
DIALOGUE BETWEEN JUDGES 2025

# Protecting human rights in a world of Artificial Intelligence, algorithms and big data

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

COUNCIL OF EUROPE
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Dialogue between judges 2025

# Dialogue between judges

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*Protecting human rights in a world of Artificial Intelligence, algorithms and big data*

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








# Marko Bošnjak

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

## INTRODUCTORY SPEECH

Mesdames et Messieurs les Présidents de cours constitutionnelles et suprêmes, Mesdames et Messieurs les intervenants, Chers collègues, actuels ou anciens, chers amis,

Je suis très heureux de vous voir ici réunis en si grand nombre aujourd'hui pour notre séminaire annuel, prélude traditionnel à l'ouverture officielle de l'année judiciaire de la Cour.

Ce séminaire est particulièrement important puisqu'il s'agit du premier événement que nous organisons cette année pour marquer le 75e anniversaire de la Convention européenne des droits de l'homme. Nous fêtons aujourd'hui aussi le 20e anniversaire de ces séminaires judiciaires dont le but, depuis le départ, est de maintenir, de renforcer et d'approfondir notre dialogue et nos échanges avec vous, juges nationaux des cours supérieures de vos pays. Il convient de rappeler qu'une protection efficace des droits de l'homme commence et souvent s'achève au niveau national.

Permettez-moi tout d'abord de souhaiter chaleureusement la bienvenue à nos éminents intervenants : la professeure Lucie Cluzel-Métayer, le professeur et juge à la Cour constitutionnelle lituanienne Vytautas Mizaras, la professeure Sandra Wachter, et notre collegue du Conseil de l'Europe, Madame Hanne Juncher. Je laisserai nos modérateurs les présenter plus en détail. Je remercie sincèrement nos intervenants de s'être joints à nous aujourd'hui en leur qualité d'experts. C'est un grand privilège que de les voir ouvrir nos discussions.

Avant d'en venir à notre thème, permettez-moi de remercier tout particulièrement le comité d'organisation de cette année, composé des juges Saadet Yüksel (présidente), Raffaele Sabato, Mykola Gnatovskyy, Anja Seibert-Fohr et Oddný Mjöll Arnardóttir. Les débats de cet après-midi seront modérés par les juges Gilberto Felici et Mateja Đurović.

La préparation de ce séminaire, notamment la rédaction de la note d'information, a nécessité beaucoup de travail et je voudrais que nos collègues sachent que le temps et l'énergie qu'ils y ont consacrés ces derniers mois sont pleinement appréciés par tous aujourd'hui.

Au sein du greffe, nous remercions également Rachael Kondak, Zoë Bryanston-Cross, Bianca Boji-Tahvanainen, Valérie Schwartz et Tatiana Kirsanova.

Chaque année, nous choisissons pour le séminaire un thème qui nous donne l'occasion d'explorer ensemble différents aspects du système de la Convention, allant du rôle joué par le pouvoir judiciaire aux notions de subsidiarité et d'instrument vivant. Naturellement, pour cette année anniversaire, nous avons choisi un thème qui est particulièrement pertinent dans le paysage juridique actuel et qui nous oriente vers les perspectives d'avenir.

The progress made in technology and science has been unprecedented over the life of the Convention and has changed the way we interact with the world. The omnipresence of Artificial Intelligence, algorithms and big data has brought new perspectives (and challenges) to human rights which we aim to explore this afternoon.

The link between AI and judicial decision-making can be seen quite clearly in a piece of research undertaken by computer scientists as well as law professors in 2016. Their goal was to see whether AI could help them predict the outcome of our Court's judgments: violation or no violation.[1] Using modelling the researchers were able to predict with high accuracy, around 79%, the outcome of our judgments, based on mining textual information from the judgments, in particular the "facts" part. This research was undertaken almost 10 years ago. One can imagine that the accuracy of their predictions has probably increased considerably during the last years. Could or should AI assist judges in their decision-making? Or the drafting of judgments? The question is more of a moral than technical one and I will listen with interest to the discussion on these and other points.

Fortunately, various parts of the Council of Europe have been active in the last years on AI-related questions. Yet the legal landscape surrounding AI is still in its initial stages, both in terms of applicable regulations and case-law. It was only last year, in 2024, that the Member States adopted the landmark Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, the first-ever international legally binding instrument aimed at providing a legal framework for the States to regulate the activities within the lifecycle of AI systems and their impact on human rights. What is interesting to note is the truly global reach of this instrument which is open for signature by non-Council of Europe Member States (and indeed has been signed by Israel and the United States of America) as well as the European Union.

Over the last years, the Court has been called upon to adjudicate cases concerning the impact of technology and machine learning on the protection of the rights and freedoms enshrined in the Convention. As we can see from the background paper, our existing caselaw is well-stocked with judgments and decisions regarding the use and impact of emerging technologies, a number of interesting applications are also pending.

These cases can undoubtedly assist our analysis of new applications on generative AI (the likes of ChatGPT etc.) and its implications, which must be approached with an understanding of this evolving legal context and the potential for significant developments in the near future. Indeed, surely one of the primary objectives of our Seminar is to familiarise ourselves, as judges and not technical experts, with the basic features and scope of AI to improve our understanding of where and how it is operating in our day-to-day lives.

Moreover, there have been cases at the national level and so your insights, distinguished guests and dear friends, play – as ever - a pivotal role in shaping the future of human rights in a world of AI and nourishing our discussions today on our shared responsibility of protecting human rights in this new technological era. I very much encourage you to take the floor when you have the opportunity. The more dialogue we generate the better.

We have asked our distinguished speakers to delve into some of the most pertinent questions raised by the development and use of AI systems, with a focus on identifying the challenges and opportunities that they represent for the protection of human rights.

We have structured the seminar around four topics: Council of Europe/European standards on Artificial Intelligence; Freedom of expression in the age of Artificial Intelligence; Artificial Intelligence and the right to a fair trial; and Addressing potential discrimination in Artificial Intelligence.

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

Without further ado, I will now pass the floor to Judge Yüksel, to take us into the substance of this year's seminar theme.

Thank you for your attention.

1 (PDF) Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective






## Saadet Yüksel

**Judge at the European Court of Human Rights, Section Vice-President**


# PROTECTING HUMAN RIGHTS IN A WORLD OF ARTIFICIAL INTELLIGENCE, ALGORITHMS AND BIG DATA

It is my pleasure to welcome you to the 2025 Judicial Seminar, addressing the important topic of human rights protection in a world of artificial intelligence, algorithms and big data.

I would like to begin by thanking President Marko Bošnjak for his support and insights in developing today's programme. I would also like to thank my colleagues on the organising committee, namely Judges Raffaele Sabato, Anja Seibert-Fohr, Oddný Mjöll Arnardóttir and Mykola Gnatovskyy, for their diligent work which has been essential in making this event possible. Many thanks must also be extended to the Administration team, guided by Rachael Kondak, for their tireless efforts in preparing today's seminar. I also must express my gratitude to our moderators, Judges Gilberto Felici and Mateja Đurović. Finally, my special thanks go to our four distinguished speakers, Hanne Juncher, Lucie Cluzel-Métayer, Vytautas Mizaras and Sandra Wachter, whose expertise will be invaluable to our discussion.

Artificial intelligence, or "AI", impacts many aspects of our everyday lives, from common, visible examples like the use of AI tools by e-commerce websites or social media platforms[1], to more complex examples, such as the use of AI tools in medical diagnostics[2].

As AI tools are deployed across a broader set of industries, the ground-breaking nature of the advancements they offer, and their benefits to society, have come into clearer focus. These benefits arise across a wide array of sectors, industries and use cases where AI tools are contributing to increased efficiency, novel thinking and ground-breaking discoveries.

To illustrate, in 2024 a Nobel Prize was awarded for the first time[3] for the use and deployment of AI technology. The award-winning research has been described as "a major revolution", where scientists have instant access to experiments that were historically unimaginable[4].

Nevertheless, these advancements, remarkable as they are, have been accompanied by concerns about unintended, or as yet unavoidable, challenges arising from the use of AI.

Public intellectuals have noted that these concerns point to a larger structural issue: "[P]ower over this technology is concentrated in the hands of just a few companies. [G]enerative AI raises the stakes, [and has] reignit[ed] debates about the broader relationship between technology and democracy"[5].

1 Tableau from Salesforce, Everyday examples and applications of artificial intelligence (AI) (last accessed 12 December 2024).
2 World Economic Forum, How AI is improving diagnostics and health outcomes, transforming healthcare (25 September 2024).
3 Ewen Callaway, Chemistry Nobel goes to developers of AlphaFold AI that predicts protein structures, *Nature* (9 October 2024).
4 *Ibidem*.
5 Evgeny Morozov, The AI We Deserve, Boston Review (4 December 2024); Evgeny Morozov: bio, in the media.

Some experts have argued that currently "[n]o institutions exist to advise the world, assessing and analyzing both the risks and the opportunities" of AI technology[6]. Indeed, woven throughout the academic and technical discourse on AI development are calls for regulation[7] and the creation of expert bodies to drive forward the development of legal frameworks to govern this technology and to ensure that the opportunities are maximised while the risks are properly identified and mitigated[8].

Although our Court has not yet heard a case directly related to artificial intelligence and human rights, the political, academic and private-sector discourse on the topic indicate that such a case is likely to be brought.

By gathering this unique set of adjudicators from the Superior Courts of member States and judges from this Court, this seminar presents an opportunity to foresee both the challenges and opportunities that AI presents with regard to human rights.

Moreover, considering the important role of subsidiarity in the Court's work, this seminar is also a key opportunity for engagement between judicial counterparts and experts from academia.

Indeed, the significance of the initial domestic decisions addressing issues of AI and human rights in the judiciaries of countries party to the Framework Convention on Artificial Intelligence is hard to overstate. The pioneering nature of this international legal framework confirms that cases interpreting its application will serve as models for similar legal regimes around the world[9].

The forward-looking nature of today's exchange is not intended as a foreshadowing for how this Court, or any judicial body, will decide any specific case related to AI. Rather, as we collectively anticipate these legal questions, this exchange will hopefully provide an opportunity to discuss the set of jurisprudential principles to which we may all turn when adjudicating early, precedent-setting cases relating to AI and human rights.

Indeed, in the light of the significant likelihood of continued technological evolution and the preliminary nature of the legal framework, it may be important to bear in mind throughout our exchange the high likelihood of significant developments in the very near future, underscoring the need for adaptability in both our understanding of AI and its impact on human rights, as well as in the legal principles relied upon to govern these issues.

I would briefly point out that despite the wide array of issues that intersect with AI and human rights, there are many Convention rights that will not be addressed today even though they have clear links with AI.

While the legal framework governing AI globally remains under construction, key pieces of legal infrastructure are already in place in Europe. The Council of Europe's European Commission for the Efficiency of Justice has provided technical insights on the topic, including a definition of AI, namely "[a] set of scientific methods, theories and techniques whose aim is to reproduce, by a machine, the cognitive abilities of

6 Geoff Mulgan and Divya Siddarth, "The World Needs A Global AI Observatory", *Noema* (29 June 2023).

7 See, for example, Tom Wheeler, "The three challenges of AI regulation", Brookings Institute (15 June 2023) ("... CEO of OpenAI told the Senate Judiciary Committee on May 16 [2023] there was a need for 'a new agency that licenses any effort above a certain scale of capabilities and could take that license away and ensure compliance with safety standards ... CEO of Google ... on May 23 [2023] announced an agreement with the European Union ... to develop an 'AI Pact' of voluntary behavioral standards prior to the implementation of the EU's AI Act").

8 Carnegie Council for Ethics in International Affairs, The Artificial Intelligence & Equality Initiative, "The Case for a Global AI Observatory (GAIO)" (2023).

9 Sandra Wachter, "Limitations and Loopholes in the EU AI Act and AI Liability Directives: What This Means for the European Union, the United States, and Beyond", 26 Yale Journal of Law & Technology 671, 676 (2024) (noting that "[f]rom a business perspective, and in the interest of streamlining, it will make sense for businesses to adapt their operations to comply with the strictest laws rather than to have fragmented standards across operations. The global effect of the [Artificial Intelligence Act] and the liability directives cannot be overstated ...").



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human beings"[10]. Although the definitional boundaries continue to evolve[11], Ms Hanne Juncher, Director of Security, Integrity and Rule of Law, will today provide an overview discussing these standards and other relevant materials from the Council of Europe.

The breadth of AI's use poses unique governance challenges, as the deployment of any given AI tool in any given context is likely to give rise to specific human rights questions, societal benefits and risks to human rights.

Therefore, it is necessary to deep dive on specific issues and contexts. One such context is how the development and deployment of AI tools support, facilitate and threaten freedom of expression.

Prof. Lucie Cluzel-Métayer will discuss how AI tools facilitate the production and circulation of information – which can include misinformation, or distorted information – and how emerging regulatory instruments and governmental actors can work to ensure the right balance is struck to both protect the right to freedom of expression and maximise the potential benefits of AI tools to facilitate expression and exchange.

Another key context warranting our closer attention relates to the subject of AI and the right to a fair trial.

While there is a great deal of literature discussing how AI tools might impact the right to a fair trial with regard to the use of AI by judges, with a significant focus on the possible use of "robot judges"[12], today's discussion led by Judge Vytautas Mizaras will broaden the discussion and address how AI tools impact the basic procedural rights and due-process guarantees inherent in the right to a fair trial which have been developed by this Court through its case-law.

Finally, it is worth mentioning that a generalised discussion of the challenges and opportunities of AI in the context of human rights would not be complete without addressing issues of discrimination.

The academic literature on the subject is robust and addresses issues of discrimination throughout the life cycle of AI, from opportunities and challenges in the selection of data used to train predictive models (including the use of proxy indicators[13]), to the reliance on algorithms by human decision-makers in a bid to avoid other biases in decisions[14].

Against this nuanced backdrop, leading expert Prof. Sandra Wachter will deliver our final intervention, addressing the relationship between the known and novel risks of discrimination caused by the use of AI tools and the current legal frameworks prohibiting discrimination.

I would like to conclude by acknowledging that in this seminar – which is intended to provide a space, informed by academic experts, for exchange between judicial colleagues to grapple with complex questions relating to AI governance – we must not only consider these topics individually, but also bear in mind the intersections between them and the cross-cutting nature of these issues.

Many thanks again to all participants for their engagement in this important exchange.

10 European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, European Commission for the Efficiency of Justice (CEPEJ), Council of Europe, pp. 69-70 (3 4 December 2018).

11 Carolyn Blais, "When will AI be smart enough to outsmart people?", MIT School of Engineering (last accessed 13 December 2024).

12 See, for example, Jasper Ulenaers, "The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge?", 11 Asian Journal of Law and Economics (2020).

13 See, for example, Cathy O'Neil, Weapons of Math Destruction (2016) (excerpts); Andrew Myers, "How Bias Hides in "Kitchen Sink" Approaches to Data", Stanford University Human-Centered Artificial Intelligence (30 May 2024).

14 Cass Sunstein, "Algorithms, Correcting Biases" (12 December 2018).

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## Hanne Juncher

**Directorate General of Human Rights and Rule of Law**

Thank you very much for giving me the opportunity to introduce these discussions from the perspective of the work of the Council of Europe.

Back in 2021, in your debate on the rule of law and justice in the digital age, you observed that the Council of Europe had been particularly dynamic in recent years in the field of human rights and artificial intelligence (AI).

The working document for this year's seminar demonstrates such dynamism and emphasises that the issues raised by AI, algorithms and big data are more than ever at the heart of our work.

This work in turn reflects the debates taking place in our member and partner States. Everything is moving very rapidly, whether we look at the technological achievements or the social issues they force us to think about.

Jules Verne famously wrote: "What one man can imagine, another will some day be able to achieve." This is all the more true when humans are aided by AI tools.

We are only at the beginning of a new technological revolution. AI is the catalyst for transforming many aspects of human life. Recently, AI led to the discovery of halicin, a new antibacterial substance that is useful for the discovery of new medicines.

AI has also proven its worth in the fight against online human trafficking, thanks to Thorn's Spotlight tool, which helps police identify victims of trafficking on the web more effectively and efficiently.

AI tools can be beneficial in promoting equality in recruitment processes; in ensuring food security, through precision agriculture; in predicting and managing natural disasters; and in producing personalised medicine.

And AI has the capacity to transform many aspects of public administration processes. It can create immersive virtual learning environments, and it can overcome language barriers.

But recent years have also been marked by news stories revealing the negative impact of algorithmic systems on human rights.

All over the world, governments are rushing to automate their services, and it is often the vulnerable in society who suffer the consequences. A family allowance case in the Netherlands provides one example.

There is also, unfortunately, great prejudice against women in digital spaces, including AI-generated sexual images and videos. AI systems may also be designed without taking into account the specific risks to children.

In addition, the role of AI in the creation of misinformation and disinformation narratives is expanding. We also have the malicious use of AI in electoral processes and the consequent risks to our democracies.

In the light of these developments, we ask ourselves about the risks associated with the latest techniques, and their compatibility with human dignity and human rights.

The Council of Europe is well placed to tackle those challenges, and the European Court of Human Rights will no doubt be at the forefront of those efforts.

For the moment, cases involving algorithms and big data are few, but it is to be expected that this will change. The debate today on the protection of human rights in the world of AI is therefore very timely.

The boldness with which your Court has interpreted the European Convention on Human Rights goes back a long way. It is well established that the Court interprets the Convention as a living instrument, and therefore in the light also of scientific and technological progress. This has been true, for example, for past cases involving biomedical progress and bioethical issues.

Adherence to the ideals and values of a democratic society governed by the rule of law remains at the heart of other Council of Europe standards and standard-setting activities. They also take account of social and technological developments, ensuring an appropriate response to contemporary challenges.

The Council of Europe has continued its long tradition of establishing innovative frameworks, such as the 1999 Oviedo Convention on Human Rights and Biomedicine or the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Your Court has referred to these legal instruments on several occasions in the past.

The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law provides a framework for addressing the human rights impacts of AI.

Eleven non-member States from five continents took part in drawing up the Framework Convention, and 68 representatives from civil society, academia and industry were actively involved. This is an unprecedented number for an international treaty negotiation within the Council of Europe and shows the level of interest in this exercise from a wide range of stakeholders.

The negotiations were finalised by the Committee on Artificial Intelligence (CAI) in March last year. The treaty was adopted by the Committee of Ministers in May and opened for signature in September 2024. It already has 11 signatories, including the European Union, which will implement the Framework Convention through its AI Act.

The Framework Convention is based on international and Council of Europe human rights standards. As a treaty open to accession not only by the member States of the Council of Europe, but also by States from other regions of the world that share the same values, its reach is global.

While it may not create new rights specific to AI technology, it does oblige parties to fully apply existing human rights in all activities related to the life cycle of AI systems, i.e. from system design through to decommissioning.

The Framework Convention adopts a risk-based approach to AI systems, meaning that only systems assessed as posing a potential risk to human rights, democracy and the rule of law fall within its scope.

In accordance with Articles 7 to 13 of the Framework Convention, the activities carried out throughout the life cycle of AI systems must respect fundamental principles, such as human dignity, individual autonomy, accountability, equality and non-discrimination, among others[1].

The Framework Convention applies to AI systems in both the public and private sectors, in accordance with its Article 3.

1 Other principles include: respect for privacy and individual autonomy; transparency and oversight; accountability and responsibility; reliability; and safe innovation.





It covers a wide range of technologies, without naming any of them. The text is deliberately technology-neutral, so as to avoid being out of date before it even enters into force. The definition of AI, as formulated by the OECD[2], also supports a life cycle and risk-based approach, with effective regulation of AI systems at every stage.

The Framework Convention provides for a range of remedies, procedural rights and safeguards, and in particular requires parties to establish a framework for managing the risks and impacts of AI systems on human rights, democracy and the rule of law (Article 16).

Last November, the CAI adopted a methodology for the assessment and management of the risks and impacts of AI systems in the area of human rights, democracy and the rule of law – the HUDERIA Methodology. We are continuing work on more detailed guidelines this year.

In addition, most of the Council of Europe's committees and intergovernmental bodies and specialised bodies, as well as its monitoring mechanisms, have sought to examine the impact of AI in their fields of activity.

I would especially like to highlight the Committee of Ministers' soft-law instruments which reflect the positions of our member States and can inspire the Court in the development of its case-law. Such instruments include the Recommendation on the human rights impacts of algorithmic systems[3] and the more specialised Recommendation on the ethical and organisational aspects of the use of AI and related digital technologies by prison and probation services[4].

It is also worth mentioning the European Ethical Charter on the use of AI in judicial systems and their environment. Adopted in 2018 by the European Commission for the Efficiency of Justice (CEPEJ), this Charter was the first European text to set out ethical principles relating to the use of AI in judicial systems.

The European Committee on Legal Co-operation plans to draw up a draft legal instrument framing the use of AI in the areas of police, administration, justice, and border and migration management, as part of its future work on administrative law and AI.

In addition, the European Committee on Crime Problems continues to examine the scope of a future legal instrument dealing with criminal liability related to the use of AI.

The Cybercrime Convention Committee is preparing a study on the specific links between cybercrime, electronic evidence and AI.

The Gender Equality Commission and the Steering Committee on Anti-discrimination, Diversity and Inclusion have a joint mandate to draft a recommendation on equality and AI by the end of this year.

And I would like to mention the work of the Steering Committee for Human Rights (CDDH), which is carrying out work to ensure that AI standardisation activities are compatible with relevant human rights standards.

Beyond AI, algorithms and big data, there are also rapid developments taking place in the area of neurotechnology. Earlier this week the Council of Europe co-organised a panel on this topic at our Data Protection Day event in Brussels, in which the Jurisconsult of the Court participated – thank you for that.

2 Article 2 – Definition of artificial intelligence systems: "For the purposes of this Convention, 'artificial intelligence system' means a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment."

3 CM/Rec(2020)1.

4 CM/Rec(2024)5.

Such developments offer the possibility of detecting certain diseases, such as dementia; assisting eyewitnesses in recalling relevant details in legal proceedings; or making a prognosis about an individual's potential future criminal behaviour. This will raise many legal and ethical issues and touch on numerous rights in the Human Rights Convention.

Excellencies, dear colleagues,

That was an overview of the ongoing work on AI and human rights within the Council of Europe. We hope this work will help the Court when dealing with future applications concerning AI and algorithms and big data.

AI is already very much with us today. The challenges are inevitable, and these discussions really could not be more timely.






# Lucie Cluzel-Métayer

**Professor of Public Law,**
**University Paris Nanterre**


## FREEDOM OF EXPRESSION IN THE AGE OF AI

## INTRODUCTION

President Bošnjak, Constitutional and Supreme Court Presidents,

It is a great honour for me to address such a distinguished audience, and I would like to thank the organisers of the seminar, in particular Saadet Yuksel, for giving me this opportunity.

## HOW DOES AI IMPACT FREEDOM OF EXPRESSION?

This is a crucial question at a time when generative AI such as ChatGPT is advancing in leaps and bounds, when you can no longer be sure whether an idea comes from a human or AI, and when major elections are being manipulated by AI on social media, putting democracy in danger. The World Economic Forum's Global Risks Report 2024 even ranks AI fuelled disinformation as one of the most significant global risks in the short term.

In law, freedom of expression online was initially recognised as the foundation for the right to internet access. In 2012, in the *Yildirim v. Turkey* judgment, the European Court of Human Rights made Article 10 of the Convention the basis for the right to internet access, acknowledging how essential this medium is in the fulfilment of freedom of expression.

Since then, rules have gradually been adopted to regulate freedom of expression, as it had been observed that some people were making extreme statements online in the belief that there would be no consequences. Four years after the Capitol riots, which revealed the power of social media and the risk of it being turned against democracy, national and European lawmakers, along with judges, have become aware of the importance of regulating freedom of expression on the internet. The right balance has to be struck between protecting freedom of expression, which can be exploited on social media to promote economic interests, and respecting the democratic values of human dignity and pluralism, so that, in particular, each individual can have access to a diversity of ideas. This objective, which the EU's 2022 Digital Services Act (DSA) attempts to achieve, requires:

- combating unrestrained – and I would even say uninhibited – online expression, and asserting that what is prohibited offline is also prohibited online; and
- forcing social-media platforms to clean up their content-recommendation practices, which often boost the visibility of the most extreme and shocking content (i.e. with significant viral potential) – in other words, content that is the least compatible with democratic values.

And AI is at the heart of these processes.

Now permeating almost all human activities, AI is profoundly transforming society. Before discussing its impact on freedom of expression in more detail, I would first like to clear up some ambiguities inherent in the fantasies that AI tends to give rise to.

Defining an AI system (AIS) is no simple matter. In principle, it is a system based on algorithms, operating with a certain degree of autonomy and capable of inferring results from input data. (These systems can make predictions, recommendations or decisions that influence the environment – in other words, they can perform tasks usually requiring human intelligence.) Some AISs, such as ChatGPT and other generative AI systems, along with facial recognition technology, harness big data and are extremely powerful. Based on machine learning, they get better as the quality of their input data improves and are largely independent from the humans who develop them.

(AI is now used on a daily basis. Examples include facial recognition to unlock smartphones as well as more specialised applications, such as helping to detect certain cancers, shortlisting job candidates, performing surveillance of public places, assisting judicial decision-making and – in situations that seek to replace humans more radically – powering autonomous vehicles and virtual avatars of deceased loved ones (known as deadbots).) The technology is rising to increasingly astounding challenges. But most of its applications are still in their infancy and, above all, AI is not yet as smart as some would have us believe. Even though ChatGPT and Gemini (Google's AI) may give impressive results, for example, they are still very approximate, if not erroneous. Large language models, which attempt to reproduce human language, are essentially only probabilistic models, trained on data that is still insufficiently diversified to generate completely reliable results.

That said, there is no doubt about the potential of AI, and its use may have a positive impact in terms of strengthening freedom of expression (I). But it is fair to say that this potential is matched by an equal amount of risk (II). In 2021, the Council of Ministers of the Council of Europe expressed concern about the future of "freedom of expression and its corollary media freedom, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms", considering that as "cornerstones of democracy", they needed to be "upheld and protected" from "undue interference" by "digital technologies such as automated content moderation tools". The European authorities have introduced rules to address these risks. With the adoption of the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law on 17 May 2024 and the enactment, one month later, of the European Regulation of the European Parliament and of the Council of 13 June 2024 on artificial intelligence (AI Act), European states have positioned themselves at the forefront of AI legislation, and this, alongside the DSA, offers avenues for protecting freedom of expression in the age of AI (III).

## I. THE POTENTIAL FOR AI TO ADVANCE FREEDOM OF EXPRESSION

There is genuine potential for AI to foster freedom of expression.

First, AI can facilitate the production and flow of information. Social networks can harness algorithms to bring people together across borders. They make it easier to exchange ideas and information, empower citizens to call out the authorities regardless of distance or other material and procedural barriers, and thereby contribute to reviving direct democracy. People now access information and form opinions mainly on social media (Arcom, 14 March 2024).

AI can also relieve journalists of time-consuming tasks, freeing them up for higher value-added activities.

Generative AI such as ChatGPT opens up a world of possibilities for everyone. "Anyone can write a prompt and create text, images, audio or video content." AI puts content creation within the reach of every individual, and platforms allow them to share this content easily, democratising artistic and media production.





Thanks to machine-translation tools, AI also breaks down language barriers, enabling ideas to flow freely between cultures and countries. In general, voice assistants make it easier for people to express themselves. This is even more true for people with disabilities.

AI can additionally be used to improve the quality of information. It can not only detect illegal content, such as hate speech, but also identify and even automatically correct false information. By analysing social media and public debate, AI can shine a spotlight on marginalised opinions or groups. (In France, the communications regulatory authority, Arcom, has been using an AI system since 2019 to determine a given speaker's gender, making it possible to measure the presence of women in the audiovisual media and thereby ensure a more even gender balance.)

While the potential is huge, the risks should not be underestimated.

## II. RISKS TO FREEDOM OF EXPRESSION

These risks are inherent in the use of AI, with, on the one hand, risks associated with disinformation and, on the other, risks relating to surveillance, which AI facilitates and which can have a chilling effect in the form of self-censorship.

### Risks relating to disinformation

First, as I said at the outset, AI is not infallible – far from it. Trained on unverified data, often sourced exclusively from the United States, the technology is biased. If you ask ChatGPT who made the first flight in an aeroplane, it will tell you that it was the Wright brothers, whereas French schoolchildren learn that it was Clément Adler. (But if you ask ChatGPT who Clément Adler is, it will point out that he made the first flight in an aeroplane!) ChatGPT is trained on American databases and reflects this cultural frame of reference – which, moreover, is extending its reach with the widespread use of the tool. The risk of "cognitive uniformity" – the product of "Anglo-American cultural domination" – should not be overlooked. Unreliable data, statistical biases and, ultimately, a lack of any true understanding of the world all cause AI to "hallucinate" – in other words, to make mistakes.

The phenomenon could get worse as AI further taps social media and fake-news websites. (This is referred to as a "vicious circle driven by the gradual replacement of professionally produced and checked information with low-cost information based on false material".) The risk is that this will create a two-tier system, with high-quality, paid information, on the one hand, and substandard or inaccurate content generated by general AI models, on the other. The entire journalism industry is being shaken (because "beyond moderating and suggesting content, the machine can produce information" which, at best, competes with the press and, at worst, imitates it and produces "falsified information likely to discredit it").

Second, AI can be used intentionally to distort information and hinder the ability to come to a free and informed opinion, thereby undermining democratic expression.

Owing to the very manner in which platforms operate, there is a risk of being trapped in an "information bubble" or "filter bubble". The attention-economy business model they nurture presupposes that the AI will suggest content that matches the user's profile, in order to keep them "captive" and collect as much data as possible. This leads to a polarisation – and radicalisation – of opinion.

Added to this is the rise of fake news and deepfakes, which generative AI is turbocharging. Disinformation is not a new problem. (In the 19th century, the New York Sun caused a sensation by revealing the presence of aliens on the Moon... And there are many other examples.) But with AI, the spread of false information has been taken to the next level, and it is becoming very hard to discern what is true and what is false. "AI has accelerated the transition to the post-truth era."

For example, a deepfake video of Queen Rania of Jordan voicing support for Israel was created to manipulate public opinion during the Israeli-Palestinian conflict. As early as 2019, the Council of Europe expressed concern about the significant effects of algorithmic persuasion, at very fine-grained, subconscious levels, on the cognitive autonomy of individuals and their right to form opinions and take independent decisions, stating: "Not only may they weaken the exercise and enjoyment of individual human rights, but they may lead to the corrosion of the very foundation of the Council of Europe."

Fake news is a central issue. But it is important to understand that in the age of large social networks (X, Meta, etc.), the very way in which content recommendation and moderation systems work can undermine democracy.

These systems are currently the focus of attention in Europe, given their owners' intention to halt all moderation in order to "get back to our roots around free expression" (Mark Zuckerberg, 7 January 2025), and in view of how these platforms are configured, giving priority to tweets promoting extreme ideas rather than those offering more nuanced statements – a practice known as trolling (i.e. the mass posting of negative content to provoke a reaction from readers). Note how Elon Musk's tweets take the leading place in suggestions to X users.

Risks associated with surveillance – More indirectly, AI can restrict freedom of expression when AI systems are used to monitor journalists and the general population. In this regard, the development of AI for video surveillance is changing the nature and scope of traditional closed-circuit television, as it enables the processing of massive amounts of personal data and, consequently, the emergence of widespread, automated, real-time surveillance of individuals.

The risk, when AI video surveillance is deployed in public places, is that it impacts the fundamental freedoms that are exercised precisely in these areas – not only the right to privacy and personal data protection, but also freedom of movement, freedom of expression, freedom of demonstration and freedom of conscience, to name a few. For these freedoms to be exercised without restraint, anonymity must be preserved – something that is compromised by the use of AI video surveillance. For this reason, the introduction of these systems must be accompanied by safeguards and must not be disproportionate.

This is what the European Court of Human Rights found in the *Glukhin v. Russia* judgment of 4 July 2023. The Court condemned the use of facial recognition technology by the Moscow authorities to identify a lone, peaceful protestor, ruling that the measure was disproportionate with regard both to the right to respect for private live (Article 8) and to freedom of expression (Article 10).

## III. LEGAL ARSENAL

As you can see, the use of AI tends to increase and diversify risks. The challenge is to successfully contain these risks without stifling innovation and leaving the field open to those less attentive to the issues of democracy and fundamental freedoms.





In Europe, several legal instruments have been adopted.

Within the European Union, the DSA, enacted on 19 October 2022, is intended to regulate the dissemination of content. For users, it requires the implementation of easy-to-use flagging mechanisms and free complaint handling, along with enhanced transparency and greater control over algorithmic content-recommendation processes. For example, it allows users to disable the content-suggestion algorithm in order to escape the "filter bubble". At a more macro level, Article 34 of the DSA requires very large platforms such as X, Facebook and Instagram (Meta), and TikTok to assess any systemic risks stemming in particular from their algorithmic recommender systems, and Article 35 obliges them to adopt effective measures to mitigate those risks.

In December 2023 the Commission opened formal proceedings against X concerning, in particular, the inadequacy of risk-mitigation measures for civic discourse and elections, along with the dissemination of illegal content. The Commission will have to strike an extremely delicate balance between freedom of expression – embraced and exploited by Big Tech – and the pluralism and integrity of democratic processes, which are endangered by the unchecked use of this freedom. There is no doubt that Elon Musk's recent tweets about the upcoming German elections will form part of the Commission's investigation. Driven by AI, the rapid, large-scale dissemination of extreme opinions, which reduces the visibility of opposing positions, is weakening democratic debate, leaving it poorly informed and open to manipulation. The Commission has its work cut out for it... In fact, it has opened two other proceedings to safeguard democratic processes: one on 30 April 2024 concerning the policy put in place by Meta (Facebook and Instagram) to demote political content on news feeds, and another on 17 December concerning TikTok's manipulation of content in favour of the pro-Russian candidate in Romania's presidential election.

In view of the specific risks associated with the use of AI, the Artificial Intelligence Act of 13 June 2024 has introduced obligations regarding monitoring, labelling of AI-generated content and transparency on training data for high-risk AI systems and generative AI. It even goes as far as to ban certain uses. For example, AI-enabled manipulative and subliminal techniques that involve "materially distorting human behaviour, [thus causing] significant harms" are prohibited, as is any technique aimed at manipulating particularly vulnerable individuals, social scoring techniques, biometric systems designed to create profiles linked to political and trade-union opinions or religious and philosophical beliefs, and real-time remote biometric identification systems in public spaces for law-enforcement purposes (e.g. RF in public spaces), with some exceptions. In fact, there are many exceptions (too many, in the eyes of fundamental-rights authorities and associations). Nevertheless, like the obligations of transparency and traceability in the use of AI laid down in the legislation, these prohibitions provide non negligible safeguards.

The same transparency and control requirements are also at the heart of the Framework Convention on Artificial Intelligence adopted by the Council of Europe one month before the AI Act was passed. It has already been signed by ten States and the European Union. It requires, for example, public and private AIS operators to inform users that they are interacting with AI and not with a human (Article 8). More generally, it obliges States to take measures to anticipate and mitigate risks to democratic processes (Articles 5 and 16) and to establish effective remedies for victims of rights violations (Articles 14 and 15).

To conclude, I would like to make three comments about these legal instruments:

- First, *the legal obligations cannot be enforced without the help of the technology itself*. AI-labelling solutions are deployed to combat fake news, for example. AI can also be used to help regulate online content, such as by identifying illegal material or false information and automatically

generating reliable output. (These still-imperfect systems have the virtue of overcoming the difficulty of mobilising human resources to carry out this particularly thankless task, which platforms have offshored for obvious financial reasons.)

- Second, these legal instruments reflect the *difficulty of regulating freedom of expression in the age of AI*. They elect to base regulation on compliance. This is a pragmatic decision that consists in having freedom of expression and AI regulated in-house or, in other words, in trusting AI operators to comply with regulations, relegating the role of public authorities to one of subsequent review. At a time when the owners of the biggest social networks are choosing to discontinue their fact-checking programmes, which brought together major media outlets and non-governmental organisations, and replace them with user-based rating systems (e.g. Community Notes), the question arises as to whether the decision to privatise the regulation of freedom of expression is actually wise. The results of the Commission's investigations are eagerly awaited from this point of view. (There are calls to place AI governance under the aegis of the UN, entrusting it to a single specialised institution with global jurisdiction.)
- Lastly, these legal instruments will have only a very limited impact unless people are *educated in AI*, from school to university and beyond. To protect freedom of expression and preserve people's ability to think critically, we will have to shape tomorrow's enlightened *homo numericus*.

Thank you for your attention.





**Vytautas Mizaras**

**Professor,**
**Judge of the Constitutional Court of Lithuania**

# ARTIFICIAL INTELLIGENCE AND THE RIGHT TO A FAIR TRIAL

## 1. INTRODUCTION

Over time, as technology has advanced from early computers to the era of artificial intelligence (AI), perspectives on its role in the judiciary have evolved as well. It continues to trigger debates surrounding the integration of algorithmic decision-making in legal practice and, more specifically, in the judiciary. The absence of a human judge in such cases is likely to violate the right to a fair trial

These reflections highlight the broader tension between optimism about technology's ability to enhance efficiency and precision, and concern about its implications for human judgment, accountability and fairness in the rule of law.

### 1.1. The objectives of the presentation

This presentation aims to explore potential roles of AI systems in the judiciary – which I will refer to as "e-judges" – within the framework of the right to a fair trial as protected by national constitutional law and international law (inter alia, Article 6 of the European Convention on Human Rights – hereinafter "the Convention").

The right to a fair trial lies at the heart of human rights protection. It represents one of the most fundamental principles of any democratic society governed by the rule of law.

Central to this principle is the indispensable role of a human judge in legal proceedings. Given that the justice system is inherently a social process, two critical questions arise:

- Would an e-judge be compatible with the values underpinning such a system?
- Would a fully autonomous AI system be capable of analysing claims and evidence, rendering decisions, and entirely replacing human judges?

## 2. TAXONOMY OF E-JUDGES

Rapidly evolving AI technologies are likely to reshape various areas of the judicial process.

The idea of e-judges – artificial intelligence systems integrated into the judicial process – attracts both fascination and scepticism.

In the following section of my presentation, I explore three conceptual models of e-judges, each one of which offers distinct advantages and challenges.

I have separated the three categories of e-judges according to their involvement in judicial proceedings and the degree of human involvement.

### 2.1. "Argument development AI"

The first conceptual model is "argument development AI", where an e-judge (or, to be more precise, an e-clerk) is designed to support judicial reasoning by analysing vast repositories of legal texts, precedents and case-law.

Imagine a digital assistant that combs through past judicial opinions, identifying the most relevant arguments and organising them into a coherent, structured form. Such a system would not replace the judge but would act as a guide, presenting a range of possibilities and ensuring that no critical angle is overlooked.

This model's primary virtue lies in its ability to enhance thoroughness and efficiency.

Argument development AI can alleviate this pressure by performing exhaustive analyses in seconds, allowing judges to focus their attention on the most important aspects of a case.

The shortcomings of this model relate to algorithms that need to be carefully calibrated to avoid bias, and their outputs must remain transparent and easy to explain.

Importantly, the judge's role as the ultimate arbiter of justice must remain intact; AI should serve as a tool, not a substitute for human judgment.

### 2.2. "Supervised e-judge": a human judge-in-the-loop

The second model, the supervised e-judge, takes a more active role in the judicial process by assisting in the drafting of judgments.

This system goes beyond identifying relevant arguments.

It synthesises them into preliminary drafts based on the judge's input and the case materials provided. The judge's task then shifts from creating judgments from scratch to refining and finalising drafts generated by AI.

This approach has clear practical advantages.

Drafting judgments is a time-consuming process that demands precision and clarity. By automating the initial stages, the supervised e-judge can significantly reduce the workload of judges, enabling them to devote more time to complex legal reasoning and deliberation.

Additionally, this model can help standardise the structure and language of judgments, making them more accessible to the public and easier to analyse for legal professionals.

This model is both pragmatic and likely to be implemented in practice, because it is designed to assist judges rather than replace them.

The human judge retains a central role in delivering justice, as the draft opinion produced by the "supervised e-judge" is presented only as a preliminary draft, requiring careful review.

In this framework, the judge remains the ultimate arbiter, making decisions based on the facts of the case and a human sense of justice.

Put simply, the human judge stays firmly in the loop and at the heart of the justice-delivery process.

### 2.3. Autonomous e-judge

The most ambitious model is the autonomous e-judge, an AI system capable of independently deciding certain types of cases.

This model could be particularly suited to routine or low-stakes matters, such as traffic violations or small claims disputes.





By handling these cases autonomously, the system could free up human judges to focus on more complex and high-stakes issues.

Autonomous e-judges could dramatically reduce case backlogs, ensuring faster resolution and greater access to justice for under-served groups.

Moreover, by applying consistent standards across cases, these systems could enhance the perception of fairness and impartiality in the judicial process.

But the introduction of fully autonomous e-judges raises profound ethical and practical concerns.

Can a machine truly understand the human context of a legal dispute? How should errors or controversial decisions be addressed? And, most importantly, could we as a society entrust delivering justice – an innate concept that we humans feel – to an algorithmic agent?

Each of these conceptual models of an e-judge offers unique opportunities to enhance the judicial process. Yet their successful integration depends on careful design, rigorous oversight and an unwavering commitment to preserving the human values at the heart of justice.

In any discussion about judicial systems enhanced by AI, maintaining a "judge-in-the-loop" is paramount.

This concept ensures that while technology can assist, it does not supplant the essential human qualities of judgment, empathy and discretion. By keeping judges actively involved, we honour the foundational principles of justice and fairness that resonate deeply with the public. This balance between human oversight and technological aid is critical for a system that aims to be both efficient and just.

The integration of AI in judicial processes should always strive to reinforce, rather than replace, the human elements that are essential to justice. By prioritising a judge-in-the-loop approach, we preserve the trust and confidence that society places in its legal institutions, ensuring that our pursuit of justice remains both fair and humane.

The next section of the presentation will explore whether such a model of AI decision-making aligns with the essential elements of a fair trial.

The goal is to determine whether these fundamental guarantees can be preserved when justice is administered not by humans, but by machines.

## 3. THE RIGHT TO A FAIR TRIAL AND AI

### 3.1. The right to a fair trial: the scope of protection

Judges have the moral obligation to ensure, i.e. to monitor and preserve, fairness in every step of the procedure and throughout proceedings as a whole.

If these requirements are met, it can be concluded that the trial has been fair. Conversely, a breach of any of these elements can result in the violation of the right to a fair trial.

The following part of the presentation looks into different aspects of the right to a fair trial.

Specifically, I have divided the guarantees of that right in relation to the use of AI in the justice system into two groups:

(a) those that can be to some extent preserved through the use of AI systems; and

(b) those that may be compromised.

Among the guarantees that may to some extent be compatible with the use of AI systems, I would include the following: independence and impartiality, the length of proceedings and legal certainty.

In contrast, the guarantees that may be at risk owing to the use of AI systems include: the adversarial principle and equality of arms, the reasoning of judicial decisions and the principle of a public hearing.

I will now discuss how the use of AI in the justice system can, in my opinion, most likely be an obstacle to the implementation of the right to a fair trial.

## 3.2. Problematic aspects of ensuring the guarantees of the right to a fair trial

### 3.2.1. The adversarial principle and equality of arms

The European Court of Human Rights (hereinafter "the Court") has consistently held that the right to adversarial proceedings and the principle of equality of arms are fundamental components of a fair trial.

These rights ensure that all parties have the opportunity to know and respond to the evidence or observations presented that may influence a court's decision.

When integrating AI-based tools into the decision-making process, such principles take on renewed significance.

For the right to adversarial proceedings to be preserved, it is crucial to make both quantitative and qualitative information about the AI system being used publicly accessible – especially to the parties involved in the trial.

Such transparency allows parties to understand the construction of the system's scales, assess their limitations and challenge them effectively before a judge (CEPEJ 2019, 47).

Transparency must extend to the workings of the AI algorithm itself, which must be communicated in clear, understandable human language.

If algorithms are shielded as trade secrets, the parties are deprived of the opportunity to fully engage with all the evidence influencing the decision. This undermines the right to adversarial proceedings, as it denies parties the ability to test and debate the reliability of the AI system – a core requirement of procedural fairness.

The principle of equality of arms demands a "fair balance" between the parties in judicial proceedings (ECtHR 2019, 65). Fairness in this context is not merely procedural; it is substantive, ensuring that neither side is placed at a significant disadvantage. However, the increasing use of AI in courtrooms poses a potential challenge to this equilibrium.

AI-based tools may enhance efficiency and accessibility for certain parties – such as the State, well-resourced companies or individuals with high levels of technological literacy. They can simultaneously create barriers for others, particularly those less familiar with technology or without access to adequate resources (CEPEJ 2019, 47 48). For instance, as AI systems and self-learning algorithms grow more complex, judicial actors may increasingly depend on computer experts to navigate and explain these technologies. This reliance introduces a risk: financially dominant parties are more likely to secure access to such expertise, potentially skewing the balance of power in their favour. Without careful oversight, this disparity can lead to an erosion of the fairness guaranteed by an equality of arms.

To prevent such outcomes, courts must adopt measures to ensure that all parties, regardless of their financial or technological capacities, have equal opportunities to access the tools and expertise required to meaningfully participate in proceedings. Addressing these risks is not only a matter of fairness but also essential to maintaining public trust in the justice system.

To uphold the principle of equality of arms, it is essential that when a judge intends to rely on AI-based technology in decision-making, the affected party is granted access to the AI algorithm. This access should enable the party to challenge the algorithm's scientific validity, scrutinise the weight assigned to various elements, and identify any potential errors in its conclusions (CEPEJ 2019, 55).





### 3.2.2. The reasoning of judicial decisions

Despite significant advancements, AI systems remain unable to provide meaningful explanations or justifications for their decisions – at least for now.

While AI-generated outcomes may often be accurate, statistical and mathematical correlations alone are insufficient to meet the rigorous standards of a reasoned decision. This shortfall is particularly critical in criminal matters, where individualised justification is not just expected but required.

The absence of a human judge in such cases is likely to violate the right to a fair trial, as there would be no judgment articulating the legal reasoning behind the decision. Without this foundation, the essential transparency and accountability of judicial decisions would be lost.

If AI-based technology is to be employed in the judiciary, it must assist rather than replace human judges.

The inclusion of human reasoning is not merely a procedural formality but a substantive requirement to ensure that judgments are comprehensible and legitimate and that they meet the high standards of justification demanded by the rule of law.

The inability of AI systems to generate reasoned decisions poses a significant challenge to the effective exercise of the right of appeal. Without a clear explanation of the reasoning behind a decision, it becomes practically impossible for a party to mount a meaningful appeal.

This issue is compounded when the algorithm or AI system in question is developed by a private company that shields its workings under the guise of trade secrets. Such opacity undermines the transparency and accountability necessary for justice, creating barriers that erode trust in the judicial process and jeopardise the fundamental right to a fair trial.

Legitimacy is foundational to the judiciary, and its importance becomes even more pronounced when AI is incorporated into decision-making. Machine-learning systems, often described as data-driven black boxes, lack explicit legal knowledge or expertise. Consequently, their predictions or recommendations may not be viewed as reasonable or persuasive by human participants in the judicial process.

A critical element of the judiciary's legitimacy – and the parties' respect for its decisions – is the perception that judgments are rendered by a fellow human being, capable of understanding and empathising with their circumstances.

It is questionable whether individuals will feel that they sufficiently understand an algorithm's conclusions to accept and respect a judgment based on them.

Thus, when an AI assistant supports a judge in the decision-making process, it is imperative for the human judge to explain why the AI system's outcome is convincing and to provide a legal justification that meets the standards of a reasoned decision. Without such a clarification, the legitimacy of the process – and the public's trust in it – may be undermined.

### 3.2.3. A public hearing

The requirement of a public hearing poses significant challenges for the concept of an autonomous e-judge.

AI systems, by their nature, lack transparency and are often described as opaque "black boxes".

This opacity creates a serious risk:

- Justice administered by an autonomous e-judge could occur in secrecy, shielded from public scrutiny.

- The risk is further compounded when these AI systems are developed by private companies that treat their algorithms as trade secrets, limiting oversight and accountability.
- Additionally, the simple cases that might, in theory, be delegated to an autonomous e-judge could often be heard by a court of first and only instance. Such cases are entitled to an oral hearing, which raises the question of how an AI system – lacking human presence and engagement – could fulfil this fundamental requirement of the right to a fair trial.

These concerns highlight the critical tension between technological efficiency and the principles of transparency, accountability and public confidence in the judicial process.

An autonomous e-judge, by its very nature, would fail to meet key procedural safeguards guaranteed under protection of the right to a fair trial. Without a public courtroom to administer justice or a human judge to publicly deliver the judgment, such a system would not comply with the rights to a public and oral hearing or the public delivery of judgments. These are foundational elements of transparency and accountability in the judicial process.

Conversely, when AI systems are employed as assistance tools, with human judges maintaining an active role in court proceedings, these requirements can still be fulfilled. The involvement of a human judge ensures the administration of justice remains public, transparent and accessible, thereby preserving the essential guarantees of the right to a fair trial.

### 3.2.4. Independence and impartiality

Judicial independence requires that judges critically evaluate AI-generated recommendations and prioritise values and considerations that algorithms cannot fully capture or preserve.

A judge should never abdicate his or her responsibility to exercise independent judgment and must avoid blindly deferring to an AI system's output.

When AI systems are used in the decision-making process, they must comply with the principles of the rule of law and judicial independence (CEPEJ 2019, 8). The critical question is whether a judge's instinct and judgment are strong enough to challenge an AI-generated result when justice demands it. Judicial independence cannot be safeguarded if judges are overly influenced by AI systems, undermining their own reasoning and discretion.

## 4. CONCLUSIONS

1. If AI systems are introduced into the courtroom, there is a risk that foundational principles such as the adversarial principle, equality of arms, the right to a public hearing and judicial independence may be undermined. In some respects, AI – particularly in the form of an autonomous e-judge – conflicts with the core values of the right to a fair trial. The most significant obstacle lies in its inability to provide reasoned legal justification for decisions. This shortfall leads to the conclusion that, with current technology, the use of an autonomous e-judge in the courtroom is not feasible.

2. Nevertheless, in the light of the Court's approach to interpreting the Convention as a "living instrument" that evolves alongside societal developments, we cannot entirely rule out the possibility of an autonomous e-judge in the future. The concept of an autonomous e-judge remains a work in progress. An autonomous e-judge could be tasked with resolving smaller, repetitive cases of a non-complex nature – cases characterised by clear outcomes and minimal evidentiary or interpretive challenges

For this to happen, society must approach AI with an open mind while ensuring that rigorous standards are upheld. Still, significant progress must be made before an autonomous e-judge can fully meet the demands of a fair trial.





The "human touch" remains irreplaceable, as the role of a human judge extends far beyond that of an information processor or problem solver. Judicial proceedings without human involvement would be undesirable from a societal perspective, given the unique capacity of human judges to deliver justice grounded in empathy, discretion and moral reasoning.

3. By contrast, objections to AI assisting human judges appear less significant, provided judges maintain a critical stance towards its use. AI assistants in courts might offer clear advantages: they can enhance legitimacy and fairness by identifying and reducing extraneous influences and individual biases, thereby minimising human error. Additionally, AI can streamline judicial processes, making court proceedings less time-consuming and reducing costs. Greater efficiency through AI has the potential to enhance legal certainty and improve access to justice.

4. The primary challenge lies not in AI itself but in its imperfection. Current AI systems cannot fully ensure the guarantees of the right to a fair trial while meeting the requirements of the rule of law. Law must not adapt to technology, nor should the principles of the rule of law – especially those enshrined in Article 6 of the Convention – be weakened to accommodate AI.

Instead, technology must be designed to operate in compliance with the rule of law. Lawyers and legal professionals must "dictate" the tasks and boundaries for technology developers, ensuring that innovations serve justice rather than undermine it.

While technology will undoubtedly continue to transform the world, it must not replace the rule of law. If it does, we risk becoming hostages to technological manipulation – entering an era of "technologocracy", where technology, rather than law, dictates societal norms and decisions. Such a future would jeopardise the foundational values of justice, fairness and human dignity.

Dialogue between judges 2025

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

Dialogue between judges 2025


# Marko Bošnjak

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

## OPENING ADDRESS

Presidents of Constitutional and Supreme Courts, President of the Ministers' Deputies, Secretary General of the Council of Europe, Commissioner for Human Rights, Excellencies, Ladies and gentlemen,

On behalf of the European Court of Human Rights, I welcome you to Strasbourg today for the opening of the judicial year. Your presence at this solemn hearing is a great honour for me personally and for all my colleagues here with me today. And since this is the last day of January, I can still wish you a very Happy New Year.

The President's speech has traditionally consisted in a review of the past year. But before I turn to our Court's work in 2024, allow me to make some more general observations on some important aspects of the context for our work here.

I will begin with Strasbourg, our host city. This past November, Strasbourg celebrated the 80th anniversary of its liberation from Nazi occupation.

The city continues to owe a great debt to those who gave their lives for our freedom. The Court would not even exist had it not been for the significant sacrifice of so many people for the sake of a free Europe and we would not be able to gather here freely today, or even to think freely. Let me take this opportunity to welcome the local representatives of the French authorities in Strasbourg who are with us this evening, whose support, as always, we greatly appreciate.

The month of November also came as a reminder of the tragic and ongoing loss of life in Europe as we reach the thousandth day of Russia's invasion of Ukraine. This war is about to enter its fourth year and the consequences are simply devastating.

Our thoughts naturally turn to the Ukrainian people, who continue to display incredible courage and strength in the face of hostility and destruction.

In 2024 many citizens across the continent were called upon to elect their new governments. Free and fair elections remain the lifeblood of the European system. As the Preamble to the Convention makes clear, the preservation of human rights depends on an effective political democracy. Changes of government sometimes give rise to processes that are not necessarily compatible with the values of the Convention, which in turn can lead to democratic backsliding. When applications are lodged with it, the Court remains true to its principles of openness, tolerance and pluralism of political debate in the member States.

Regardless of election results, the Court will continue to ensure that no government can exercise power in defiance of the law and of human rights.

The United Nations World Meteorological Organization recently confirmed that 2024 was the hottest year on record. What was described as a risk just a few years ago is now becoming a pervasive reality. The devastation in Valencia, Spain, and in Mayotte are but two examples of this, as are the wildfires still raging in Los Angeles.

Ladies and gentlemen, we are living in a period of political and climatic instability. Nevertheless, we must have confidence in tomorrow.

This was the message conveyed by young people at a Council of Europe youth event.

In their message to Europe, these young people felt they were hardest hit by many of the problems facing the world today, be it armed conflict, austerity or the negative consequences of artificial intelligence. Young people want to have confidence in the future, but they are asking that we take action and work in their interest. And this is what the Court does every day when it deals with individual and inter-State applications relating to the challenges routinely faced by ordinary citizens.

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I now turn to my analysis of the developments of the past year, starting with some statistics on the Court's activities.

At the end of 2024, there were approximately 60,000 applications pending before the Court. That number is still relatively high, but it is down from our figures for 2022 and 2023.

Last year, the Court dealt with almost 37,000 applications and delivered judgments in almost 11,000 of them. The vast majority of these judgments were delivered by Committees of three judges, while single-judge formations examined approximately 22,200 applications. This achievement is the result of the efforts of all judges and members of the Registry, who have my sincerest thanks.

As regards the applications pending against the Russian Federation, the Court continued to deal with them expeditiously, in accordance with its residual jurisdiction. As of September 2022, 17,450 applications were pending against that State. By 1 January of this year, that figure had been reduced to 8,150.

Regarding the Grand Chamber, 17 cases are currently pending, 4 of which are inter-State cases involving Russia, Azerbaijan and Armenia.

I take this opportunity to thank our member States for their practical commitment to the Convention system and their unwavering financial support, which has enabled the Court to maintain a healthy and sustainable budget.

This is essential to the continuation of our work and to ensure that our Court remains a Court that matters.

Beyond the statistics, changes have also been made to the Court's working methods. The Court amended Rules 28 and 39 of the Rules of Court. Rule 28 now contributes to our efforts to strengthen the impartiality and independence of the Court and its judges. It now clarifies the procedural framework governing the recusal of judges by expressly codifying existing practice. In addition, at the end of December last year, the Plenary Court amended its Resolution on Judicial Ethics to reflect the establishment and functioning of a new Ethics Council. This development marks another important step taken by the Court to demonstrate its commitment to judicial ethics.

Rule 39 has also been amended to reflect the Court's practice with regard to interim measures. A new Practice Direction has been published to clarify the Court's approach to such matters. The Court has thus addressed the need to enhance the transparency of its activities in situations where an imminent risk of irreparable harm is alleged.

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In 2024 the Grand Chamber was at the forefront of addressing the contemporary concerns of Europeans. It handed down five judgments and two decisions dealing with a broad range of subjects. One of those judgments, delivered in April, was widely reported in the press. I am referring, of course, to the case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.





This case was brought by a non-profit organisation promoting the effective implementation of climate change laws for the benefit of its members, as well as by four older Swiss women whose age and medical conditions rendered them particularly vulnerable to heatwaves. They complained of Switzerland's reticence in adopting measures necessary to prevent the rise of global temperatures. More specifically, they complained that by failing to quantify its national greenhouse gas emission limits, and in particular to adopt a carbon budget, and by exceeding previous greenhouse gas limits, Switzerland had failed to comply with the positive obligations under Article 8.

Two related cases were examined in parallel: *Duarte Agostinho and Others v. Portugal and 32 Others* and *Carême v. France*. They form a trilogy with the *Verein KlimaSeniorinnen Schweiz* case.

In the Swiss case, the Grand Chamber found violations of Article 6 § 1 and Article 8 of the Convention. However, it is only on a combined reading of all three rulings that one can identify the elementary principles laid down by the Court. First, the Court recognised that climate change is an empirically established fact and its major drivers are anthropogenic. Secondly, by severely restricting people's pursuit of a healthy and fulfilling life, climate change also interferes with their human rights. Thirdly, States have positive obligations to prevent and mitigate the effects of climate change, and their actions in that field may fall to be scrutinised by the Court.

In *Duarte Agostinho*, the complaints against Portugal were declared inadmissible in so far as the applicants had not exhausted all the effective remedies made available under national law.

Similarly, in *Carême*, the complaints were declared inadmissible because the risk of harm complained of was too hypothetical in nature for the Court to recognise the applicant's victim status.

The *Duarte Agostinho* and *Carême* decisions may come as no surprise to veteran jurists, since they are an application of classic principles on subsidiarity. However, the Grand Chamber equally recognised the heightened vulnerability which future generations will face if States do not act. The Court has espoused an intergenerational perspective by affirming that intergenerational burden-sharing is a consideration which must be taken into account in this context.

The impact of these rulings has been felt even beyond European borders. Our *Verein Klima-Seniorinnen Schweiz* judgment provided crucial inspiration for a recent judgment of the South Korean Constitutional Court in August last year.

Apart from its climate change rulings, last year the Court handed down many seminal judgments dealing with issues of life, health, individual autonomy and human dignity. In this context, two of these judgments deserve a closer look since they provide clear examples of how the Court approaches the regulation of sensitive moral and ethical issues by the member States.

In a Hungarian Chamber case, *Dániel Karsai v. Hungary*, a patient suffering from a motor neurone disease complained that Hungarian law violated his right under Article 8 to decide how and when his life should end. Seeing the extremely sensitive nature of the case, the Court looked at the applicable rules on physician-assisted dying and withdrawal of life-sustaining interventions.

It found that member States were far from having reached a consensus with regard to an individual's right to decide how and when their life should end, since this was an extremely sensitive ethical question on which opinions in democratic countries differed profoundly. The Court also took into account the fact that Hungary had put in place various means of protecting the human dignity of terminally ill patients. As a result, Hungary was afforded a considerable margin of appreciation when balancing the applicant's wish to end his life at the moment of his choosing and the respondent State's interest in protecting vulnerable persons from harming themselves. By criminalising euthanasia and assisted suicide, even if committed abroad, Hungary had not overstepped the margin of appreciation afforded to it.

Complex ethical questions relating to life and death situations were also raised in the Grand Chamber judgment in *Pindo Mulla v. Spain*. The applicant, a committed Jehovah's Witness, was given emergency treatment for a pre-existing medical condition. Knowing she was due to have surgery, she issued two documents recording her refusal to undergo a blood transfusion of any kind in any healthcare situation, even if her life was in danger. Owing to haemorrhaging, she was transferred by special ambulance to a hospital in Madrid.

The doctors at the hospital contacted a duty judge for instructions on what to do. The duty judge, who did not know her identity, or her precise wishes, and in the absence of concrete information on her state of health, authorised all medical or surgical procedures that were needed to save her life.

Surgery was performed that day and blood transfusions were administered to Ms Pindo Mulla. She had not been informed of the duty judge's order, despite still being conscious when she was taken to the operating theatre.

The Grand Chamber approached the complaints under the right to private life from the perspective of her freedom of thought, conscience and religion. The Court set out how, in an emergency situation, a patient's autonomy was to be reconciled with their right to life. Where a State had decided to put in place a system of advance medical directives that was relied on by patients, it was important that the system functioned effectively. In this case, the Court found shortcomings in the decision-making process. Therefore, the applicant had not been able to exercise her autonomy in order to observe an important teaching of her religion.

In both judgments, the Court relied on rich comparative-law material to gauge the convergence or divergence of regulatory frameworks in the member States. While the common theme running through them is that of human dignity, the judgments show that the Court will tread carefully where opinions on how to protect this value diverge considerably. Taking the principle of subsidiarity seriously, the Court applies the appropriate margin of appreciation to domestic systems. However, the Court does not shy away from its role and intervenes when it establishes that the domestic system failed to properly protect the rights of the individual.

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Having looked back at the past year, let me now cast an eye to the near future. The year 2025 will be one with three important milestones for the Court.

Firstly, this year we celebrate the 75th anniversary of the European Convention on Human Rights. Drafted in 1950, the Convention was the first internationally binding instrument to transform the Universal Declaration of Human Rights into binding law.

A number of key events will be organised by us in Strasbourg and by you in your member States to mark this important anniversary. Indeed, just next week a significant delegation of Court judges will travel to Paris for a bilateral meeting with the three French superior courts, hosted by the French Constitutional Council. Our aim is, of course, to come together to celebrate the Court's achievements over these past decades and we are thankful for the help provided by national judiciaries and governments – another example of shared responsibility.





Secondly, this June we will also be celebrating the 10th anniversary of the establishment of our vitally important Superior Courts Network. The SCN remains a unique judicial network which enriches judicial dialogue between the national courts and the Strasbourg Court. It does so by offering a practical means of exchanging information on the Convention's implementation in the member States. I am very pleased to inform you that we have a full house, with all our 46 member States – covering 111 courts – being represented as of 2024. We also have three observer courts: the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights and the Court of Justice of the European Union. Indeed, these last few weeks, the Supreme Court of Canada and the Supreme Court of Mexico have also expressed an interest in becoming observer courts. This demonstrates the global reach of our system.

Our third celebratory event in 2025 will be an Open Day in September for the 30th anniversary of our building designed by British architect Richard Rogers. A strong and iconic architectural work, its glass and steel structure, representing the transparency of justice and the resilient fight for human rights, is today known and recognised around the world. The open doors event will be a key occasion for the public to visit the building up close and get to know our work. Indeed, all of our celebratory events are key opportunities to enhance the visibility of our judicial work and strengthen our outreach, as well as communicate with the general public. Judges cannot remain in their perceived ivory towers.

Moving on from the celebratory events, the Court will continue in 2025 to respond to contemporary societal issues. Next month the Grand Chamber will be conducting several important hearings. Three of those hearings relate to cases which were widely reported in the media concerning alleged mass pushbacks of migrants by Poland, Lithuania and Latvia. The other hearing relates to a number of applications lodged by Georgian nationals complaining of the excessive use of force by Georgian authorities when suppressing a 2019 protest which took place in front of the Parliament building in Tbilisi.

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Looking back at the Convention's contribution over the last 75 years, the conclusions to be drawn are now clear. On the one hand, the Convention was the most elementary response to the destruction which Europe faced in the aftermath of the Second World War.

On the other hand, it continues to be a key point of reference for addressing the concerns and adversity which contemporary Europeans face. Our 2024 case-law demonstrates this clearly.

In opening today's ceremony, I referred to a number of threats which challenge our fundamental values. Naturally, we cannot ignore these threats, but this does not mean that we should allow ourselves to be submerged by them. We need to strengthen our democratic resilience.

I would like to highlight the positive signs which States within and beyond the Council of Europe have provided us with. In all of the visits I have made as President of the Court in 2024, leaders and officials have affirmed the recommitment to the Convention made by our Heads of State at the Reykjavík Summit and have promised to reform laws, if need be, to bring national frameworks and practices in line with the Court's jurisprudence.

This fills me and my colleagues with great satisfaction, and reinforces our own confidence in tomorrow. It confirms that Strasbourg remains the brightest lodestar for States which falter on the path of democracy. Those States will always find our Human Rights Building to guide them back.

It is now time for our guest of honour. We are fortunate to have with us today the President of the Court of Cassation, Mr Christophe Soulard, whom the Court is honoured to welcome as the keynote speaker at this ceremony.

Mr Soulard, you are the highest judge of the ordinary courts in France. As head of the Court of Cassation, you are both an administrator and a judge who continues to preside over many a hearing.

As such, you ensure, as you did when you were President of the prestigious Criminal Division, that the Court of Cassation applies our case-law. This profound attachment to human rights is inseparable from your commitment to Europe, convinced as you are that there is no more appropriate framework for their defence: the Europe of the Council of Europe, of course, but also that of the European Union, where you began your professional life and about which you have both written and taught. It is highly symbolic that the first official visit you have chosen to undertake since your appointment has been saved for us at the European Court of Human Rights.

Tonight, therefore, we welcome a great judge and a great friend of the Court. We are delighted, now, to have this opportunity to hear from you, Mr President: the floor is yours.





# Christophe Soulard

**First President**
**of the Court of Cassation of France**

President of the European Court of Human Rights,President of the Court of Justice of the European Union, Judges of the European Court of Human Rights, Presidents of the Constitutional and Supreme Courts, Secretary General of the Council of Europe, Chairperson of the Ministers' Deputies, Commissioner for Human Rights, Excellencies, Ladies and gentlemen,

The audience gathered here today is not only distinguished – comprising presidents and representatives of the highest national courts and of political institutions – it is also diverse. This exceptional quality and this diversity attest to the fundamental role played by the European Court of Human Rights, not only in the administration of justice, but also, more broadly, in the vitality of our democracies. I am therefore deeply honoured to be speaking in such a setting.

The law is an essential component of modern democracies. Yet it is in the name of parliamentary democracy that courts are criticised for enshrining general principles that allegedly have the effect of preventing parliaments from legislating. We hear this criticism in France, but also in other European countries, where it sometimes leads to troubling institutional reforms. I should like to demonstrate that, far from being at odds, the work of the courts and of the legislature is complementary, and in this respect, the role of your Court – although I should say ***our*** Court, for it belongs to us all – is irreplaceable.

In a sense, those who, in the same breath, challenge the European and national courts alike are not incorrect in their target, and are – no doubt unintentionally – paying tribute to the fact that the protection of fundamental rights is a collective endeavour. This is, moreover, a precondition of its legitimacy. It is because this shared body of law is formed through exchanges between courts which, through trial and error, seek consensus, that it is legitimate.

But this collective approach is also a precondition for its effectiveness. A European Court of Human Rights whose case-law required a State found to be in breach merely to make reparation for the damage caused or to retry the case would play only a marginal role. It is precisely because the Court's case-law is of general application and is based on that of the national courts, which sometimes pre-empt it, that it affords effective protection to everyone.

The incorporation of the European Convention on Human Rights into the case-law of the national courts has been, and continues to be, achieved largely through the reasoning contained in those courts' decisions. This should come as no surprise, since the reasoning of decisions is at the heart of judicial activity. This is why I have chosen it as the lens through which to view the collaboration between the European Court of Human Rights and national courts.

The subject of reasoning can be approached from two angles: the requirements laid down by the European Court of Human Rights, and the influence that the way in which the Court drafts its judgments may have on the drafting of decisions by the highest national courts.

The European Court of Human Rights has made the point many times[1]: the reasoning must be capable of demonstrating to the parties that they have been heard.

But, perhaps more fundamentally, the reasoning also contributes to legal certainty.

Over time, first – since the European Court of Human Rights has considered that the existence of well-established case-law does not prevent it being changed, but that this case-law has to be taken into account when assessing the extent of the reasoning to be provided in a given case[2]. For several years now, the French Court of Cassation has incorporated this requirement and provided reasons for departing from its case-law[3].

Departures from case-law are not the only events which undermine the foreseeability of the law. It can also be called into question by divergences within the case-law "at a given point in time". The European Court of Human Rights has had occasion to address this issue, in, moreover, a very nuanced way[4]. This second requirement has also been taken on board by the French Court of Cassation, which is particularly anxious to avoid such divergences, whether among its divisions or between the case-law of the Court of Cassation and that of the *Conseil d'État*. Sometimes the divergence will remain, because it pertains to different situations. But in such cases, the French Court of Cassation will carefully explain this difference[5].

This leads me, quite naturally, to mention the profound change that the case-law of the European Court of Human Rights has brought about as regards the status of case-law in continental-law countries. It is well known that since the judgment in *The Sunday Times v. the United Kingdom (no. 1)*[6], the Court has expressly recognised that the notion of "law" covers not only statute but also unwritten law. Initially, this approach primarily concerned the common-law States, where a norm is the applicable precedent. But very quickly, the European Court of Human Rights indicated that this substantive concept also applied to Romano-Germanic legal systems.

Today, therefore, all States Parties to the Convention are invited to consider that "law" means "norm".

The French Court of Cassation has deduced from this that a departure from case-law must be subject to the same rules of temporal application as legislation. Thus, in criminal matters, a departure from case-law which has the effect of making the constituent elements of the offence or penalty more severe can only be applied prospectively, unless it was foreseeable[7].

However, equating law with norms by including case-law implies that those who create this case-law – that is, the superior courts – have a law-making role. This is, in fact, not new, since a superior court cannot ensure uniformity in the interpretation of the law without imposing interpretations expressed in general terms.

What is new is that this law-making role is now more consciously embraced. And contrary to what one might think, embracing this role leads not to judicial hubris, but rather to greater caution. In that context, I should like to discuss the European Court of Human Right's reasoning, not in terms of imposing requirements, but as a source of inspiration.

1. *Hôpital local Saint-Pierre d'Oléron and Others v. France*, nos. 18096/12 and 20 others, §§ 83-84, 8 November 2018.
2. *Atanasovski v. the former Yugoslav Republic of Macedonia*, no. 36815/03, § 38, 14 January 2010.
3. See, for example, Court of Cassation, full court, 28 June 2024, application no. 2284760.
4. *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, 20 October 2011.
5. See, as an example of divergence with the *Conseil d'État*, Court of Cassation, full court, 8 March 2024, applications nos. 21-12.560 and 21-21.230, and, for an example of divergence between divisions, Court of Cassation, mixed division, 19 July 2024, application no. 20-23.527
6. *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, Series A no. 30.
7. Court of Cassation, Criminal Division, 25 November 2020, application no. 18-86.955.





Each judgment of the European Court of Human Rights forms part of a jurisprudential history, through the references made therein to previous judgments. They may refer to comparative-law surveys, conducted to ascertain areas on which there is consensus; it is well known that where there is no consensus among the member States of the Council of Europe, the Court considers that the margin of appreciation available to them is wide.

But the judgments of the European Court of Human Rights also explain the reasoning behind the answers given to questions that, by their nature, were and remain open to debate. Where necessary, the judgments set out the reasons why the case-law should or should not be refined.

This model has had an impact on how national superior courts draft their decisions, and not only in France. A few months ago, the annual Colloquium of the Network of the Presidents of the Supreme Judicial Courts of the European Union was held. In that context, as rapporteur, I sent a questionnaire to all members and associate members, prepared by the Court of Cassation's Service of International Relations. The questionnaire focused on the impact of European rights on the drafting practices of superior courts. We were able to draw on the responses of 33 courts, which is not quite the full quota of Council of Europe member States, but still more than the EU Member States.

The majority of these courts now cite the judgments of the European Court of Human Rights on which they rely, something they did not do just a few years ago. It should be noted that, according to the replies we received, this was originally done with the intention of improving the general public's awareness of the Convention. Subsequently, the courts cited those judgments with a view to strengthening the traceability of decisions and, today, this practice reflects a willingness to engage in dialogue and a concern to respond to the European Court of Human Rights.

Other replies to the same questionnaire also showed that recourse to comparative law was increasing among the superior courts, again under the influence of the manner in which judgments of the European Court of Human Rights are drafted. Comparative law can be used either as a source of inspiration, to substantiate reasoning, or, again, with the aim of harmonising practices between member States.

This reflects the idea of seeking consensus. By observing what happens in the rest of Europe, each superior court defines the boundaries of its own margin of appreciation. One might call this "predictive subsidiarity": the aim is to prevent a finding of violation by pre-emptively applying the criteria that the European Court of Human Rights would use if an application were lodged with it. The French Court of Cassation officially set itself this objective, stating in a plenary judgment of 15 April 2011[8] that States had to comply with the European Court of Human Right's case-law "without waiting to be challenged before it or to have their legislation amended".

Accordingly, in a judgment of 26 May 2020[9], it held, without relying on specific case-law of the European Court of Human Rights, that the automatic extensions of pre-trial detention introduced by legislation during the COVID-19 public-health crisis were compatible with Article 5 of the Convention only if they were subjected to rapid judicial review.

It is worth noting that the Court of Cassation did not find that the law was in breach of the Convention, but rather that it would be compatible with it only on condition that it was interpreted in a certain way. This conditional compatibility shows that the review of Convention compliance is being refined over time.

8. Court of Cassation, full court, 15 April 2011, application no. 10.17-049.
9. Court of Cassation, Criminal Division, 26 May 2020, application no. 20.81-910.

The French Court of Cassation, like the other superior courts, is assisted in this preventive approach by the provisions of Protocol No. 16, which entered into force on 1 August 2018. Indeed, two months later, it was the first court to make use of it, in a case concerning the establishment, in France, of the legal parent-child relationship between a child, born through a surrogacy arrangement in a country where that practice was legal, and the intended mother.

Two factors aid the superior courts in making use of comparative law. The first is the very comprehensive overview contained in some of the judgments of the European Court of Human Rights. To give but one example, there can be no doubt that the comparative-law material on the Aarhus Convention and the domestic case-law on climate change set out in the notable judgment of 9 April 2024, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[10], will be of great value to all national courts dealing with such issues.

The second factor is the Superior Courts Network, which celebrates its tenth anniversary this year. The SCN allows each of its member courts to access and exchange information on emerging legal issues faced by the courts in other countries.

I have attempted to demonstrate that, above and beyond the requirement to provide reasons that it imposes on the national courts, the way in which the European Court of Human Rights provides reasons for its own decisions is not without influence on the drafting method adopted by the national superior courts.

But the question can be asked whether, more broadly, the judicial process itself could not provide a model for the discussion of social issues.

Irrespective of the court before which it occurs, the judicial process is characterised by several features.

First, the choice of words. Their meaning must correspond exactly to the reality being described or recommended. This requirement prohibits the use of hyperbole or exaggeration.

Judicial decisions are generally nuanced and sometimes complex, but this merely reflects the complexity of reality itself. Simplification is held up as a solution to this reality; the courts respond by addressing and explaining its complexity. There is no doubt that the judgments of the European Court of Human Rights have helped the French Court of Cassation to recognise the importance of educational reasoning.

Moreover, the deliberations before a court are depersonalised. They represent a confrontation of ideas, not of individuals. ***Ad hominem*** attacks are thus prohibited, and no offensive remarks may be made. In this way, far from being divisive, judicial deliberations tend to bring viewpoints closer together.

This restraint in the choice of vocabulary naturally leads to caution in the choice of solutions. Unlike the legitimacy of a member of parliament, which is based on the fact of his or her having been elected, the legitimacy of a judge is constantly being challenged. This should not be seen as a weakness, but rather as a strength, in that this legitimacy, which must be continuously renewed, requires validation by the courts through the quality of the deliberations that lead to their decisions, and in the caution that characterises those decisions. In his day, Aristotle also considered prudence to be an essential quality in a judge.

This caution is also what leads the courts to try to gauge the impact of their decisions and, where they find that these have had unforeseen adverse consequences, to change their case-law. In this respect, the judicial process affords a degree of flexibility which is not available to the legislature, since it is easier to change case-law than to amend a law. Above all, developments in the case-law may come about through successive adjustments, sometimes of a minor nature. Judge-made law is a straight line, but this straight line is the result of a thousand oscillations.

10. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024.





In all these respects, it is important that the deliberations be as wide-ranging as possible, even beyond the parties to the dispute, since they will not be the only ones affected by the outcome. This justifies the use of ***amicus curiae***, a concept that is well known to the European Court of Human Rights and has also been adopted by the French Court of Cassation.

There is therefore no doubt, in my view, that judicial deliberations can serve as a standard model with regard to social issues. This model is valuable at a time when it is sometimes not only the role of the courts that is challenged, but also the usefulness of parliamentary debate.

Indeed, certain trials contribute to substantive debates that are of interest to society as a whole and may subsequently continue in Parliament. The enactment of legislation that originated in judicial proceedings thus appears to be a useful addition to the legislative process. This has undoubtedly been the case in France; examples include certain assize court proceedings concerning the offence of rape, or cases before the Court of Cassation concerning universal criminal jurisdiction, surrogacy, and the liability of parents for damage caused by a minor child.

Far from being disconnected from a society on which they impose their views, the courts would thus appear to be a sounding board, absorbing and reflecting back issues that affect that society. This is done after giving a provisional response to these questions, and through a process that is theirs alone: that of adversarial, open, reasoned and calm discussion.

We must pay tribute to the European Court of Human Rights for having contributed significantly to improving this process, an essential one in a democracy. There can be no doubt that it will continue to do so.

Thank you.

Dialogue between judges 2025

# PHOTOS



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