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

"Responding to backlash, populism and challenges to the rule of law? A European Court's perspective."

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Let me begin by thanking most warmly the Faculty of Law of the University of Oslo, and in particular Dean Ragnhild Hennum. I would also like to thank Andreas Føllesdal, Professor and Co-Director of PluriCourts, for organising my guest lecture on a topic of particular relevance.

I salute the scholars from the University of Oslo who are present and will soon take the floor. I am very much looking forward to our ensuing discussion. I hope that my intervention will spark a stimulating debate.

Today you have chosen the topic of challenges faced by the European Court of Human Rights, and by analogy other liberal institutional institutions.

Let me begin by setting out the obvious: we are currently facing an existential challenge to our liberal democratic order as a result of Russia's war in Ukraine. Indeed, it has been called "a tectonic shift in European history".[1] In addition to the violence and human misery which this war is causing, some fundamental questions must be asked on the nature and role of the Council of Europe and its judicial enforcement mechanism, the European Court of Human Rights.

When we celebrated the European Convention on Human Rights' 70th anniversary in 2020, we highlighted that the Convention constituted one of the greatest peace projects in human history. Indeed, the very Preamble to the Convention refers to human rights and fundamental freedoms as the foundation of justice and peace in the world.

The work of the Council of Europe and its judicial control mechanism, the European Court of Human Rights, has contributed to the stability, security and peace in Europe through its work on human rights, democracy and the rule of law. It can certainly be questioned whether we have failed in our mission when witnessing current events. It is for others to debate that question. I still maintain my view that the Court has and will continue to play an essential role in protecting human rights and fundamental freedoms to pave the way for peace again. Indeed, the need for a solid and stabilising European Court is arguably more pressing than ever.

In particular, the European Court of Human Rights ensures the maintenance of a pluralistic democracy by guaranteeing respect for basic democratic principles in areas such as participation in free elections, freedom of expression, religion, association and assembly, and non-discrimination. It

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promotes the rule of law, which provides the essential framework for the development of effective political democracy. For it is when individual freedoms are eroded that we see the catastrophic consequences of unbridled totalitarianism and violence which we are now witnessing.

Accordingly, consolidated democracies, such as Norway, have an important role to play within the system as a whole in maintaining their support for the European Convention and the Court's role in ensuring peace and security in Europe.

With these preliminary remarks, I move to the next part of my talk where I will set out the various challenges which the European Court of Human Rights is facing.

I. Challenges to the rule of law

It is no exaggeration to claim that the fundamental values of the Council of Europe, namely human rights, democracy and the rule of law, are increasingly being called into question in our society, both at the European and the global level. The rule of law is under pressure. Institutions, like the Council of Europe and the European Court of Human Rights, which are grounded in the concept of collective guarantees of human rights and multilateralism, are also vulnerable to attack, as are domestic and international judges.

Current challenges to the European Court of Human Rights and the human rights framework may be understood in the context of the current political polarisation and the rise of authoritarianism which we are witnessing in society in general.

One may ask: Why are courts and their judges a target?

Judges are the means by which powerful and often abusive interests are restrained. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law. Courts preserve the core value underpinning the fundamental idea of a constitutional democracy. As the former President of the UK Supreme Court, Brenda Hale, famously stated in a judicial opinion: "democracy values everyone equally, even if the majority does not".[2]

The role of the judiciary has evolved over recent decades with the number of cases brought to the courts multiplying, and with judges being called upon to decide on issues of political, social and economic importance[3].

We could say that the justice system has been called on to play a more and more important role in society. At the same time, challenges are being brought by the public to legislative powers and actions. As a result the judiciary has increasingly had to examine the actions of the two other state powers.[4]

If we take the COVID-19 pandemic as an example, over the last 2 years national courts have received a large number of challenges to the actions of the executive. The pandemic has led to important restrictions not just to our civil and political rights, but also to our economic, social and cultural

[2] Ghaidan (Appellant) v Godin-Mendoza (FC) (Respondent) UKHL 30 § 132.
[3] "State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe", Report by the Secretary General of the Council of Europe, 2021.
[4] CCJE Opinion NO. 18 (2015) on the position of the judiciary and its relationship with the other powers of the state in a modern democracy, paragraph 1.

rights. Vulnerable groups have been particularly impacted.[5] Domestic judges have faced the difficult task of making sure that the public health emergency has not been used by the executive as a pretext for human rights infringements. There is a difficult balance to achieve of ensuring public safety on the one hand and enjoyment of fundamental rights and freedoms on the other.

Not all of the decisions taken by the courts will be appreciated by governments and the temptation to speak out publicly against unpopular decisions may be greater.

If we contextualise the role of the courts with the onset of populist governments, we see that a possible tension is created. Populist governments may express impatience with the institutional checks and balances which the judiciary provides. The result may be a temptation to weaken or replace the independent components of government, such as the judiciary or Ombud's institutions[6]. Judges may be targeted by politicians or the media for their policy-making or overstretching their role. We don't have to look very far for examples, and some come even from our most established democracies.

Constitutional courts, including Supreme Courts which also act as Constitutional Courts, such as the Norwegian Supreme Court, are particularly vulnerable to attack. Why? Because once they are weakened, the very institution which is there to prevent future violations of constitutional rights is no longer able to fulfil its core function[7].

International human rights structures, such as international courts, are also vulnerable to attack for the same reasons. The European Court on Human Rights may be perceived by some governments as getting in the way of specific governmental objectives, for example being tough on criminals or reducing migration. International human rights treaties are then painted by these populist governments as standing in the way of national sovereignty. This can lead to examples of backlash against liberal international institutions, such as the European Court of Human Rights. This leads me to the second part of my intervention today.

II. Backlash against an overreaching Court

Some governments are increasingly uncomfortable with what they see as a form of 'human rights inflation'; a law-making which has swung away from the legislator towards the courts, resulting in a democratic deficit[8]. I know that PluriCourts has researched the phenomenon of "backlash" from certain consolidated democracies against the Court and in particular its impact on possible judicial restraint.[9]
According to the "backlash" view, the Court is seen as descending on a slippery slope towards less restraint and accordingly less credibility. Examples which are given are the creation of positive obligations opening the path to costly economic and social rights; the over extension of the living instrument doctrine; and the use of interim measures[10]. Others pinpoint a more general "conceptual overreach of human rights" [11] within the European human rights architecture.

[5] Statement of the President of the CCJE, "The role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges," 24 June 2020.
[6] Gerald L. Neuman, "Populist Threats to the International Human Rights System", in "Human Rights in a Time of Populism", edited by Gerald L. Neuman, Cambridge University Press, 2019.
[7] Wojchiech Sadurski, Populism and Human Rights in Poland, in "Human Rights in a Time of Populism", edited by Gerald L. Neuman, Cambridge University Press, 2019.
[8] Human Rights Act Reform: A Modern Bill of Rights
[9] O. Stiansen and E. Voeten, Backlash and Judicial Restraint: Evidence from the European Court of Human Rights, International Studies Quarterly, Volume 64, Issue 4, December 2020.
[10] M. Bossuyt 'Judicial Activism in Strasbourg' in K Wellens (ed) *International Law in Silver Perspective: Challenges Ahead,* Brill-Nijhoff, Leiden, pp 31–56.
[11] Conceptual overreach threatens the quality of public reason | Aeon Essays

I would like to present one example which comes from the United Kingdom. The case made against the Strasbourg Court by former Supreme Court Justice Lord Sumption in his Reith lectures was that the Court had 'invented rights' and was guilty of 'mission creep', as well as having interfered with national political processes in a manner which undermined democracy[12].

In 2020, at the inaugural Bonavero Institute Annual Human Rights Lecture[13], I set out in detail my own response to Lord Sumption's arguments and in particular to his views on the expanding role of law at the expense of politics. History has repeatedly taught us that unchecked majority rule risks descending into authoritarianism. The judiciary is therefore an essential component of democratic societies, they reinforce democracy, they are an integral part of any meaningful concept of democratic governance, not the other way around. Human rights law in fact plays an integral part in justifiably characterising political action as democratic. In a State governed by the rule of law infused with European human rights values, the legitimate exercise of political power must always be balanced. Fundamental rights and politics are thus inextricably entwined in a true democracy.

Turning to the matter of judicial restraint – what is its relationship to challenges from established democracies?

It is true that over the last 5-10 years the Court has to a considerable extent recalibrated what I have called the "*methodological parameters of its jurisprudence towards a more democratically incentive review mechanism*"[14].

When the national authorities have in good faith balanced competing interests, in other words, themselves adequately assessed the necessity of an interference into qualified rights, the Court is increasingly ready to apply the rule that it will require strong reasons for it to substitute its judgment for the one adopted by the national authorities. See, for example, the recent line of case-law regarding the expulsion of settled migrants from Denmark.[15]

In the Norwegian context I would like to give the example of *Lillo-Stenberg and Sæther*, a judgment adopted by the Court in 2014.[16] I will not repeat the facts of the case as I am sure you are all aware of them. In finding no violation of the applicants' right to private life, the Strasbourg Court relied on the fact that the Norwegian Supreme Court had applied the relevant criteria set out in the Court's case-law and had carefully balanced the right to freedom of expression on the one hand versus the right to private life on the other.

I would like to read out part of the relevant paragraph of the judgment, and I quote:

"The Court therefore finds reason to point out that, although opinions may differ on the outcome of a judgment, "where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts".'

This reinforces the overall logic of the Convention system which is that human rights should be protected first and foremost at the national level. It is for national politicians, the executive at

[12] See J. Sumption, *Trials of the State—Law and the Decline of Politics (London: Profile Books, 2019)*.
[13] See R. Spano, 'The democratic virtues of human rights law - a response to Lord Sumption's Reith Lectures', E.H.R.L.R. 2020, 2, pp. 132-139
[14] See R. Spano, 'The democratic virtues of human rights law - a response to Lord Sumption's Reith Lectures', E.H.R.L.R. 2020, 2, pp 132-139.
[15] See *Munir Johana v. Denmark*, no. 56803/18, § 65 12 January 2021
[16] *Lillo-Stenberg and Sæther v. Norway*, no. 13258/09, § 44, 16 January 2014. See also, A. Bårdsen, "The Norwegian Supreme Court and Strasbourg: The case of *Lillo-Sternberg and Sæther v Norway*", German Law Journal, Volume 14, Issue 7, 01 December 2014.

national level and national judges to protect human rights, not international judges. Here I would like to add that the style of the reasoning of the Norwegian Supreme Court's judgments, coupled with that court's profound engagement with the European Convention and with constitutional issues more generally are a very good example of shared responsibility in action. The Strasbourg Court is only a subsidiary safety valve, only to be activated when all else fails.

However, some have argued that process-based procedural review has led to a "hollowing out of substantive ECHR protections and a check-box style approach to rights protection"?[17]

I disagree. Indeed, the Court's Norwegian Grand Chamber judgments in *Strand Lobben and Others*[18] as well as *Abdi Ibrahim*[19] from 2021 are very much cases in point. In fact, these are examples of where process-based review has reached its limits. Subsidiarity does not mean the abdication of Strasbourg review, to claim otherwise is not misunderstand and even misconceive its normative foundations.

Subsidiarity and process-based review is a give and take, a two-way street, a shared responsibility and may require variable levels of scrutiny depending on the nature and importance of the Convention right implicated. In these child-care cases, where we were dealing with core Article 8 family life rights, thus certainly not rights and values at the periphery of fundamental rights protection, the Court has consistently demonstrated that it will remain as firm as ever in applying the principles laid down by the Convention. As the Court set out in the *Strand Lobben* case itself, "*The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake….*"
A stricter scrutiny will be called for in respect of any further limitations which entail the danger that the family relations between the parents and a young child are effectively curtailed.[20]

That has not changed and will not change. Violations found in cases like these, which go to the development of national policy, may of course create some natural tensions between the Convention system and the sovereign member States, but that is simply the inherent nature of a collective, international system of rights protection. I would want to state here very clearly, and without going into more detail at this point, that the general manner in which the Supreme Court of Norway reacted to the *Strand Lobben*-line of case-law was exemplary.

Today, the Convention is incorporated, and to a large extent, embedded into the domestic legal order of the States Parties, and the Court has provided a body of case-law interpreting most Convention rights. I think I can state without much controversy that this embedding process has been rather successfully achieved in a number of States, including Norway. This enables States Parties to play their Convention role of ensuring the protection of human rights to the full.

It has also allowed for an increased diversity in the protection of human rights; which has been to my mind a necessary development. Lord Justice Laws is correct when he stated in his contribution to the Hamlyn Lectures in 2013 that, and I quote, '[*there] may perfectly properly be different answers to some human rights issues in different States on similar facts*'.[21]

[17] See Harriet Ní Chinnéide, *Avci v Denmark*: The expulsion of Settled Migrants and the Pitfalls of process-based review in Strasbourg, 4 February 2022, Strasbourg Observers blog.
[18] *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019, and the follow-up judgments.
[19] *Abdi Ibrahim v. Norway* [GC], no. 15379/16, 10 December 2021
[20] § 211.
[21] Lord Justice Laws, 'Lecture III: The Common Law and Europe', Hamlyn Lectures 2013, 27 November 2013, at 13.

In the seminal judgment in *Handyside v the United Kingdom* (1976),[22] the Court laid the foundation for its approach to subsidiarity and the margin of appreciation which has been the touchstone ever since. However, it is true that for over a decade now the Court has been developing its approach in this area.

Following the entry into force of Protocol No. 15 to the Convention on 1 August 2021 a reference to the principle of subsidiarity and to the doctrine of the margin of appreciation has moreover been added to the Preamble of the Convention.

In States in which the substantive embedding of the Convention has been largely successful, the Court may therefore be in a position to take on a more framework oriented role when reviewing domestic decision-making.

I reject the view that the process-based review entails a more lenient approach to European human rights supervision and is a concession made in response to governmental backlash. However, it is does require some explanation and hence the need for an effective human rights communication strategy.

I will now conclude as I would like to allow for plenty of time for discussion. I hope that I have managed to outline some of the main challenges currently faced by the Court.

ltimately the Court has a limited margin of maneouvre when it comes to responding to political or societal challenges, because after all it is a judicial body which must remain independent and impartial. Nevertheless, the Court has always striven to be reactive to the changing times. One example is that the Court has put in place a new impact case-processing strategy which allows it to respond more rapidly to cases which are likely to have an impact on the domestic or international scene, such as applications complaining of violations of judicial independence. Over the last few years, I would say that the Court has reinforced considerably its case-law on the rule of law in particular.

As regards governmental backlash, I have outlined today that my view is not that the Court has lessened its scrutiny in response to recent pressure, but rather that the trajectory of the Convention system was always pointing in the direction of more subsidiarity and margin of appreciation. Bringing rights home is an integral part of the system itself and we should embrace it and attempt to make this transformative change as smooth as possible.

Thank you for your attention.

[22] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24