



Opening of the Judicial Year 2026

Solemn hearing

“European Unity in Diversity: the Ability of Liberal Democracies to Act in the Face of Multiple Challenges”

Speech by Stephan Harbarth

Strasbourg, 30 January 2026

President of the European Court of Human Rights, Judges of the European Court of Human Rights, distinguished Presidents of Constitutional Courts and Supreme Courts, Madam Chair of the Ministers’ Deputies, Secretary General of the Council of Europe, Madam President of the Parliamentary Assembly, Commissioner for Human Rights, Excellencies, ladies and gentlemen,

On 7 May 1948, almost three years to the day after the end of the Second World War in Europe, leading European politicians gathered in The Hague for the Congress of Europe, among them Winston Churchill and Konrad Adenauer¹. The nearly 700 members of that Congress proclaimed in the “Message to Europeans”:

“We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; We desire a Court of Justice with adequate sanctions for the implementation of this Charter.”²

Just over two years later, these aspirations became a reality. On 4 November 1950 12 member States of the newly formed Council of Europe signed the European Convention on Human Rights (European Convention)³. Three-quarters of a century later, in November of this past year, the Convention celebrated its 75th anniversary. The numerous festivities, accolades and publications on the occasion of

¹ Wilfried Loth, “Vor 60 Jahren: der Haager Europa Kongress”, in: *Integration* 2/2008, p. 179 et seq.

² See Walter Lipgens/Wilfried Loth, *Documents on the History of European Integration*, Vol. IV, 1991, p. 350-351.

³ Christoph Grabenwarter/Katharina Pabel, *Europäische Menschenrechtskonvention*, 7th edition 2021, § 1 paragraph 3.

the anniversary made clear: the Convention and the European Court of Human Rights (ECHR) hold an essential and globally recognised position within the international system of human rights protection⁴.

This positive resonance demonstrates a clear commitment to the international legal order, whose cornerstones include, among others, human rights, State sovereignty and the prohibition of the use of force. Following the formative experience of the Second World War, these principles were given particular emphasis in the central post-war instruments of international law in order to protect future generations from the horrors of war and human suffering⁵. Since that time, these guiding principles have not lost any of their significance and rightfully continue to be upheld today – not least by the European Court of Human Rights. The defence of these principles is especially needed in the present day, as freedom, democracy, the rule of law, human rights and international cooperation are being tested in numerous ways. It is therefore a great honour for me to speak to you today, at the opening of this very special judicial year for the European Court of Human Rights. My most sincere gratitude for the invitation!

I. 75 years of the European Convention on Human Rights

1. The prominent role of the European Convention and ECHR

One of the reasons for the prominent role of the Convention and the European Court of Human Rights in the system of international human rights protection is – along with the global respect for the Court's case-law, which I will touch on later – the current design of individual applications to the Court. Since the entry into force of Protocol No. 11 to the Convention on 1 November 1998⁶, the over 700 million people of the 46 States Parties⁷ to the Convention have had the right – after exhausting all domestic remedies – to bring direct applications before the European Court of Human Rights.

This unique⁸ instrument for individuals to apply to an international human rights court has been put to frequent use. In the early years of the last decade, the Court recorded over 60,000 applications allocated to a judicial formation per year⁹. Even though these numbers have decreased in recent years due to various reforms, with nearly 29,000 applications allocated to a judicial formation in 2024¹⁰, they still remain at a very high level. This demonstrates not only the high caseload of the Court, but also the great

⁴ See the symposium on Verfassungsblog "The European Convention on Human Rights at 75: Transnational Perspectives and Global Interaction", available at <https://verfassungsblog.de/category/debates/the-european-convention-on-human-rights-at-75-transnational-perspectives-and-global-interaction-debates/> (last access 24 February 2026).

⁵ One example is the United Nations Charter, the preamble to which begins as follows: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ...".

⁶ Jochen Abr. Frowein, "European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)", in: Anne Peters (ed.), *The Max Planck Encyclopedia of Public International Law*, 2009, paragraphs 2 and 3.

⁷ ECHR, "Annual Report 2025", p. 35.

⁸ Stephanie Schiedermaier, "75 Jahre EMRK – Leuchtturm im Sturm", *Zeitschrift für Rechtspolitik* 2025, p. 97.

⁹ ECHR, "Analysis of Statistics 2015", p. 7.

¹⁰ ECHR, "Analysis of Statistics 2024", p. 6; see also Alec Stone Sweet/Wayne Sandholtz, *The Law and Politics of International Human Rights Courts*, 2024, p. 36 et seq.

hope that so many people, in Contracting States spanning from the Atlantic to the Caucasus, place in the European Court of Human Rights on the basis of its impressive performance.

2. Achievements of the Court

(a) Case-law with great resonance

Over its long history, the European Court of Human Rights has issued countless groundbreaking judgments and decisions. Naturally, one cannot give proper due to all of them today. Just from its recent case-law, one can mention the *KlimaSeniorinnen* case from 2024¹¹, which received worldwide attention, including in last year's Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change¹².

(b) The “living instrument” doctrine

The case-law of the European Court of Human Rights has not only exerted influence in substantive terms, but has also influenced legal methodology. One example of this is the “living instrument” doctrine¹³. This doctrine is of great significance, not least because the Convention dates back to the middle of the 20th century, and is therefore from a time in which the social, economic and technological conditions were very different from those of today.

In its 1978 judgment in *Tyrer v. the United Kingdom*, the Court stated for the first time that the Convention is a “living instrument which ... must be interpreted in the light of present-day conditions”¹⁴. The Court has further developed the idea of the Convention as a dynamic treaty and has issued numerous significant judgments on this basis.

II. “Present-day conditions”: challenges for the State’s ability to act

So what are the “present-day conditions”, as the *Tyrer* judgment describes them, of today? Rarely in the 75-year history of the Convention have European States faced such a concentration of challenges as they do now. Even if crises may seem more acute from a contemporary than from a historical perspective, it can hardly be denied that at present the challenges for the liberal democracies of Europe – and also outside Europe – have coalesced to an unprecedented extent.

¹¹ ECHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 9 April 2024.

¹² International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, paragraphs 144 and 385.

¹³ For an introduction, see Grabenwarter/Pabel (cited in footnote no. 3), § 5 paragraphs 14-16; Oliver Dörr/Rainer Grote/Thilo Marauhn, *EMRK/GG Konkordanzkommentar*, 3rd edition 2022, Kap. 4 paragraphs 88-92.

¹⁴ ECHR, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.

European States and societies now find themselves in what has been described as a polycrisis¹⁵. The world order within which western Europe since the end of the Second World War, and Europe as a whole since the fall of the Iron Curtain, has felt secure, appears less stable today. At the same time, there are overarching challenges of exceptional dimension: from the strengthening of military defences in the face of the Russian war against the Ukrainian people to artificial intelligence, from immigration to debt explosions – not to mention climate change, which has the potential to bring about an additional polycrisis¹⁶. All the while, public trust in the capabilities of democratic States is decreasing¹⁷. There is little to suggest that the great success story of liberal democracy and the rule of law is at an end. Nevertheless, the pressure on democracy, freedom and the rule of law can be felt throughout European societies.

In a contest with the many forms of autocracies, liberal democracy can only prevail when it can demonstrate, even when under pressure from external and internal crises, a continued ability to function and evolve. For liberal democracies to prevail in these circumstances, it is equally important to credibly refute the narratives of decline spread by various actors and counter the danger of an erosion of trust in State institutions with prospects for the future. In this regard, liberal democracies must also prove their ability to act in special conditions. In an age of dynamic change and globalisation, these conditions are especially volatile and demanding, and require the rapid resolution of ever more complex problems.

Along with external limits on States' ability to act, there are also internal limits: the separation of powers is an essential component of liberal democratic orders¹⁸. Over the course of history, the spectacular failures of authoritarians' plans for the future are unrivalled. Yet despite this, the effects of the separation of powers have been ambivalent. On the one hand, the principle of the separation of powers acts as a driver of processes of improvement and adaptation¹⁹ while, on the other, it involves constraints on power²⁰ and thus requires discourse, thereby creating specific challenges for the capacity of liberal democracies to act.

All of this underscores the permanent challenge faced by the European Court of Human Rights in holding the Contracting States to the standards of the Convention in accordance with Article 19 without unduly constraining them and depriving them of their ability to act. It also highlights the importance of the

¹⁵ The term was coined by Jean-Claude Juncker, speech by President Jean-Claude Juncker at the Annual General Meeting of the Hellenic Federation of Enterprises (SEV), 21 June 2016, https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_16_2293 (last access 24 February 2026) ("polycrisis"); for an overview, see Wolfgang Kahl/Paul Hüther, *Der „Zweckverband funktioneller Integration“ nach Hans Peter Ipsen. Ein Beitrag zur Begriffsgeschichte und zur Finalitätsdebatte in der Europawissenschaft*, 2023, p. 99 et seq.

¹⁶ See, regarding traditional and new forms of State functions, Ferdinand Kirchhof, "Aufgabenwandel ändert Staatsstrukturen", *Archiv des öffentlichen Rechts* 148 (2023), p. 65 et seq.

¹⁷ See Stephan Harbarth, "Selbstbehauptung des Rechtsstaats", *Juristenzeitung* 80 (2025), p. 161-162.

¹⁸ See Karl-Peter Sommermann, in: Peter M. Huber/Andreas Voßkuhle (eds.), *Grundgesetz*, 8th edition 2024, Article 20 GG paragraphs 205 et seq.; Angela Schwerdtfeger, "Gewaltenteilung", in: Uwe Kischel/Hanno Kube (eds.), *Handbuch des Staatsrechts*, Vol. II, 2024, § 36 paragraph 3.

¹⁹ See Thomas Wischmeyer, "Gewaltenteilung und institutionelles Gleichgewicht", in: Wolfgang Kahl/Markus Ludwigs (eds.), *Handbuch des Verwaltungsrechts*, Vol. III, 2022, § 78 paragraph 41.

²⁰ For further references see Schwerdtfeger (cited in footnote no. 18), § 36 paragraph 7.

application of the “margin of appreciation” doctrine and the necessity of consistently ensuring the conditions for the proper functioning of democracy and the rule of law.

III. The “margin of appreciation” doctrine

1. Navigating the tension between enforcement of the European Convention and respect for the Contracting States’ primary responsibility

As a result of Protocol No. 15 to the Convention, which entered into force in 2021, a paragraph was added to the Preamble to the Convention that recognises the inherent tension that exists between the enforcement of the Convention and the primary responsibility of the Contracting States. It affirms that “the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in [the] Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by [the] Convention”.

This calls attention to a central doctrine which – along with other instruments – has particular importance for Europe in the present times: the “margin of appreciation” doctrine²¹. At its core, this doctrine is a limitation of judicial scrutiny through which the Court may reduce its scope of review in certain circumstances²². In this way, the doctrine relates to an issue which constitutional and supreme courts regularly deal with, namely, whether and to what extent in certain circumstances actors other than the reviewing court may be authorised to reach decisions that are subject to a limited judicial review, and which – limited – standard of review should be applied in such circumstances.

2. Essence

In 2011, in its much publicised judgment *Lautsi v. Italy* concerning the display of crucifixes in Italian State schools, the European Court of Human Rights declared that “Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development”²³.

Consequently, the Court saw that it had “a duty in principle to respect the Contracting States’ decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination”²⁴.

²¹ For a comparative overview, see Jean-Pierre Cot, “Margin of Appreciation”, in: Anne Peters (cited in footnote no. 6).

²² See Bernadette Rainey/Pamela McCormick/Clare Ovey, *The European Convention on Human Rights*, 8th edition 2020, p. 81.

²³ ECHR, *Lautsi and Others v. Italy* [GC], no. 30814/06, § 68, ECHR 2011 (extracts).

²⁴ ECHR, *Lautsi and Others v. Italy* [GC], no. 30814/06, § 69, ECHR 2011 (extracts).

In this statement by the Court, the central rationale of the “margin of appreciation” doctrine is expressed: for certain combinations of circumstances, in weighing the conflicting interests in a Contracting State, there is not just one but in fact several different tenable results that are compatible with Convention rights²⁵. This applies all the more so as the national actors typically have a closer proximity to the circumstances of the matter at issue.

3. Scope of application

The Court’s reference in *Lautsi* to Europe’s great cultural and historical diversity, which has only grown over the past decades as a result of the steady increase in the number of members of the Council of Europe from the original 10 to the current 46 member States from across Europe and neighbouring regions, points to one of the key aspects that is particularly important for the “margin of appreciation” doctrine, which is the presence, or absence, of a European consensus in regard to the question at issue in the specific proceedings. If the Court determines that such a consensus exists, then it will increase its level of scrutiny; conversely, if no such consensus exists, then the Court reduces the intensity of review²⁶. Consequently, in the *Lautsi* judgment, the Court ultimately concluded:

“[T]he decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools ... speaks in favour of that approach.”²⁷

Another decisive factor²⁸ for the “margin of appreciation” doctrine is whether a “particularly important facet of an individual’s existence or identity” is affected by the State measures at issue; if this is the case, then the margin of appreciation accorded to the Contracting State can be reduced²⁹. Conversely, and just as in the case of a lack of a European consensus, a greater margin of appreciation might be warranted in those cases that raise sensitive moral or ethical questions³⁰ and when, and here I cite the Court again directly, “the State is required to strike a balance between competing private and public interests or Convention rights”³¹.

In addition, procedural aspects, such as the quality of the national decision-making procedure, may also be relevant to the level of scrutiny under the “margin of appreciation” doctrine³².

Pursuant to the case-law of the European Court of Human Rights, the “margin of appreciation” doctrine is to be considered in light of the specific Convention right at stake; for absolute rights such as the

²⁵ Angelika Nußberger, *The European Court of Human Rights*, 2020, p. 89.

²⁶ See Janneke Gerards, *General Principles of the European Convention on Human Rights*, 2nd edition 2023, p. 256 et seq.

²⁷ EHR, *Lautsi and Others v. Italy* [GC], no. 30814/06, § 70, ECHR 2011 (extracts).

²⁸ For an overview of the relevant factors, see Gerards (cited in footnote no. 26), p. 255 et seq.

²⁹ ECHR, *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011.

³⁰ Gerards (cited in footnote no. 26), p. 261.

³¹ ECHR, *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011.

³² Nußberger (cited in footnote no. 25), p. 94.

prohibition of torture under Article 3 of the Convention, a margin of appreciation for Contracting States is generally out of the question³³. In contrast, the doctrine is more often applied in cases involving Articles 8 through 11 of the Convention, each of which contains a limitation clause³⁴.

4. Differences to constitutional restrictions on standards of review

While the European Court of Human Rights will no doubt further hone and refine the “margin of appreciation” doctrine in its future case-law, a look back at the first key ruling of the Court regarding this doctrine is helpful to differentiate it from the forms of limited scrutiny practised by other courts, and particularly national courts. In the 1976 *Handyside* judgment, the Court noted:

“[T]he machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.”³⁵

The allocation of responsibilities in *Handyside* between the international human rights protection of the Convention and the European Court of Human Rights, on the one hand, and the national systems of human rights protection, on the other, has been affirmed in the addition to the Preamble to the Convention through Protocol No. 15 that I mentioned earlier. This embodies the main differences between the “margin of appreciation” doctrine and the techniques of limited scrutiny as practised by the constitutional and supreme courts which, if I may use an example from the case-law of the German Federal Constitutional Court on the margin of assessment and appreciation and leeway to design³⁶, I would outline as follows:

- (i) The “margin of appreciation” doctrine encompasses the relationship between an international court and sovereign States; the point of reference of the doctrine is the respective Contracting State as such.
- (ii) In contrast, the point of reference for the margin of assessment and appreciation and leeway to design accorded by the Federal Constitutional Court is not that of the State itself but the domestic leeway of a State organ; this technique of limited scrutiny concerns the relationship between the legislator or executive, on the one hand, and the constitutional court, on the other.

Naturally, a comprehensive discussion of this multi-layered doctrine – for example, with regard to the degree of discretion accorded by the European Court of Human Rights, or on the comparative perspective briefly outlined here – is not possible today.

³³ Gerards (cited in footnote no. 26), p. 250.

³⁴ Gerards (cited in footnote no. 26), p. 252.

³⁵ ECHR, *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

³⁶ For a recent example, see Federal Constitutional Court, 1 BvR 1541/20, 16 December 2021 (Triage I), paragraphs 99 and 126-127.

5. “Margin of appreciation” doctrine: current challenges

In looking at the future application of this doctrine, one of its particular strengths comes to the forefront: the “margin of appreciation” doctrine allows – and should allow – for consideration of the specifics of a situation involving multiple complex and intertwined problems in the areas of geopolitics, the economy, technology and social welfare. In this regard, it should not be overlooked that this multiplicity of challenges may not affect all Contracting States in the same way – one can think, for example, of the very different challenges caused by simple geography in coastal States as compared with landlocked States, potential differences in social conditions as between smaller States and larger States or variations in the defence considerations of NATO members and non-NATO States. In response to these multiple challenges of the present day, there may also be multiple different courses of action, which may vary from State to State.

The ability of States to take action, which is particularly needed at this moment and presumably in the years to come, but also the need to allow the development of individual abilities to act in order to address these multiple challenges, both require refraining from excessive normative constriction by the European legal framework. Indeed, this cannot be regarded as the sole or even the primary task of the European Court of Human Rights. In this regard, it is the law-making activity of the European Union (EU) that must also be considered. The European Union enacts approximately seven new legal acts a day – many of which exhibit a considerable level of detail³⁷. As the Draghi report, commissioned by the EU itself, has highlighted – even when a direct comparison due to the different legal and political systems is not possible – during the period of 2019-2024, the European Union enacted over twice the number of legal provisions as the United States at the federal level³⁸. Yet the European Court of Human Rights too must keep in mind – which it does – that excessive normative requirements can impede the ability of States to take action.

In this regard, the “margin of appreciation” doctrine proves to be an instrument which can – and should – allow for a temporal and context-dependent variation of the level of scrutiny through which difficulties for the abilities of States to act can also be taken into account. This is the basis for the reference to the principle of subsidiarity in Protocol No. 15 to the Convention. The resulting allocation of responsibilities can only be determined contextually and is therefore subject to change³⁹ and open to the consideration of the current multiple challenges.

³⁷ See Mario Draghi, “The future of European competitiveness (part B)”, 2024, p. 318.

³⁸ Ibid.

³⁹ See also in this respect, from a religious perspective, paragraph 79 of Pope Pius XI’s encyclical *Quadragesimo anno* of 15 May 1931, which is considered a landmark in the intellectual history of the principle of subsidiarity: “As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.” https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html (last access 26 February 2026).

IV. Attacks on democracy and the rule of law in Europe

1. Starting point

The ability of liberal democratic States to rapidly and effectively respond to challenges is not limited to that of the executive or the legislator. It also requires an independent judiciary⁴⁰ – not just for the sake of freedom and constitutionalism as such, but also for the effectiveness and efficiency of a State's problem-solving competence, which would be stunted without the guarantee of a competition of ideas.

Against this backdrop, the attacks on constitutional and other courts which can be observed in many parts of the world come into focus. These can be classified into three categories:

- (i) the failure to comply with judicial rulings;
- (ii) restraints on judicial independence by means of limiting the jurisdiction of the courts, amendments to court rules or so-called "court-packing";
- (iii) intimidation, threats or even violence directed at judges.

2. The necessity of defending the rule of law

In light of these attacks, safeguarding the conditions for the proper functioning of an independent judiciary is of great importance for two essential reasons:

- (i) Judicial independence is not just an end in itself, but a hallmark of democratic States under the rule of law⁴¹. The principle of democracy is not without limitations, but rather is subject to boundaries set by the freedoms guaranteed by fundamental rights. These freedoms, in turn, are not possible without the protection of individual freedoms from the State or from other individuals by independent courts. Without independent courts, there is no freedom.
- (ii) In a liberal democracy, certain principles are placed beyond the reach of the popular will for the sake of the proper functioning of democracy. Such legal limitations are an essential prerequisite for a functioning democracy. Without freedom of expression, without freedom of the press, without freedom of assembly – to name just a few examples – the democratic process cannot function in the long term, because the minority has no realistic chance of becoming the majority⁴². Ultimately, democracy in its raw and unregulated form is not democracy at all – as demonstrated by the necessity of an electoral law to be applied by independent courts.

⁴⁰ The majority of European constitutions contain a provision guaranteeing judicial independence; see Helmuth Schulze-Fielitz, in: Horst Dreier (ed.), *Grundgesetz*, 3rd edition 2018, Art. 97 GG paragraphs 11-12.

⁴¹ See Mia Swart, "Independence of the Judiciary", in: Rainer Grote/Frauke Lachenmann/Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law*, 2019, paragraph 1.

⁴² See Federal Constitutional Court, 1 BvR 233/81, 14 May 1985, BVerfGE 69, 315 (Brokdorf), headnote 1: "The right of the individual to actively participate in the formation of political opinion and the political will by exercising the freedom of assembly is one of the indispensable elements that ensure the functioning of a democratic society. The fundamental significance of this freedom must be taken into

Democracy and the rule of law are thus inextricably linked. Constitutionalism is not only a restriction, but also the foundation of democracy.

3. External protection

The conditions for the proper functioning of the judiciary require – not least in light of the attacks on judicial independence in parts of the world that I have briefly described – both external protection and protection through the judiciary itself.

The “external protection” of the conditions for the proper functioning of the judiciary, particularly for constitutional courts, is specifically a task for the legislator, but is also one for the public as a whole. An example of this might be the so-called “resiliency reforms” to the German Basic Law, which is the German Constitution, enacted in 2024 to better safeguard the conditions required for the proper functioning of the Federal Constitutional Court. As a precautionary measure to protect the independence of the Federal Constitutional Court from legislative overreach, a broad parliamentary majority voted to anchor the central components of the Federal Constitutional Court in the Basic Law⁴³. These provisions can now only be changed by amending the Basic Law and are no longer subject to change by a mere federal law passed by a simple majority. Rather, any future changes will require a two-thirds majority in both the *Bundestag* and *Bundesrat*. This example shows that political actors may be well advised to design protective measures not just reactively, but also proactively, even when the institutions of the State are not under attack. In this regard, the public can do more than just observe the process – they can also act to initiate it.

4. Self-defence

The courts’ own capacity to assert themselves is of central importance for ensuring the conditions for their proper functioning⁴⁴. It is this assertiveness that – as welcome as external protections may be – is at the core of the discourse surrounding the preservation of independent constitutional courts. This is because the constitutional courts, whose role it is precisely to bind and limit legislative and executive power, would be fundamentally called into question due to a structural conflict of interest if they were only able to assert themselves when other branches of government, which they serve to limit, are prepared to protect them.

In this regard, there are several possibilities available to the judiciary. These include, first, legal remedies that judges can make personal use of to protect their (fundamental) rights. Second, judges can, in both their official and private capacities, promote the importance of an independent judiciary or, in more

account by the legislator when enacting provisions that restrict fundamental rights, and by the authorities and courts when interpreting and applying such provisions.”

⁴³ See Articles 93 and 94 of the German Basic Law; for further details, see Harbarth (cited in footnote no. 17), p. 163.

⁴⁴ For an overview, see Harbarth (cited in footnote no. 17), p. 163 et seq.

general terms, the importance of the rule of law and democracy. This is essential, because the ability of citizens to identify with the fundamental values of their constitution, and the commitment to preserve such values, are prerequisites for a functioning State. The third – and in this context perhaps most important – possibility is judicial review, particularly by constitutional and supreme courts, of measures that undermine democracy and the rule of law. My remarks today will be limited to this last aspect.

In the European multi-level system, the assertiveness of the courts is the joint responsibility of the national constitutional and supreme courts, the European Court of Human Rights and the Court of Justice of the European Union. This can be illustrated through the courts' reaction to the crisis of the rule of law in Poland. Alongside the financial sanctions of the EU, that is, withholding the disbursement of budget funds from the sanctioned State⁴⁵, the case-law of the Court of Justice of the European Union and the European Court of Human Rights also played a significant part. In numerous judgments, the Court of Justice of the European Union made the organisation of the national judiciary subject to judicial review under Articles 2 and 19 of the Treaty on European Union as well as Article 47 of the Charter of Fundamental Rights of the European Union and on that basis classified many legislative changes in Poland as incompatible with EU law.

Above all, however, it is the role of the European Court of Human Rights that deserves praise. According to a press release from the Court, at the end of the past year, the European Court of Human Rights had over 1,100 pending cases involving the Polish judicial reforms⁴⁶. In the proceedings that have already been decided, the Court has in numerous cases found, with reference to its earlier case-law on the appointment of judges and Article 6 of the Convention, that the Polish judicial reforms are incompatible with central principles of the Convention. Even when the applicability of the “margin of appreciation” doctrine in the context of Article 6 of the Convention was not ruled out from the outset⁴⁷, it was not decisive in this situation, because the provisions were aimed at abolishing central conditions for the proper functioning of the liberal democratic State under the rule of law. In its pilot judgment in the *Wałęsa* matter, the European Court of Human Rights affirmed violations of Article 6 of the Convention due to “interrelated systemic problems connected with the malfunctioning of domestic legislation and practice”⁴⁸.

The multiple recognisable cross-references between the case-law of the European Court of Human Rights and that of the Court of Justice of the European Union in matters relating to the Polish rule of law crisis demonstrate the strength of the European multi-level system⁴⁹. Nevertheless, the primary role in such cases falls to the national constitutional and supreme courts, as they are generally involved with issues of judicial independence at an earlier stage, they are through their experience well versed in the national idiosyncrasies of the respective legal culture, and they have a special understanding of the expectations of the parties involved; they also have a keen sense of the rationale of the legislation under

⁴⁵ See Harbarth (cited in footnote no. 17), p. 165.

⁴⁶ ECHR, press release 269 (2025), “‘Rule-of-law’ cases against Poland adjourned for a further year”, 17 November 2025.

⁴⁷ See Gerards (cited in footnote no. 26), p. 252, with further references.

⁴⁸ ECHR, *Wałęsa v. Poland*, no. 50849/21, operative provision no. 6, 23 November 2023.

⁴⁹ See CJEU (GC), *Commission v. Poland*, C-448/23, 18 December 2025, §§ 61-63 and 270; ECHR, *Advance Pharma sp. z o.o. v. Poland*, no. 1469/20, §§ 204 et seq., 3 February 2022.

review and its practical effects. However, it remains clear that when these institutions falter as guardians of judicial independence, the European Court of Human Rights and the Court of Justice of the European Union are needed.

V. Conclusion

We have the European Court of Human Rights to thank not only for its response to the crisis of the rule of law in Contracting States, but also for its general role as the guardian of the Convention, which it has fulfilled for many decades with distinction. For Europe, and indeed the entire world in view of the global recognition of the Court's case-law, let us wish that the Court continues to uphold its place in the European multi-level system for many years to come.

For the Court and its members, the very best wishes for the new judicial year – and for Europe, a happy, peaceful and prosperous 2026!