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

EUnited in Diversity II – The Rule of Law and Constitutional Diversity Perspectives from the European Court of Human Rights

Speech by Síofra O'Leary

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I - Introduction

Presidents,
Commissioner,
Dear colleagues and friends,

I would like to thank the organisers, and particularly President de Groot and our Benelux hosts, for this invitation to address the second EUnited in Diversity conference. It gives me great pleasure to represent the Court accompanied by Judges Krenc and Šimáčková.

In January this year the Strasbourg Grand Chamber delivered a decision on admissibility in the interstate case of *Ukraine and the Netherlands v. Russia*.[1] Hearings will follow in the coming months in this and other interstate cases relating to the invasion, dating back to 2014 all the way up to 2022.[2]

I mention these cases at the outset because they remind us of the grave context in which we are meeting to discuss the need for unity and common purpose in defence of human rights, the rule of law and effective, pluralist, democracy as we have known it to date.

Your focus will of course be on the EU 27. But the events of the past year – which have led to the mass displacement of Ukraine's people, reconfigured Europe's legal and political borders and altered dramatically its security architecture - have demonstrated that an EU-centric focus is insufficient to tackle the many and varied threats confronting the three pillars which underpin both European organisations and which have their roots in your national constitutions.

Given the challenges facing the EU and Europe writ large, of which the Council of Europe remains an enduring and effective symbol, it strikes me as fitting to rewind to 1949 and remind ourselves of the Council's Statute.

[1] *Ukraine and the Netherlands v. Russia* [GC] (dec.), n$^{os.}$ 8019/16 43800/14 28525/20, 30 November 2022. The case concerns events in Eastern Ukraine since 2014 and the downing of Malaysia airlines flight MH17 the same year with the loss of all 298 passengers aboard.

[2] See the applications cited above to which has been added *Ukraine v. Russia* (X), n° 11055/22, introduced after the invasion which commenced on 24th February 2022, in which 26 Member States, 23 of which are EU Member States, have been granted leave to intervene, and which will be heard early in 2024; and *Ukraine v. Russia* (re Crimea), n^{os} 20958/14 and 38334/18, which will be heard on 8th November 2023.

In it, the 10 founding States, 9 of which would become EU Member States, reaffirmed in the Preamble:

> "their devotion to the *spiritual and moral values which are the common heritage of their peoples* and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy".[3]

The Statute required Council of Europe members, then and now, to accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, on pain, in cases of serious violations, of expulsion.[4]

One of the principal means for achieving greater unity and safeguarding the signatory States' common heritage was and is the European Convention on Human Rights and its innovative mechanism for the collective enforcement of individual rights.[5]

However farsighted the founding fathers of both the Council and the Convention may have been, they are unlikely to have realised that they were setting down what was, in essence, a first reference in a European Treaty to common constitutional traditions. They pooled Europe's common values as a basis for the development of extraordinary levels of political and economic integration on the one hand and the convergence of legally binding minimum standards in order to safeguard human rights, democracy and the rule of law on the other.

Those common constitutional traditions would go on to influence the interpretation and development of the European Convention as a living instrument for over seven decades, fill important gaps at crucial points in time in the protection of fundamental rights under the EEC Treaty[6] and infiltrate the formulation and spirit of different provisions of the TEU and the Charter of Fundamental Rights of the EU; not least Articles 2 and 6 § 3 of the former and Articles 52 §§ 3 and 4 and 53 of the latter.

Our multi-level system for the protection of human rights in Europe is a living and changing organism. However, the common values which lie at its core are and have always been a product of our common European heritage and not a top-down imposition from Strasbourg, Brussels or Luxembourg.

This is perfectly illustrated in the interstate decision I just mentioned, in which the Grand Chamber emphasised that:

> "the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but […] 'to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law' […].[7]

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[3] See the third recital of the Statute of the Council of Europe, ETC No. 001, London, 5 May 1949.

[4] See Articles 1 (the aim being to achieve a greater unity between members for the purpose of safeguarding and realising the *ideals and principles which are their common heritage* and facilitating their economic and social progress) and 3 of the Statute of the Council of Europe. See also Article 8 on suspension and cessation of rights and membership for serious violations of Article 3.

[5] See the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 in whose preamble reference is also made to Europe's "common heritage of political traditions, ideals, freedom and the rule of law".

[6] See variously the gaps identified in Corte Costituzionale, Decision N° 183/1973 – *Frontini*, EUR 1974, § 255 and BVerfGE 37, paragraph 271 et seq. – *Solange I*; and the responses of the Court of Justice of the then EEC in Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114; Case 4/73 *Nold* EU:C:1974:51; Case 36/75 *Rutili* EU:C:1975:137, and Case 44/79 *Hauer* EU:C:1979:290.

[7] *Ukraine and the Netherlands v. Russia* [GC], cited above, § 385, in which the Court went on to explain the essential nature of interstate cases such as those currently pending: "It follows that when a High Contracting Party or Parties refer an alleged breach of the Convention

In the time available to me I would like to touch on three themes:

- Firstly, how the European Court of Human Rights accommodates diversity, while achieving convergence, in a European legal space embracing 46 heterogeneous States.

- Secondly, I'd like to revisit the kinetic mobile structure which the former President of the Bundesverfassungsgericht used almost ten years ago to characterise the interaction between the Strasbourg court and its national constitutional counterparts, as well as the CJEU.[8]

- Lastly, I'll point to some factors which I think merit further exploration given how they will or might influence our interaction in the coming years.

II – Accommodation of diversity

At the 4th Summit of the Heads of State and Government of the Council of Europe earlier this year, the latter reaffirmed their:

> "deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights across our continent, alongside our domestic democratic and judicial systems".[9]

This political expression of the legal principle of shared responsibility, on which the Convention system is based,[10] goes some way to explaining why and how diversity between Council of Europe Member State systems is accommodated, while common minimum standards are established, developed and safeguarded.

The protection of human rights by the Strasbourg Court and the uniformity it entails is balanced with respect to national (constitutional) identities and the diversity which the latter may entail by the principle of subsidiarity, in particular the requirement to exhaust effective domestic remedies, as well as by the doctrine of the margin of appreciation.[11]

As regards exhaustion, when examining a complaint the Court should have the benefit of the examination by national courts, to the highest instance required under the domestic system, of the substance of the complaint later pleaded in Strasbourg. This is particularly important in cases in which a complex and delicate balance has to be struck between competing interests.[12]

In the same vein, where the Convention is demonstrated to be properly embedded in the domestic system and the obligations thereunder have been duly assessed in a given case by national

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to the Court under Article 33 of the Convention, they are not to be regarded as exercising a right of action for the purpose of enforcing their own rights, but rather as bringing before the Court 'an alleged violation of the public order of Europe' […]."

[8] See Prof. Dr. A. Voßkuhle, "Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts" in *Dialogue between Judges 2014*, pp. 36 – 40.

[9] See Reykjavik Declaration, *United around our Values*, https://rm.coe.int/4th-summit-of-heads-of-state-and-government-of-the-council-of-europe/1680ab40c1.

[10] See *Handyside v. the United Kingdom*, 7 December 1976, § 48, series A no. 24: "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights" and "the Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines".

[11] See the extensive examination of subsidiarity and the margin of appreciation at the ECtHR judicial seminar on the occasion of the opening of the 2015 judicial year - https://www.echr.coe.int/documents/d/echr/dialogue_2015_eng.

[12] See the Chamber judgment in *Big Brother Watch*, n° 58170/13, 62322/14 and 24960/15, 13 September 2019, § 245, and the authorities cited therein: "[…] it is particularly important that the domestic courts are first given the opportunity to strike the "complex and delicate" balance between the competing interests at stake. Those courts are in principle better placed than [the ECtHR] to make such an assessment and, as a consequence, their conclusions will be central to its own consideration of the issue".

judges, the Court's role is not to substitute the assessment of the latter, unless it has been shown that there are strong reasons for doing so.[13]

Subsidiarity, now incorporated in the preamble of the Convention following the ratification of Protocol n° 15, "does not provide for the primacy of national safeguards over European guarantees: on the contrary, it ensures their complementarity and interweaves them".[14]

As regards States' margin of appreciation, it contributes to striking a balance between common minimum standards on the one hand and the needs and specificities of different societies and legal systems on the other. The margin also reflects the fact that the Convention does not impose uniform standards throughout Europe in relation to a multitude of issues: the protection of morals, democratic accountability or the organisation of justice systems, to name but a few. Regulation of these matters, which fall to be appreciated by national authorities, can however be subject to external European supervision with a view to assessing whether those authorities overstep their margin.

When it comes to verification of the existence of a European consensus, the Court looks to whether or not there is common ground between the national laws and practices of Contracting States, as well as, where relevant, the situation at EU level and in international law. The existence or absence of common standards is not dispositive, but it is relevant.

A good recent example of both in operation can be found in *M.A. v. Denmark*, concerning the extension of statutory waiting periods to be eligible for family reunification for persons benefitting from subsidiary or temporary protection.[15]

While Member States may be recognised to enjoy a margin of appreciation – wider or narrower depending on the interests at stake - the margin is not unlimited. Convention rights operate in accordance with the principle of effectiveness; a general principle of interpretation extending to all the provisions of the Convention and the Protocols thereto.[16]

The system of shared responsibility also attributes considerable importance to how and if the domestic legislative procedure has Strasbourg-proofed or assessed legislation which finds itself subsequently at the heart of an individual complaint.

The point is well-illustrated in the seminal ruling in *Animal Defenders*, which concerned an article 10 complaint regarding a statutory prohibition on paid political advertising, in which the Court emphasised that:

> "there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision […]. By reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative

[13] See, for example, in the immigration context and the right to family reunification derived from Article 8 of the Convention, *Ndidi v. the United Kingdom*, n° 41215/14, 14 September 2017, § 76: "The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so".

[14] See further J.-P. Sauvé, *Dialogue between Judges 2015*, p. 25.

[15] *M.A. v. Denmark* [GC], no. 6697/18, §§ 151-163, 9 July 2021. For an example of where the existence of clear statutory consensus was not relied on to reduce the respondent State's margin of appreciation in view of the acute sensitivity of the moral and ethical issues at stake see *A., B. and C. v. Ireland* [GC], n° 25579/05, 16 December 2010.

[16] See, for example, *M.A. v. Denmark*, cited above, § 162.

> and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State […]. The [respondent] State must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue in the present case."[17]

The supervision exercised by the ECtHR is thus external, subsidiary, intervenes when a case has concluded at domestic level, except in relation to Protocol n° 16 requests, and is of a review type only.

This is, of course, a major difference between the direct and indirect actions heard by the CJEU. However, it is noticeable that as the latter's case-law has developed in new and more sensitive areas, a margin of appreciation for EU Member States has also taken explicit root in the CJEU's legal reasoning.[18]

III – Judicial dialogue, convergence and exchange in the multi-level system for the protection of human rights in Europe

Speaking at the opening of the Strasbourg judicial year almost a decade ago, Andreas Voβchule, depicted the interaction between the Strasbourg court and national courts in relation to the protection of human rights, and necessarily the interaction of both with the CJEU, as a kinetic structure. The latter is an ensemble of balanced parts which can move independently but which are also interconnected, such that movement in one part of the structure may necessarily trigger movement elsewhere.[19]

Is this still an apt description of our ongoing dialogue and interaction and are our judicial movements as fluid as they should be given the challenging changing of an era which our continent is experiencing?

I would like to echo President Lenaerts' characterisation of the dialogue between the two European courts in recent years as being one of constructive, and in certain fields, highly effective, dialogue and complementarity.

Of course, one can never forget the key features that distinguish the two European courts, the legal systems of which they form a part and the different scope of their jurisdiction.[20]

The mission of the CJEU is broader than that of the ECtHR in that it seeks to ensure the uniform interpretation of EU law generally. However, until now its fundamental rights' jurisdiction has been limited by the scope of application of EU law and by the principle of conferral, with the exception of questions relating to judicial independence and related aspects of the rule of law; a point to which I will return in my conclusion.

[17] See *Animal Defenders v. the United Kingdom* [GC], n° 48876/08, 22 April 2013, § 111. See also *L.B. v. Hungary* [GC], n° 36345/16, 9 March 2023, a case with extensive references to EU data protection law; or *Satakunnan Markkinapörssi Oy et Satamedia Oy v. Finland* [GC], n° 931/13, 27 June 2017, a case in which a preliminary reference had first been made to the CJEU in relation to derogations provided by the EU Data Protection Directive.

[18] See, for example, Case C-804/18 and C-341/19 *IX v. WABE eV and MH Müller Handels GmbH v. MJ,* EU:C:2021:594, §§ 87 – 88.

[19] Voßkuhle, cited above.

[20] See S. O'Leary, "The EU Charter Ten Years On: A View from Strasbourg". In M. Bobek and J. Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Oxford: Hart Publishing, 2020, Chapter 2.

President Lenaerts has given several examples, from fields as diverse as data protection,[21] judicial independence[22] or LGBT rights[23], where effective and necessary synergies are evident in our case-law. Let me supplement his references with others relating to asylum and immigration,[24] the operation of the European Arrest Warrant,[25] the right to a reasoned refusal of a request for a preliminary reference,[26] or justified restrictions of the right to freedom of expression in defence of media pluralism and common values.[27]

Depending on the field of law or legal question, the traffic flows may be in both directions. Where new EU legislation codifies the fundamental rights contained in the Convention, the flow is understandably more pronounced in one direction given the terms of Article 52 § 3 of the Charter. This is well illustrated, for example, in recent judgments of the CJEU on the EU directives on criminal procedure in which clear use of Convention benchmarks on rights guaranteed by Article 6 and the Court's developed toolbox in such cases is evident.[28]

It is important to stress that the Strasbourg court does not have the authority to assess the validity or the correct interpretation of EU law. It seeks not to trespass into the exclusive domain of the CJEU in this regard.[29] The ECtHR's role is confined to ascertaining whether the effects of adjudication by national courts and authorities in EU Member States in an individual case are compatible with the Convention.[30]

However, where the common values underpinning the Convention and the EU Treaties are openly challenged – common values which derive from Europe's common constitutional heritage - both European courts assist directly and indirectly in their defence, in defence of the other European

[21] See, for a recent example, the references to EU law and CJEU case-law in *L.B. v. Hungary*, cited above, on the disclosure of the names and home addresses of tax defaulters.

[22] See variously Ástráðsson *v. Iceland* [GC], n° 26374/18, 1 December 2020; *Xero Flor v. Poland*, n° 4907/18, 7 May 2021; *Reczkowicz v. Poland*, n° 43447/19, 22 July 2021; *Dolinska-Ficek and Ozimek v. Poland*, n[os.] 49868/19 and 57511/19, 8 November 2021; *Advance Pharma v. Poland*, n° 1469/20, 3 February 2022; *Grzeda v. Poland*, n° 43572/18, 15 March 2022; *Żurek v. Poland*, n° 39650/18, 16 June 2022; *Broda and Bojara v. Poland*, n[os.] 26691/18 and 27367/18, 29 June 2021; *Bilgen v. Turkey*, n° 1571/07, 9 March 2021; *Ramos Nunes de Carvalho e Sà v. Portugal* [GC], n[os.] 55391/13, 57728/13 and 74041/13, 6 November 2018; *Kovesi v. Romania*, n° 3594/19, 5 May 2020; *Miroslava Todorova v. Bulgaria*, n° 40072/13, 19 October 2021; *Xhoxhaj v. Albania*, n° 15227/19, 9 February 2021 and *Ovcharenko and Kolos v. Ukraine*, n[os.] 27276/15 and 33692/15, 12 January 2023 on judicial and prosecutorial independence. The selection illustrates the range of issues and respondent States, both EU and several EU "accession" States, in relation to which rule of law questions have arisen of late.

[23] See, most recently, *Macatė v. Lithuania* [GC], n° 61435/19, 23 January 2023, a case on Article 10 of the Convention sanctioning the labelling of books as harmful to children because of their positive depiction of same-sex couples, of possible relevance to Case C-769/22 (2023/C 54/19) *Commission v. Hungary*, pending; or *Fedotova v. Russia* [GC], n° 40792/10, 30538/14 and 43439/14, 13 July 2021; *Buhuceanu and others v. Romania*, n° 20081/19 and 20 others, 23 May 2023 and *Maymulakhin and Markiv v. Ukraine*, n° 75135/14, 1 June 2023, on the requirement under Article 8 and, in one case, under Articles 8 and 14, for some form of legal recognition of same sex couples.

[24] See *M.A. v. Denmark*, cited above, on waiting periods and family reunification; *Savran v. Denmark* [GC], n° 57467/15, 7 December 2021, on the expulsion of a foreign national suffering from psychiatric illness, or *N.H. and others v. France,* n° 288201/13, 2 July 2020, on the saturation of accommodation facilities for asylum-seekers.

[25] See, for example, *Bivolaru and Moldovan v. France*, n° 40324/16 and 12623/17, 25 March 2021.

[26] See, recently, *Sanofi Pasteur v. France*, n° 25137/16, 13 February 2020 or *Georgiou v. Greece*, n° 57378/18, 14 March 2023.

[27] See *NIT S.r.l. v. Moldova* [GC], n° 28470/12, 5 April 2022 and reliance on the general principles therein in Case T-125/22 *RT v. France* EU:T:2022:483. At the time of writing, it is understood that the appeal before the CJEU in the latter case has been withdrawn.

[28] See the recent judgments of the CJEU in Case C-564/19, *IS*, EU:C:2021:949, § 101; Case C-420/20 *HN*, EU:C:2022:679, § 55; Case C-347/21 *DD*, EU:C:2022:692, § 31; Case C-242/22 PPU *TL*, EU:C: 2022:611, § 40 and Case C-348/21, *HYA and Others*, EU:C:2022:965. In the other direction of travel see the use made by the Strasbourg Grand Chamber of the more developed language of the EU directive on the right of access to a lawyer in *Ibrahim and others v. the United Kingdom* [GC], n° 50541/08, §§ 210 and 259, 13 September 2016. See further J. Callewaert, "The Recent Luxembourg Case-law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg" *EU Law Live*, 4 May 2023.

[29] See *Jeunesse v. the Netherlands* [GC], n° 12738/10, § 110, 3 October 2014, or *Thimothawes v. Belgium*, n° 39061/11, § 71, 4 April 2017. See, however, *Spasov v. Romania*, n° 27122/14, 6 December 2022, on the thin line which may exist in some exceptional cases.

[30] Good examples, in relation to the EAW, are provided in *Romeo Castaño v. Belgium*, n° 8351/17, 9 July 2019 and *Bivolaru and Moldovan*, cited above.

system[31] and in defence of national constitutional and supreme courts which are, let us not forget, on the front line.[32]

The ECtHR is also necessarily – in a system based on shared responsibility - in constant dialogue with national constitutional courts, where we speak through our judgments, sometimes separate opinions and also the odd obiter dictum. I have referenced some key factors which condition our structured dialogue in the first part of my intervention.

That dialogue with national courts is particularly important where country-specific and complex assessments lie behind the Convention complaint pending before us.[33] A good example will be provided in a Dutch case on criminal procedure by President De Groot.

But dialogue is also crucial in cases which raise cutting edge legal issues in relation to which no consensus has yet emerged. This is precisely because the common standards derived from the Convention will apply across 46 States with different cultures, heritage and rhythms of societal development. Good examples can be found in recent cases on Article 8 from Germany and France on, respectively, the legal impossibility for a transgender parent's current gender to be indicated on a birth certificate[34] or the recognition of a neutral gender for intersex persons.[35]

IV – So what challenges and opportunities lie ahead?

In its two conditionality judgments regarding Poland and Hungary handed down in 2022, the CJEU held, in relation to Article 2 TEU values, that:

> "[they] have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties".[36]

These are landmark judgments, which come at a critical time, and which built on previous judgments, such as *Associação Sindical dos Juizes Portgueses*,[37] in which the CJEU innovatively and to great effect combined Articles 2 and 19 § 1 TEU.[38]

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[31] See, for a striking example, the analysis of the CJEU in Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v. Openbaar Ministerie*, EU:C:2022:100, §§ 79-80, regarding execution of an EAW issued by an EU Member State and the two-step assessment required under EU law: "In the context of that assessment, the executing judicial authority may also take account of the case-law of the European Court of Human Rights, in which a breach of the requirement for a tribunal established by law in respect of the procedure for the appointment of judges has been established […]. For the sake of completeness, it should also be added that those relevant factors also include constitutional case-law of the issuing Member State, which challenges the primacy of EU law and the binding nature of the ECHR as well as the binding force of judgments of the Court of Justice and of the European Court of Human Rights relating to compliance with EU law and with that convention of rules of that Member State governing the organisation of its judicial system, in particular the appointment of judges." See, for a corresponding defence of the need to respect EU law, *Tuleya v. Poland*, n° 21181/19 and 51751/20, 6 July 2023.

[32] See, for example, *Tuleya*, cited above, § 264, where, in response to the Polish government's argument regarding loss of victim status due to a decision of the Chamber of Professional Liability in the applicant's favour the Court noted: "that the [national] judges dealing with the applicant's case were guided by the Court's case-law and, applying and interpreting for the first time section 9 of the 2022 Amending Act, they did so in the light of the requirements of a fair trial as established by the Convention. In putting together various strands of the Court's and the CJEU's rulings, they not only reached a decision consistent with the Convention and the rule-of-law standards but, at the same time, gave practical effect to the principle of subsidiarity underlying the Convention. The Court cannot over-emphasise the fundamental role played by the national courts as guarantors of justice in upholding that principle through their decisions whereby they give direct effect to the Convention rights and freedoms or remedy Convention violations that have already occurred […]. Nor can the Court fail to see that the resolution in the applicant's case is a step forward in terms of ensuring compliance with the Court's judgments given in the context of the independence of the judiciary in Poland."

[33] See, for example, *Association of Civil Servants and Union for Collective Bargaining v. Germany*, nos. 815/18 and 4 others, 5 July 2022, or *Ayoub v. France*, n° 77400/14 and 2 others, 8 October 2020 (freedom of assembly); *Rekvényi v. Hungary* [GC], no. 25390/94, §§ 44-50, ECHR 1999-III, or *Annen v. Germany* (no. 6), n° 3779/11, § 79, 18 October 2018 (freedom of expression).

[34] See *O.H. and G.H. v. Germany*, no. 53568/18, 4 April 2023 and *A.H. and Others v. Germany*, no. 7246/20, 4 April 2023.

[35] See *Y v. France*, n° 76888/17, 31 January 2023.

[36] Case C-156/21 *Hungary v. Parliament and Council*, EU:C:2022:97, § 127; reflected also in § 145 of Case C-157/21 *Poland v. Parliament and Council*, EU:C:2022:98.

[37] Case C-64/16 EU:C:2018:117.

[38] See L.D. Spieker, ""Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal*, on the mutually amplifying effect of this combination of TEU provisions with Article 19 § 1 TEU facilitating

However, one of several questions which now arise in our multi-level system is what future role Article 2 TEU is set to play. Must it be invoked in combination with another "concretising" provision of EU law or can it serve as a self-standing basis for the defence of the rights which the values listed in that provision seek to protect.[39]

Naturally, as I said, it falls to the CJEU to interpret and apply the relevant provisions of the Treaties, the Charter and secondary EU law. However, what interests me for the purposes of our two-day exploration is the impact of the mobilisation of Article 2 in the autonomous manner now discussed in the literature on the kinetic mobile structure which both President Lenaerts and I have been referencing and which has, overall, been functioning effectively to date.

The Treaty of Lisbon and the recognition of the equal legal value of the Charter were premised on explicit inclusion of the principle of conferral and general provisions setting out the limits to the scope and functioning of EU law. Those provisions sought, in essence, to channel and even to control the potentially centripetal force of the Charter and EU law more generally.[40] As previously evidenced in the case-law of the CJEU, where a situation was not covered by EU law, it was to national remedies and, if they failed, to Strasbourg and the Convention that litigants were directed.[41]

For decades, the central core of fundamental rights and freedoms underpinning our democracies have been safeguarded by national constitutional courts, subject to the external supervision of the ECtHR.[42] The latter not only renders justice in a given case, but also elucidates, safeguards and develops the rules instituted in the Convention, thereby contributing to the observance by Contracting Parties, including EU Member States, of the Convention engagements undertaken by them.[43]

As the EU evolved into the integrated and comprehensive legal and political system which it is today, it was thus through the Convention system that strength and concrete expression was given to the common European values now set out explicitly in Article 2 TEU.[44] Good illustrations of the importance of the Convention system for the EU's value alignment and defence can be found in the Copenhagen accession criteria, in being a party to the ECHR as a *sine qua non* of EU membership or even post-membership,[45] in the terms of the TEU and the Charter itself and in the importance

judicial enforcement of the value at stake due to its greater precision and Article 2 TEU providing an extension of scope beyond that of the EU Charter and EU law more generally.

[39] See, for example, L.S. Rossi, "La valeur juridique des valeurs. L'article 2 TUE : relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels" (2020) *Revue trimestrielle de droit européen* 639 or Spieker, cited above. Cf. M. Bonelli, "Infringement Action 2.0: How to Protect EU Values before the Court of Justice" (2022) 18 *European Constitutional Law Review* 30-58.

[40] See Advocate General Øe in Case C-235/17 *Commission v. Hungary* (Usufruct) EU:C:2018:971, §§ 68-69: "It is important not to lose sight of the context in which that question [relating to when the Court has jurisdiction to determine a failure to respect the rights guaranteed by the Charter] arises. In essence, the extent to which the Member States are bound, under EU law, by the requirements regarding the protection of fundamental rights is a constitutional issue, which is delicate and fundamental, concerning the division of powers in the EU. Requiring Member States, in their actions, to respect fundamental rights as provided for in EU law has the effect of limiting the regulatory and policy approaches available in those Member States, while the power of the EU to set the boundaries of what is possible increases correspondingly. […] Moreover, institutionally, at issue is the extent to which the Court of Justice, as the highest court, has the jurisdiction to take the place of national constitutional courts and the European Court of Human Rights […] in monitoring the legislation and actions of the Member States in the light of fundamental rights. Undoubtedly mindful of those issues, the drafters of the Charter took care expressly to limit the circumstances in which it applies to national legislation." On the limits to CJEU jurisdiction following the Treaty of Lisbon see K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) 8 *European Constitutional Law Review* 375-403.

[41] See, for example, Case C-256/11 *Dereci*, EU:C:2011:734, §§ 70-73 or the Opinion of Advocate General Øe, cited above, §§ 108-109.

[42] See, for example, the extensive case-law referenced in the ECtHR Factsheet on the right to vote - https://www.echr.coe.int/documents/d/echr/FS_Vote_ENG.

[43] *Nagmetov v. Russia* [GC], no. 35589/08, § 64, 30 March 2017.

[44] See, for example, *Bouyid v. Belgium* [GC], no. 23380/09, 28 September 2015, § 89 (concerning the value of human dignity); *Matthews v. the United Kingdom*, no. 40302/98, 15 July 2002,§ 42 (concerning the concept of effective political democracy); *Jurčić v. Croatia*, no. 54711/15, 4 February 2021, § 83 (concerning gender equality and non-discrimination); *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, § 211 (concerning the value of the rule of law); *Molla Sali v. Greece*, no. 20452/14, 18 June 2020 (concerning the rights of minorities); *S.A.S. v. France*, no. 43835/11, 1 July 2014, § 128 (concerning pluralism, tolerance and broadmindedness are hallmarks of a democratic society).

[45] See, for example, Case C-327/18 *RO* EU:C:2018:733, § 61.

accorded in the Commission's annual Rule of Law Reports to Member State execution of Strasbourg judgments. The latter are the expression of the ECtHR's specific mandate to penalise infringements of fundamental rights committed by the Member States, on condition that domestic remedies have been exhausted and that subsidiarity and applicable margins are respected.

As I said at the outset, our multi-level system for the protection of fundamental rights and the prevention of rule of law backsliding and democratic erosion has always been a living and changing organism.[46] This turbulent changing of an era may require further adaptations and, yes, also concessions, in defence of our common European values.

The use to which Article 2 TEU is put, expansion of EU competences, the accession of the EU to the Convention provided for in Article 6 § 2 TEU, greater future alignment between EU and Council of Europe membership, given that 8 members of the latter are in line to accede to the former, or the ongoing war on our European borders, to name but a few;[47] all these events may in time call for rebalancing and adjustments.

But the delicacy, solidity and balance of the kinetic structure which has served us in Europe so well, points to the need for sensitivity and care, at both national and European level, if, when and how we seek to realign component parts. After all, the point of all our endeavours is not the mechanism itself, but the peace, security, unity, mutual trust and treasured diversity which our multi-level system seeks to foster and protect.

[46] See XXV Congress of the International Federation of European Law (FIDE), introductory statement by J.M. Sauvé, given on 30 May 2012 in Tallinn (Estonia), emphasising the movements at work in Europe over the last decades in relation to fundamental rights, namely the expansion of rights, their increasing number of sources and their many interpretations.

[47] Turkey, North Macedonia, Montenegro, Serbia, Albania, Moldova, Ukraine and Bosnia Herzegovina have all been recognised as candidates for EU membership.