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"Judges preserving democracy through the protection of human rights"

Judges and the Safeguarding of Democracy

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There are serious concerns about the state of democracy in Europe and around the world. The Secretary General of the Council of Europe has spoken of democratic decline. Many consider democracy today to be under threat. What, in those circumstances, is the role of judges and courts, in particular transnational courts? That is the question you have asked me here to discuss.

Safeguarding democracy has always been central to the role of judges. This is particularly so of courts tasked with enforcing and protecting a constitution or human rights. It is true that constitutionalism and the protection of human rights have sometimes been cast as a counterweight to democracy. Viewed through that lens, constitutionalism means placing limits on political action – limits to which the powers that be, including democratically elected powers, must adhere if they are to safeguard human rights. It is a perspective that continues to exert considerable influence over the way the constitutional and human rights role of judges is presented. Thus the role of constitutional courts and courts with a human rights remit is routinely thought of as one of protecting fundamental human rights against abuses of the democratic process. To my mind, however, this way of seeing things perpetuates an incomplete, blinkered view of democracy, constitutionalism and fundamental rights. And in so doing it perpetuates an incomplete view of the role of the courts themselves.

Such a view rests, first, on a reductive conception of democracy as majority rule. Democracy and the very idea of self-government are premised on the equal dignity of all citizens. This presupposes not only an equal say for all of them in the political process, but also a requirement that that process give equal consideration to all of their interests (so as to factor in the various and unequal ways they may be affected by political decisions). In order to safeguard those two aspects of democracy, far more is needed than a guarantee of free elections. Elections must also be held in such a way that all points of view may be expressed and tested against one another. And citizens must, as far as possible, be able to make their political choices on the basis of rational and genuine epistemic and cognitive processes. Without rationality, without an insistence on truth, there is no such thing as true democracy. Absent those two elements, the choices expressed by the citizenry are distorted. What sets democracy apart from other political processes is that, under democracy, truth emerges from the representation of a plurality of views. It is not dictated from on high. We should add that a broadened conception of democracy also requires checks and balances and the safeguarding of fundamental rights, so as to guard against the risk that an

occasional majority may ensconce itself in power or abuse its power by threatening the interests of a minority, thereby disregarding the democratic injunction to take account of the interests of all citizens in equal measure.

This conception of democracy has gradually come to predominate, both among authors writing on the subject and in the decisions of the courts. It contemplates human rights and the rule of law as inextricably bound up with democracy (or even as an integral part of it), and it is the conception usually referred to as liberal democracy. It calls for free and fair elections, the safeguarding of fundamental rights, the separation of powers, an independent justice system and the guarantee of a number of general legal principles such as certainty, clarity, transparency and effective protection by the courts.

This connection between democracy and human rights is acknowledged in the preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms that fundamental freedoms are best maintained by an effective political democracy. It is also recognised in the judgments of the European Court of Human Rights. Witness the Court's dictum that the Convention "was designed to maintain and promote the ideals and values of a democratic society", a point it took even further by stating that "[d]emocracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it"[1].

This signifies, on the one hand, that without democracy there can be no effective protection of human rights, as both the effective recognition of many of those rights and the political institutions with the requisite culture to uphold them will be lacking. On the other hand it also means that, without human rights, there can be no true democracy. It is a fact, as I have already said, that the epistemic, cognitive and deliberative conditions that must be in place to have a genuine democracy are predicated on the safeguarding of certain human rights. If those rights are not protected, democracy cannot exist. Likewise, equal political dignity for all citizens – the crux of democracy – requires equal consideration of their interests, even where that entails imposing certain limits on the political process.

From this perspective, the connection between democracy and the human rights jurisprudence of the courts becomes manifest. It goes to more than just political rights, or to checks and balances, both of which the courts generally protect. And yet, those checks and balances are the main focus of discussion when it comes to the role of the courts in safeguarding democracy.

The judgments of the European Court of Human Rights are particularly illustrative in this regard. The Court's case-law protects rights such as freedom of expression and freedom of association – the building blocks of the free and open space for discussion which every democracy must have. The Court has made clear that the protection of those rights, understood in terms of their relationship to democracy, encompasses far more than the mere guarantee of free expression; at issue are the promotion of media pluralism and the representation of a variety of political views, and, to take the point further still, the preservation of a rich and diverse civil society[2]. It follows from the Court's judgments that protecting democracy requires much more than protecting political expression and political parties. It entails protecting other forms of speech and association, in so far as they are an essential part of the public space in a true democracy. Moreover, the Court has shown itself to be attentive to the quality and integrity of public speech. So it is, for example, when the Court protects the independence and integrity of journalists and the public media or considers the risks of disinformation, particularly in the context of the new digital space.

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[1] *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, *Reports of Judgments and Decisions* 1998-I.

[2] See, in particular, *Ecodefence and Others v. Russia*, 14 June 2022.

In applying Article 3 of Protocol No. 1, the Court also protects electoral democracy. This includes the right to vote and the right to stand for election. But, to protect those rights, it is necessary, too, to protect the democratic character of the institutions and processes on which they rely. Doing so involves a host of thorny issues, from scrutiny of election procedures to the protection of political actors, including individual members of the legislature.

As reflected in many States' constitutions and made clear by your Court, democracy is not a "suicide pact". Democracy is well and truly entitled to defend itself against anti-democratic forces. In this regard it seems to me that the approach taken by the European Court of Human Rights to "militant democracy" is precisely akin to that of national constitutional courts. To attract the censure of the law, it is not enough for social movements or political parties to expound and disseminate anti-democratic ideas. They must also pose an actual threat to democracy by actively working to undermine it or by advocating violence as a means of putting their ideas into practice. Nor is there a need to wait for such organisations to seize power before taking protective action. A "sufficiently imminent" risk, in the words of the Court, is both necessary and sufficient[3].

Unlike the European Court of Human Rights, the Court of Justice of the European Union is not a human rights court. Gradually, however, it has turned its attention to questions of human rights and democracy. This is due primarily to two, seemingly contradictory changes. The first change has helped to circumscribe the powers of the EU, whereas the second has helped to expand them. The first change originates with the advent of a supervisory jurisdiction over the EU institutions in matters of fundamental rights. When particular powers were being transferred from national to EU level, a need was identified for that transfer to be accompanied by mechanisms of fundamental rights review comparable to those in place in the legal orders of the member States. This is the familiar history – albeit one that sometimes comes in for criticism – of the "judicial" introduction of fundamental rights into the jurisprudence of the Court of Justice following a dialogue with national constitutional courts. The outcome was the recognition and inclusion of those rights in the Treaties, and, subsequently, the adoption of the Charter of Fundamental Rights of the European Union. The European Court of Human Rights and its judgments played a prominent role in this change by serving as a vital tool for determining the nature and content of the constitutional traditions common to EU member States. Those traditions have since formed the basis for the development of fundamental rights in the EU.

The other major change regarding fundamental rights in the European Union is more recent and probably more controversial. It has developed, by fits and starts, out of the application of other rules of EU law, such as the four freedoms, in so far as those rules are capable of raising fundamental rights issues, some of which are deeply connected to the democracy problem. I will cite a few examples. In one case, a public broadcasting monopoly was challenged both as a restriction on the freedom to provide services in the EU and on the ground that it could be seen as an obstacle to freedom of expression. In another, the lack of media pluralism in a member State was challenged under the rules of EU law relating to competition safeguards and media market access in that State. In a third case, the EU legislation against age discrimination was relied on to challenge a national law aimed at enabling the exercise of greater control over the judiciary in a member State. These indirect applications of EU fundamental rights to democratic problems have gradually been supplemented by rules geared to meet those problems head on, some of which have been enacted under the EU's competences. One example, in the field of fundamental rights, is the EU's anti-discrimination legislation. Also of note is the recent regulation tying the release of EU

[3] Judgment in *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], ECHR 2003-II.

funds to compliance with rule of law standards, or the draft EU legislation on media pluralism and freedom. This change has been accompanied by treaty developments, not least the introduction of Article 7, which establishes a political mechanism for monitoring and sanctioning member States' breaches of the values enshrined in Article 2 TEU, such as democracy, the rule of law and the protection of human rights. But as I said, that Article provides for a political mechanism, which has proved toothless in the face of mounting challenges to those values from certain member States.

Against this backdrop, the European Commission and other parties have explored other remedies, so as to bring the potential fundamental rights breaches and rule of law violations observed in certain member States before the Court of Justice. I do not have time to give a detailed account of the debate that has ensued both in political circles and in the legal community.

The question whether EU fundamental rights may be used to review the actions of member States is often cast as one of the "incorporation" of EU fundamental rights into the municipal legal orders. The operative word calls to mind the process whereby the United States Supreme Court "incorporated" the Bill of Rights (a part of the US Constitution[4] that originally applied only to the Federal government) into the "due process" clause, which was binding on the individual US states. This had the effect of making the Bill of Rights applicable to the states and their internal affairs. EU law has yet to witness this kind of full incorporation. The Court of Justice has been willing to extend the reach of EU fundamental rights to the actions of member States, but only in so far as those actions fall within the scope of EU law, in the sense that a State is applying or derogating from that law[5].

More recently, though, in a line of cases on the independence of the judiciary, the Court of Justice has relied on a treaty Article whose application is not subject to the limits placed on the application of EU fundamental rights by Article 51 of the Charter. In response to the concerns raised about the rule of law, it made use of Article 19(1) TEU, which requires it to ensure that, in the interpretation and application of the Treaties, the law is observed. The CJEU accordingly held that Article 19 was a provision "which [gave] concrete expression to the value of the rule of law stated in Article 2 TEU" and ensured mutual trust between member States, in particular as regards the shared values on which the EU was founded. It furthermore held that "[t]he very existence of effective judicial review designed to ensure compliance with EU law [was] of the essence of the rule of law". This entails respect for the right to a fair hearing, which in turn – echoing what has been decided by the European Court of Human Rights – requires an independent judiciary.

In my view there is nothing surprising about these decisions. As a matter of fact, in my capacity as Advocate General of the Court of Justice, I advanced a similar line of reasoning in the case of *Centro Europa 7*. I stated there that a review aimed at ascertaining whether a member State provided the necessary level of fundamental rights protection to satisfy its obligations as a member of the Union "flow[ed] logically from the nature of the process of European integration [and] serve[d] to guarantee that the basic conditions [were] in place for the proper functioning of the EU legal order and for the effective exercise of many of the rights granted to European citizens."

I believe the same approach should be extended to other areas, particularly to issues of democracy. Consider the requirement in Article 10 TEU that the EU be founded on representative democracy, or that laid down in Article 14 TEU that members of the European Parliament are to be elected by direct universal

[4] The Bill of Rights consists of the first ten amendments to the US Constitution.

[5] See *Wachauf v. Germany*, C-5/88, 13 July 1988, ECR 2609, and *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, C-260/89, 18 June 1991, ECR I-2925.

suffrage in a free and secret ballot. The preservation of free and fair elections and of a Parliament elected and operating on democratic principles presupposes the fulfilment of certain conditions that must be secured within all the member States themselves. The distinction between the two planes – as to whether the conditions are met in respect of European democracy and elections on the one hand and in respect of national elections and democracy on the other – has become untenable. It is plainly only a matter of time before the Court of Justice is called upon to decide whether those conditions are met in a member State where the outcome of an election to the European Parliament is at stake.

The upshot is that the Court of Justice of the European Union will gradually have to take on a role in protecting democracy in the member States. But how the Court meets that challenge will depend on the particularities of its own jurisprudence – not that of the European Court of Human Rights. The supervision to be exercised by the Court of Justice over matters of national democracy will have to be concerned with protecting European democracy and the EU legal order. This calls for developing a more "systemic" approach – otherwise put, one where the question for the Court of Justice is whether the case before it poses a systemic problem that may concern the EU as a whole. This sets the stage for possible convergence and complementarity between the Court of Justice and the European Court of Human Rights. In order to appreciate this point in full, it is important to clarify the *raisons d'être* of these two courts in the European sphere.

There are three reasons why a transnational court may be vested with a particular role in protecting national democracy (and fundamental rights within the State).

The first reason, paradoxically, is purely internal to States themselves. It is to add an external layer of constitutional supervision at a level "above" that of the national constitution. This additional layer of supervision represents a form of collective self-discipline instituted by the member States in the light of their past experience, which teaches that domestic constitutional mechanisms have not always proved effective at protecting democracy and fundamental rights.

A second reason is the political and moral externalities which one State's democratic breaches and human rights violations may generate for other States. To be sure, the concept of "political and moral externalities" is controversial, not least because the international community is not *ad idem* as far as the concept is concerned. However, when the member States themselves undertake to share a single economic and political space (which may be embodied in a treaty such as the European Convention or the EU Treaties), it seems to me to be fair to say that such an undertaking rests on the principle that they share certain common fundamental values, and that a breach of those values throws the common enterprise into doubt.

There is a third reason, particularly relevant to the European Union. The member States of the EU have entered into a form of integration which renders them so interdependent that violations of the rule of law, democracy or fundamental rights by one of them may have repercussions for all the other member States, in the sense that either those other States will be obliged by the cooperation mechanisms inherent in integration to give effect to the decisions taken by a member State in breach of those values, or breaches of those values by one or more member States will taint the actions of the EU itself, affecting them from that point onwards. In other words, the problems of respect for fundamental rights and democratic principles facing one member State become problems of respect for fundamental rights and democracy for the European Union itself.

That, I think, accounts for the latest developments in the case-law of the Court of Justice of the European Union.

Whereas the role of the European Court of Human Rights in this regard is predicated largely on the first two reasons I mentioned, that of the Court of Justice finds its basis mainly in the third. This accounts for the differences in jurisdiction and in the approaches favoured by the two courts, in particular the more systemic (and less haphazard) nature of the supervision exercised by the Court of Justice. On balance, the two roles are not at odds. There is no major difference, substantively speaking, in the analysis of the problems posed. Furthermore, the broader purview of the European Court of Human Rights, and its jurisprudence, will be extremely valuable to the Court of Justice as it looks from a systemic perspective at the democratic problems that befall the member States of the EU. The two courts should see themselves as complementary and not at all in competition.

Indeed, the problems they are facing are common to both courts. But what makes the challenges now being levelled at democracy so hard to tackle is that they also involve a challenge to the role of judges themselves (and transnational judges in particular) under democracy.

These challenges are fed by the growing dissatisfaction with democratic government being voiced, if opinion polls are any indication, by citizens throughout Europe. Underlying that dissatisfaction, in reality, are two factors: (1) the fact that people no longer feel represented by the political class; and (2) the fact that growth rates in authoritarian States, coupled with the economic stagnation and rising social inequality seen in many democracies, have discredited the idea that democracy and socio-economic progress go hand in hand.

These two factors can in turn be linked to three ongoing transformations in the political landscape.

The first is a growing asymmetry between the public policy space, which is increasingly immersed in transnational interdependencies, and the political space, which remains deeply national.

The second is a transformation in the ways and means of conducting politics, arising out of the digital revolution. This is changing how information is constructed and disseminated, how political preferences are formed and how deliberation happens in the public space.

The third is a transformation in the timescale of politics, as it becomes increasingly short-termist.

I do not have time here to go into the details of this political transformation, but there is no doubt that it is having a profound effect on the deliberative, epistemological and cognitive underpinnings of democracy.

This transformation is bringing forth new democratic challenges to which the courts must respond; but, at the same time, it is placing the conditions for their ability to do so under threat.

The most obvious challenge comes from the forces of populism and their proto-authoritarian conception of power. This challenge does not just entail a proliferation of human rights litigation. Much of that litigation arises out of a decay of the dominant democratic culture and a systemic “capture” of democratic institutions by power. But the courts are ill-equipped to deal with institutional issues going to the framework of democracy. They are probably also less effective because the solutions they can provide are seldom systemic in character. And, as recent events in Europe show, courts may themselves fall victim to such “capture” and democratic backsliding. At the same time, in such a context, intervention by the courts becomes all the more necessary and is in many cases the only possible alternative. This applies in particular to transnational courts, which may turn out to be a last resort as democratic challenges take root in a political culture that is sliding away from democracy. Not to mention that the courts are placed in an all the more difficult position by the populist representation of judges as members of a disconnected elite hostile to the democratic will of the sovereign people. It follows that courts must show that they are

capable of developing not only the judicial avenues for prompting democratic change but also a form of legal argument that is persuasive outside the legal community, to the political community at large.

A second challenge looms regardless of the rise of populism. Democracy is increasingly fragmented and polarised – a particularly problematic state for democracy because it makes it hard for it to fulfil, in a way that everyone accepts, its function of reconciling and arbitrating between the interests of various social groups and citizens. As democracy founders, the role of the courts as a rationalising force in politics is thrown into relief. What is sometimes referred to as the "judicialisation of politics" or "government by judges" is in fact the consequence of an implicit delegation of the political sphere to the judiciary, whereby certain political disagreements are translated into legal arguments to be adjudicated on by judges reasoning from universally accepted principles.

The conferral of this role on judges arises out of an understanding of democratic constitutionalism in which the judicial role is not merely one of supervising politics or entrenching certain values against the course that politics might ordinarily take. Instead it is, in fact, to make politics possible and productive. What is sought is not merely to keep disagreement in check, but also to authorise, regulate and resolve disagreement. This conception of democratic constitutionalism carries with it far-reaching consequences for the role of judges. Under it, their function is to shape and frame the search for meaning in the political community, rather than to reveal the meaning stored in previously enacted rules.

The third challenge stems from the new nature of the public sphere. As the virtual public sphere expands and becomes hegemonic, it will increasingly fall to judges to ensure freedom of speech and pluralism, thereby helping to protect the integrity and the quality of the public sphere and public speech. That is not a new role, as your Court is well aware, having dealt with cases such as *Delfi*, *Høiness* and *Magyar Jeti*. But it is one that is certain to grow in importance and – more fundamentally still – it will be increasingly bound up with those forms of transnational power which escape the scrutiny of national democracies but exert decisive influence over the shape of politics and public policy. I am referring to social networks but also to other forms of transnational private power, such as the prominent and longstanding role of sports federations.

Because they are transnational, these forms of power are immune to democratic or judicial scrutiny at the national level. The European Court of Human Rights and the Court of Justice of the EU alike have rightly shown that the apparent limits on the applicability of the Convention or certain rules of EU law to private power are not a conclusive bar to judicial intervention. However, these courts have yet to fully appreciate the democratic problems currently posed by the existence and operation of private power. In this regard I see an opportunity for them, for it is here that they can make up for the role that national democracies are no longer able to fulfil.

With these three challenges come two sets of consequences for judges. First, they will necessarily have to take part in configuring and devising the political space. Second, willingly or not, they will be placed at the centre of many a political conflict. And this presents a paradox. As I pointed out, the political centrality of the courts is a product of politics, not a result of the courts' own actions. But – and herein lies the paradox – that phenomenon of centrality makes their decisions all the more contentious. The only way out of this paradox is to revise our conception of the role of judges in a democratic polity. The courts must change the nature of their own legal reasoning and the understanding of the role they play in exercising their supervisory jurisdiction.