for that country, as Thorbjørn Jagland, Secretary General of the Council of Europe, rightly pointed out, but for all member States. The signal that this would send to Europeans would be at odds with everything that the Council of Europe has built up over the past seventy years – another anniversary we will be celebrating in 2019.

But this crisis now facing the Council of Europe is not my only cause for concern. There are deeper issues at stake. Men and women of my generation had, for a long time, taken the view that once democracy was established it could not be undone. We were sure that democracy was here to stay. But, as some scholars have observed, we are witnessing a phenomenon of social disillusionment, which could lead to democratic deconsolidation. For the younger generations, automatic support for the idea of human rights is no longer a given.

The reasons for this situation are numerous and varied: stagnation of living standards; fears raised by waves of migration or stemming from isolationism; the anarchical development of social networks and large-scale dissemination of so-called “fake news”. Voters seem to be losing faith in their political system. The fact that citizens have turned their backs on the democratic model is such that the spread of extremist discourse, and even in some cases the rise to power of leaders who call into question the foundation of a pluralistic democracy, is facilitated. As the preamble to the European Convention on Human Rights clearly states, human rights are best maintained by an effective political democracy.

There is a risk of democracy being dismantled: first by undermining the rights of the opposition and the independence of the justice system, then by suppressing the media, and even by imprisoning opponents. Political leaders whose intention it is to dispense with the checks and balances, will seek to weaken, or even to eliminate, those institutional actors which nevertheless remain essential to the democratic process. They see the justice system, the press, the opposition as “enemies of the people”.

Our Court is a first-hand witness of these developments. Thus, one of the indicators of the decline in the rule of law is undoubtedly the application of Article 18 of the Convention. It provides – as you know – that any restriction of the rights and freedoms guaranteed by the European Convention on Human Rights must not be applied for any purpose other than that for which it has been prescribed. This provision, which is crucial for a pluralistic democracy, has been breached only twelve times, but five times during the year 2018 alone. This is both a worrying and a revealing symptom. Without pinpointing any particular country, it can be seen that the aim is often to reduce an opponent to silence, to stifle political pluralism, which is an attribute of an “effective political democracy” – a concept contained, as I was saying, in the preamble to the Convention.

Faced with the situation that I have just described, what response should be forthcoming from the judicial protection mechanisms, such as that of the Strasbourg Court or of the domestic courts – as guarantors of the rule of law – that you represent? There is no easy answer but, to cite Yascha Mounk, a political analyst who has studied these phenomena in his work “The People versus Democracy”: “If we want to preserve both peace and prosperity, both popular rule and individual rights, we need to recognize that these are no ordinary times — and go to extraordinary lengths to defend our values.”

We are certainly ready and willing to go to such lengths, to pursue what we have been doing for the past 60 years. All of us, judges of superior domestic courts and international judges, have a role to play in the protection of democracy and the rule of law.

Our Court, for its part, will never renege on the very mission for which it was created. In 2018 our case-law has once again been testament to its resolve. I would like now to refer to a few examples, even though, as you know, it is always difficult every year to single out one case rather than another, in view of the significance and variety of the questions submitted to it.

I will begin with two judgments delivered by the Grand Chamber, which is seen by many as setting the benchmarks of our case-law.

The first, *S.V. and A v. Denmark*, concerns a phenomenon which has unfortunately been spreading in our present-day society, namely violence surrounding sports competitions. The applicants, football supporters who were in Copenhagen to watch a match, had been detained for more than seven hours by the authorities to prevent any risk of hooliganism. The Court found that there had been no violation of the Convention, relying on the fact that the Danish courts had struck a fair balance between the right of those supporters to their freedom and the importance of stopping hooligans. In our Court's view, the domestic courts had carefully examined the strategy applied by the police to avoid clashes. The police had, in particular, taken account of the domestic-law rule limiting preventive custody to six hours, even though that limit had been slightly exceeded; they had begun by entering into a preliminary dialogue with the supporters, before having recourse to more radical measures such as deprivation of liberty; they had made every effort to detain only those individuals whom they regarded as representing a risk for public safety; and lastly they had carefully assessed the situation in order to be able to release the applicants once the situation had calmed down.

The judgment in *S.V. and A.* in particular emphasised the need to weigh in the balance the duty to avoid disorder against the rights secured to individuals in relation to custodial measures. The Court applied the subsidiarity principle, relying on the fact that the assessment by the domestic authorities had been neither arbitrary nor manifestly unreasonable and that the deprivation of liberty in question had been consistent with the rules of domestic law.

The second Grand Chamber judgment I wish to mention was delivered at the very end of last year. It is the case of *Molla Sali v. Greece* concerning the application of sharia law by the Greek courts. This judgment gave rise to erroneous interpretations, with some commentators suggesting that our Court wanted to pave the way for the application of sharia law in Europe. However, the *Molla Sali* judgment leads to precisely the opposite conclusion.

In that case, a Greek national belonging to the minority Muslim community, had bequeathed all his property to his wife in a will drawn up under the civil law of Greece. The sisters of the deceased had brought a case before the domestic courts, which took the view that questions of inheritance within the Muslim community had to be settled by the "mufti" according to the rules of Islamic law, pursuant to the Treaties of Sèvres and Lausanne of 1920 and 1923. The widow, who was thus deprived of three-quarters of her inheritance, considered that she had sustained a difference in treatment on religious grounds, because if her late husband had not been a Muslim she would have inherited his entire estate.

Ruling unanimously, the Court took the view that the difference in treatment sustained by the applicant did not have any objective or reasonable justification. First, freedom of religion did not oblige Contracting States to set up a given legal framework to grant religious communities a status carrying special privileges. But if such a status were to be created, the conditions of its application could not be discriminatory. The fact of not allowing followers of a minority religion to be able to opt voluntarily for the ordinary law had led to discriminatory treatment and infringed the right to free identification, in other words the right to choose not to be treated as someone belonging to a minority. This right, I would point out, constitutes the "cornerstone" of international law on the protection of minorities. Lastly, the Court noted that Greece was the only country in Europe which, up to the material time, had been applying sharia law to part of its citizens against their will. The Court thus found a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1. The

situation evolved in the course of the procedure as, on 15 January 2018, a law came into force with the aim of abolishing the specific rule imposing recourse to sharia law in respect of family matters of members of the Muslim community. By giving priority to the ordinary law over the religious law, in accordance with the applicant's wishes, this was one of the leading judgments of the past year.

Some Chamber judgments in 2018 have also aroused great interest or have been widely reported in the media. I will briefly mention a number of those which, in my view, reflect the key questions with which our Court, just like our societies, is confronted.

New technologies have, once again, been at the forefront of our case-law. For example, in the case of *M.L. and W.W. v. Germany*, the Court had to arbitrate between different Convention rights. The case concerned individuals who had been convicted of premeditated murder and who sought a ban on the possibility for media organisations to retain references to their trial and conviction on their websites. Faced with a balance to be struck between the applicants' right to respect for their private life and the public's right to receive information, the Court gave priority to the latter. Like the German Federal Court of Justice, the Court acknowledged the applicants' interest in no longer being confronted with their conviction, which was far from recent, but it took the view that the public had an interest in being informed about newsworthy subjects, and that the media had to be able to make information available to the public from its archives, however old it might be.

The last case I will mention tonight concerns my own country: *V. C. v. Italy*. This case concerned a minor who was the victim of a child prostitution ring. The Court found against Italy, taking the view that the domestic authorities, who had been aware of the girl's vulnerable situation, had not taken any measures to protect her from abuse. The judgment illustrates the Court's concern to protect, as it always has done, the weakest and the most vulnerable in society. We already had a considerable body of case-law protecting women from any forms of violence and this case is a further example.

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But 2018 has also given us reasons to be thankful, and I am thinking in particular of the ratification by France of Protocol No. 16, on the initiative of President Macron. This tenth ratification triggered the entry into force of that instrument. This is a milestone in the history of the European Convention on Human Rights and a major development for the protection of human rights in Europe. Our Court is also now part of a well-established network with superior courts from around Europe. To show that this Protocol had been keenly awaited by the supreme courts concerned, just two months after its entry into force we received our first request for an advisory opinion, which came from the French Court of Cassation. It was announced by the President of the Court of Cassation, Bertrand Louvel, during his visit to the Court. I would like to pay tribute to him, as he is attending this solemn hearing for the last time in his current capacity; he is an eminent figure of the French judiciary, who has also been a loyal ally of the European Court of Human Rights.

The request for an opinion is now being examined and our Court is ready to take up this new challenge.

The subject of Protocol No. 16 leads me to say a few words on the case-law exchange network. It has developed significantly, because it now includes 71 superior courts from 35 countries. As this permanent dialogue with supreme courts has been one of the key aspects of my presidency, I am obviously pleased to note that there have been many meetings with these courts in 2018. In the course of the year we had exchanges with the Spanish Constitutional Court and Supreme Court, the Constitutional Authority of San Marino, the Greek Court of Cassation, the French *Conseil d'État*, the Supreme Court and other superior courts of the UK, the Supreme Court of Iceland, the French Court of Cassation, the Irish Supreme Court, and, last but not least, the Supreme Court of the Russian Federation, on the occasion of the highly symbolic visit of Chief Justice Lebedev for the launch of an Encyclopaedia of Human Rights.

Presidents of Constitutional Courts and Supreme Courts, Ladies and Gentlemen,

Before I conclude, allow me to take you beyond the confines of our continent for a moment. It is often said that India is the largest democracy in the world. In 2018 the judges of the Indian Supreme Court delivered a judgment declaring Article 377 of the Indian Criminal Code illegal, which criminalised same-sex intercourse. That historic decision, long awaited by human rights advocates, received worldwide coverage. Going beyond the decision itself and the progress it represents for those concerned, I was proud to see that, in its judgment, the Supreme Court in Delhi cited, in several places, our Court's well-known cases of *Dudgeon*, *Norris*, *Modinos* and *Oliari*, which have gone such a long way towards putting an end to the discrimination sustained by LGBT people. For me this was additional proof that our case-law is a source of inspiration even beyond the continent of Europe. It is also proof that, in spite of the differences in our cultures and traditions, human rights are universal, because in taking its decision the Indian Supreme Court looked to Europe – and indeed to Strasbourg.

The time has now come to give the floor to our guest of honour. In keeping with our tradition, we are receiving the president of a constitutional court or authority. But that is not his only credential.

Thus our guest of honour is Laurent Fabius, one of those figures who needs no introduction. He has not merely witnessed, but has played, a leading role in the history of France – the history of Europe – and even in that of the planet, because we all remember his key role as Chair of the international Climate Change Conference, held in Paris in 2015.

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President Laurent Fabius,

President of the French Constitutional Council,

In view of all those credentials,

Because your experience is far-reaching,

And since your views are of value to us and your presence here is a major event, we are now keen to listen attentively to you.



## Laurent Fabius

**President of the  
French Constitutional Council**

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

"If I deserve a prize, it is for persistence".

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

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

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

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

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

### THE CONSTITUTIONAL COUNCIL AND THE CONVENTION SYSTEM

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

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

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

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

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

It was thus natural that the “wordless dialogue” between our institutions, which already took tangible form through our participation in the Superior Court Network, be extended through the designation of the French Constitutional Council as a national “highest court” for the purposes of Protocol No. 16.

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

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

## THE FUTURE ROLE OF CONSTITUTIONAL COURTS AS THEY FACE CONTEMPORARY CHALLENGES

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

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

Firstly, with regard to what one might describe as the challenge of technology, we held for the first time, in respect of the legislation adapting French law to the so-called GDPR European Regulation, that not only are the authorities not authorised to use algorithms as the basis for individual

decisions on automatized processing of “sensitive data”, but also that no decision can be based solely on an algorithm whose operating principles are not disclosable, and that the use of “self-learning” algorithms was limited by the obligation on the data controller to be capable, at any stage, of providing a detailed explanation of its functioning. In view of technological advances, this question will undoubtedly become increasingly pressing.

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

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

President, I should like to add a fourth theme, that of the climate and, more broadly, the environment, which, as we are all aware, threatens the survival of humanity itself. Courts are receiving an increasing number of requests from citizens, associations, NGOs, companies and towns, seeking to ensure that the States comply with their obligations in terms of environmental protection. In the area of climate alone, litigation has developed significantly since the Urgenda ruling by the Dutch courts in 2015. The United Nations Environment Programme counted almost 900 climate cases in 2017, more than a hundred of which were in the European Union. In such disputes, and more generally in the area of environmental protection, what is our role as guardians of fundamental rights? In protecting the environment, we are also protecting human rights, namely the rights to health, safety and, beyond these, human dignity. The European Court of Human Rights has understood this very clearly. Since its 2009 judgment in the case of Tatar against Romania, it has acknowledged the right to live in a safe and healthy environment and, in so doing, has joined a more general movement to enshrine environmental law at the highest level of the hierarchy of laws. As environmental threats worsen and certain politicians demonstrate a lack of ambition, we can all sense that human-rights litigation as applied to the environment will grow in importance, making the courts, even more than they are at present, major players in the construction of environmental justice.

## THREATS TO FREEDOMS AND TO THE RULE OF LAW

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

Extremism and brutality are the marks with which some would like to imprint our era. As judges of fundamental rights, we cannot tolerate any form of extremism whatsoever, as we protect the rights and freedoms guaranteed by the supreme standards with whose application we are entrusted.

We must act with unfailing vigilance to strike a harmonious balance between all of the principles and rules that are safeguarded by these founding texts. Equally, we cannot accept that, through the scapegoating of certain individuals, anyone is deprived of his or her fundamental rights.

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

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

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

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

**PHOTO**





## PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2018
- Dialogue between judges - 2017
- Dialogue between judges - 2016
- Dialogue between judges - 2015
- Dialogue between judges - 2014
- Dialogue between judges - 2013
- Dialogue between judges - 2012
- Dialogue between judges - 2011
- Dialogue between judges - 2010
- Dialogue between judges - 2009
- Dialogue between judges - 2008
- Dialogue between judges - 2007
- Dialogue between judges - 2006
- Dialogue between judges - 2005