

Visit of the First President and the Prosecutor-General at the ECHR for the judicial seminar and the opening of the judicial year ceremony

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On 26 January 2024, First President Christophe Soulard and Prosecutor General Rémy Heitz travelled to Strasbourg to take part in the ceremony of the European Court of Human Rights' opening of the judicial year. The First President was accompanied by President Zientara, Director of the Documentation, Research and Reporting Department, and junior judge Clémence Bourillon, Head of the International Relations Department; the Prosecutor General was accompanied by Advocate General Sonya Djemni-Wagner.

The event brought together the heads of the high courts of the Council of Europe member states and local, national and international authorities on the theme of "Revisiting subsidiarity in an era of shared responsibility".

Opened by the President of the European Court of Human Rights (ECtHR), Siofra O'Leary, the aim of the judicial seminar was to analyse the evolution of the principle of subsidiarity in the light of the case law of the ECtHR, in particular on the national margin of appreciation, and the adoption of Protocol No. 15. The question thus posed amounted to welcoming the appropriation by national judges of the European Convention for the Protection of Human Rights and Fundamental Freedoms, who have become judges of the day-to-day application of fundamental rights. From then on, the issue raised was the advent of a process-based review. As part of this review, the ECtHR examines the extent to which the national authorities have weighed up competing interests and taken account of compliance with the Convention in their decision-making process.

This choice of subject is closely linked to the current situation of multiple crises in the rule of law in Europe. As shown by the *Handyside v United Kingdom* judgment, subsidiarity is an essential instrument for the proper functioning of the system, to prevent the Court of Human Rights from becoming a last resort and becoming clogged up. Moreover, the principle of subsidiarity ensures that the courts remain close to their citizens. Through this mechanism, national courts remain "in direct and permanent contact with the living forces of their countries"^[1].

This judicial seminar particularly echoes the movement of acculturation to European human rights law that has taken place in France, and at the Cour de cassation. Initially reluctant to refer to the Convention, from the 1980s onwards the Court of Cassation began to appropriate it before becoming truly aware of the internationalisation of the law and the normative power of the case law of the European Court of Human Rights (ECtHR) by reversing its case law in the light of the ECtHR's decisions^[2]. Litigation concerning freedom of expression (art. 10 of the Convention), which used to be very rich, is an illustration of this development, as can be seen from the case law of the Cour de cassation, which is now the leading judge in this area.

The Judicial Seminar thus concluded with the idea of a shared responsibility between national and supranational judges in the "era of subsidiarity", to use the expression of the former President of the Court of Human Rights, Robert Spano.

^[1] CEDH, 7 décembre 1976, *Handyside c/ Royaume-Uni*

^[2] Cass., crim., 15 mai 1990, *Bacha Baroudé*, n° du pourvoi 90-80.827



The solemn hearing was an opportunity for President O'Leary to take stock of the Court's activities in 2023. In her speech, she expressed the Court's concern about challenges to the rule of law, and in particular to the independence of judges, noting the rise in individual attacks on judges, including international judges, and the increase in requests for recusal. She was particularly keen to highlight developments in the case law of the European Court of Human Rights in three particularly contemporary areas: the protection of victims of domestic violence, the civil recognition of same-sex couples, and the rights of whistleblowers.

The guest of honour at the hearing, Didier Reynders, European Commissioner for Justice, recalled the shared ambitions of the European Union and the Council of Europe in the quest for joint peace and the protection of rights and freedoms. He also emphasised the proximity of the values protected by the Convention and the Charter of Fundamental Rights of the European Union. In particular, he quoted the case law of the European Court of Human Rights in *Walesa v Poland* of 23 November 2023, which reached the same conclusion of non-compliance with the requirements of impartiality and independence of a court as the CJEU judgment of 21 December 2023 in the case of *L.G. v Krajowa Rada S downictwa* (C-718/21). This concordance of case law marks the fruitful dialogue at work between Europe's supranational courts. He concluded by outlining the important role of the European Commission's annual report on the rule of law as a tool for vigilance.

This visit was an opportunity for the Cour de cassation to reiterate its will to pursue this fruitful cooperation with the European Court.

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