

Populism, a Common Challenge for the European Courts

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1. The approach of the European Courts in respect of populism

The **European Court of Human Rights** (ECtHR) and the **Court of Justice of the European Union** (CJEU) each have their own **specificities**, in terms of their:

- **Place** and **role** in the European judicial architecture
- **Jurisdiction**

They are nonetheless broadly **on the same line** when it comes to **protecting the “democratic acquis”** against populist attacks, but with some **differences and particularities**.

Populism as a challenge to democratic values and institutions

Populists attack democratic societies on mainly **two different levels**:

1. The **democratic values**, such as:

- ✓ Human dignity
- ✓ Freedom of expression
- ✓ Protection of minorities
- ✓ Prohibition of hate and violence
- Their **value and relevance** being challenged **as such**

2. The **democratic institutions**, such as:

- ✓ Courts
- ✓ Parliaments
- Challenged not for being worthless or irrelevant but for being **malfunctioning**

Populism as a challenge to democratic values and institutions (II)

At both levels, the European Courts seek to **preserve the “democratic acquis”**, with slightly **different strategies**, adapted to the type of challenge:

- As regards the challenged **values**: they **uphold** them by highlighting their **fundamental role** as the **hallmark of genuine democracies**, i.e. as preserving the **democratic nature of European societies**.
- As regards the challenged **institutions**: they **protect** them by ensuring their proper, i.e. **transparent and fair operation**, with a view to fostering the **confidence** of the people in their institutions.

Examples below



The overarching principle: The rule of law

ECtHR

- “The rule of law, **one of the fundamental principles of a democratic society**, is a notion inherent in all the Articles of the Convention” (Vistiņš and Perepjolkins v. Latvia, 71243/01, § 95)
- “**One of the fundamental components of European public order** is the principle of the rule of law, and arbitrariness constitutes the negation of that principle” (Al-Dulimi and Montana Management Inc. v. Switzerland, 5809/08, § 145).

CJEU

- “The rule of law: a value common to the European Union and the Member States which forms **part of the very foundations of the European Union and its legal order**”.
- “The concept of the rule of law, as enshrined in Article 2 TEU, includes the principles of **legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers and non-discrimination and equality before the law**” (Hungary v. Parliament and Council, C-156/21 , §§ 128 and 136)

Upholding democratic values: Human dignity

ECtHR

- “The very essence of the Convention is respect for **human dignity** and **human freedom**” (Pretty v. the United Kingdom, 2346/02, § 65)
- “The Court considers that the applicant has been the victim of humiliating treatment showing a **lack of respect for his dignity** and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation.” (M.S.S. v. Belgium and Greece, 30696/09, § 263)

CJEU

- “The general scheme of [Directives 2003/9 and 2013/33] and the observance of fundamental rights, in particular the requirements of **Article 1 of the Charter**, under which **human dignity** must be respected and protected, preclude a situation where an applicant for international protection is deprived, even temporarily, of the protection of the minimum standards laid down by those directives.” (Minister for Children, C-97/24, § 37)

Upholding democratic values: Freedom of expression

ECtHR

- “Freedom of expression constitutes **one of the essential foundations of a democratic society.**”
- “Art. 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that **offend, shock or disturb**. Such are the demands of **pluralism, tolerance and broadmindedness** without which there is no “democratic society”
- “There is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression when a **matter of public interest** is at stake.” (Couderc and Hachette Filipacchi Associés v. France, 40454/07, §§ 88-89, 96)

CJEU

- “It must be remembered that Article 11 of the Charter constitutes **one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the European Union is founded.** ... In such a context, **interferences** with the rights and freedoms guaranteed by Article 11 must be limited to what is **strictly necessary.**” (Real Madrid Club de Fútbol, C-633/22, § 49, with many references to the case-law of the ECtHR).

Upholding democratic values: Protection of minorities

ECtHR

- “**Judicial intervention**, including by this Court, cannot replace or provide any substitute for the action which must be taken by the **legislative and executive branches of government**. However, **democracy** cannot be reduced to the **will of the majority** of the electorate and elected representatives, in disregard of the requirements of the **rule of law**” (Verein Klimaseniorinnen Schweiz v. CH, 53600/20, § 412; in the same sense: Karacsony and Others v. Hungary, 42461/13, § 147).

CJEU

- *Art. 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the **rights of persons belonging to minorities**.”*
- *Apparently no application by the CJEU to date.*

Upholding democratic values: Prohibition of hate and violence

ECtHR

- “The majority of the impugned comments amounted to **hate speech** or **incitements to violence** and as such did not enjoy the protection of Article 10” (Delfi AS v. Estonia, 64569/09, § 140).
- “A **political party** may **promote a change** in the law or the legal and constitutional structures of the State on two conditions: firstly, the **means** used to that end must be **legal and democratic**; secondly, the change proposed must itself be **compatible with fundamental democratic principles**. ... A political party whose leaders incite to **violence** or put forward a policy which fails to respect democracy or which is aimed at the **destruction of democracy** ... cannot lay claim to the Convention’s protection against penalties imposed on those grounds (Refah Partisi v. Turkey, 41340/98, § 98)

CJEU

- *Apparently no direct statement by the CJEU to date.*
- *Art. 35 of the **Digital Services Act** (Regulation 2022/2065) imposes an obligation on very large online platforms and search engines to take measures to combat “**illegal hate speech or cyber violence**”.*

Protecting democratic institutions: National courts – common requirements

Broad **consensus** between the two European Courts on the strategy for the protection of **judicial independence**:

1. Goal: **effective judicial protection** (Art. 47 Charter) / right to a **fair trial** (Art. 6 Convention), as a requirement of the **rule of law** and the **separation of powers**
2. Means: protection of the national courts from **outside pressure** → courts must be **established by law, independent and impartial**
3. Purpose: **trust of citizens** (“to enable any **legitimate doubt** to be removed, in the minds of litigants, as to the **imperviousness** of that body to external factors and as to its **neutrality** in relation to the conflicting interests”)
4. Safeguards against outside interference or pressure: concerning *inter alia*:
 - Appointment procedures
 - Irremovability
 - Dismissal→ Importance of appearances!

See, among many others:

- CJEU, Lita, C-646/23; AW “T”, C-225/22.
- ECtHR, Ástráðsson v. Iceland, 26374/18; Reczkowicz v. Poland, 43447/19; Dolińska-Ficek and Ozimek v. Poland, 49868/19.

Protecting democratic institutions: National courts – specific requirements

ECtHR

- “It is inherent in the very notion of a “tribunal” that it be composed of judges **selected on the basis of merit** – that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law” (Astradsson v. Iceland, 26374/18, § 220).
- “For the requirements of a fair trial to be satisfied, **the accused, and indeed the public, must be able to understand the verdict** ; this is a vital safeguard against arbitrariness. ... In the judicial sphere, [the **rule of law** and the **avoidance of arbitrariness**] serve to foster **public confidence** in an **objective and transparent justice system**, one of the foundations of a democratic society” (Taxquet v. Belgium, 926/05, § 90).

CJEU

- “The receipt by [judges] of a level of **remuneration** commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence” (Sąd Rejonowy w Białymstoku, C-146/23, § 49).
- “The Member States are thus required to ensure that their legislation on the organisation of justice **does not regress in relation to [the value of the rule of law]**, by refraining from adopting rules which would undermine the independence of judges” (Lita, C-646/23, § 66).
- By virtue of the **primacy of EU law**, lower courts may be required to **disregard rulings by higher courts** members of which have been appointed through a procedure not compliant with EU law (AW “T”, C-225/22)

Protecting democratic institutions: National parliaments

ECtHR

- “Such safeguards [against arbitrariness] serve to ensure the observance of the **rule of law** during the procedure for examining **electoral disputes**, and hence the **integrity of the election**, so that the **legitimacy of Parliament** is guaranteed and it can thus operate without the risk of any criticism of its composition. What is at stake is the preservation of the **electorate’s confidence** in Parliament.”
- “The **discretion** enjoyed by the national authorities should nevertheless be compatible with the concepts of “**effective political democracy**” and “the **rule of law**” to which the Preamble to the Convention refers (ibid.). It follows that **parliamentary autonomy** can only be validly exercised in accordance with the **rule of law**” (Mugemangango v. Belgium, 310/15, §§ 87-88)

CJEU

- “**Transparency and openness of the legislative process** ... contributes to reducing **doubts in the minds of citizens**, not only as regards the lawfulness of an isolated legislative measure but also as regards the **legitimacy of the legislative process as a whole**” (Hungary v. Parliament and Council, C-156/21, §§ 58-59).

Provisional conclusion

- The ECtHR covers a **wider range of topics** (protection of minorities, hate speech).
- On the **substance** of the common topics, there is **broad consensus** between Strasbourg and Luxembourg, despite slight **differences in the formulations**. Against the background of other areas showing discrepancies, this is **not self-evident** and should therefore be **commended**.
- **Judicial independence** is one of the areas showing the **biggest convergence** between the two European Courts. This is perhaps because it is **most under attack** from populism.

2. The challenges ahead

1. Execution of the judgments

- Depends to a large extent on the **adherence of national authorities to the rule of law**
 - This is especially true for the **ECtHR**, who has **no means of coercion** at its disposal
 - By contrast, the **CJEU** can impose **financial sanctions** (see the CJEU on the conditionality mechanism or recently *Commission v. Greece*, C-368/24)
- This adherence is **under increasing pressure**
 - Illustrations: **Meloni letter** (5/2025), signed by 9 Governments, concerning **migration** addressed to the ECtHR; Ministers in France and Belgium openly stating that they will not execute some Strasbourg judgments
 - Possible explanation: too much **assertion** and not enough **explanation** in the case-law?
 - Possible reaction: Courts should redouble their efforts to **explain what the benefit of the rule of law is** → be **more pedagogical**, i.e. **better explain** that the **alternative** to the rule of law is **arbitrariness** (Al-Dulimi, § 145) → better explain what the **consequences of arbitrariness** for the individuals are

The challenges ahead (II)

2. Disinformation and fake news:

- Seem to play an **important role** in the rise of populism
- **Blind spot** in the case-law?
- Challenge: tackling disinformation without breaching **freedom of expression** (see Bradshaw and Others v. UK, 15653/22, §§ 160-161)
- → disinformation and fake news should be openly and actively **challenged on their substance** rather than **banned, silenced or prosecuted** → an important democratic challenge.

3. Composition of the European Courts: judges in Strasbourg and Luxembourg are not appointed for life but have a **limited term of office** (not renewable in Strasbourg) → they are **regularly replaced** → national authorities have a lot to say in this renewal process → **vulnerability**. However, there are safeguards: the **screening of candidates** by committees. What will be the future of this mechanism?

The challenges ahead (III)

However that may be:

1. European Courts are **stronger** and their jurisprudence has **greater authority** when they are **united**.
2. In practice, they are united when it comes to upholding the **rule of law** against populist attempts to undermine it. This is all the more to be commended, as there is no such unity in all common areas.
3. But even united, the European Courts cannot successfully fulfil this task in the long term without the **support of a majority of democratic citizens**.
4. Ergo: upholding democratic values and protecting democratic institutions is **as much a challenge for the citizens** as it is for the two **European Courts**.

Thank you!

**More information on the interplay between
the Convention and EU law on:**

www.johan-callewaert.eu