Recent challenges to the judicial independence of the European Court of Human Rights: rationale and available remedies

di Diego Venuti

Abstract: *Recenti sfide all'indipendenza della Corte Europea dei Diritti dell'Uomo: ratio e possibili rimedi* – This work explores emerging challenges to the independence of the judiciary at supranational level, focusing on the European Court of Human Rights. While the scholarship has given much attention to national-level attacks on judicial independence, recently developed ways to influence the Court's decision-making reveal a troubling new dimension. What happens when it is the independence of supranational bodies (that should protect independence at national level) that is challenged? Are there enough safeguards against such challenges? Are these challenges effective? If not, why are they even carried out?

Keywords: Judicial independence; Rule of law; Interpretation; ECtHR; Living constitution

1. Overview

There are multiple instances which show that in the last years the number of challenges to judicial independence – especially with respect to the European panorama – has been increasing. Hungary, Poland and Bulgaria provide clear examples of such paths, but these are – unfortunately – not isolated instances[1].

In light of this, ensuring a full respect of the principle of judicial independence – which shall be understood as the freedom for judges to decide «according to law»[2] – becomes fundamental. To avoid the possible

[1] By way of example, the proposed reform of the Italian judicial system has raised serious concerns about a possible watering down of the principle of judicial independence. In this regard, see E. Giordano, *Giorgia Meloni's Vendetta Against Italy's Judges* in *Politico* 13-11-2024, www.politico.eu/article/giorgia-melonis-italy-judges-viktor-orban-hungary-albania-rome-court-russia-war-ukraine/.

[2] D. J. Barron, *Judicial Independence: Origins and Contemporary Challenges* in 25(1) *Roger Williams U. L. Rev.* 1, 10 (2020). A similar definition of judicial independence, with specific reference to the independence of supranational and international judicial bodies has been developed by E. Voeten (see E. Voeten, *International Judicial Independence*, in J. L. Dunoff, M.A. Pollack (Eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge, 2012, 421-444), according to whom judicial independence entails the freedom to adjudicate without taking into

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risk of a lack of protection at national level deriving from the unwillingness or inability of national courts to ensure compliance with fundamental rights of individuals and the rule of law, European States have established, in the past decades, some mechanisms of supranational judicial review, namely the Court of Justice of the European Union and the European Court of Human Rights. These Courts have, indeed, issued important judgements protecting judicial independence in cases where national governments were unable or unwilling to do so[3].

Furthermore, European Treaties and the European Convention on Human Rights as well explicitly provide for the independence of such supranational judges[4].

The issue that this work intends to examine, however, is not about how supranational courts have protected the independence of the judiciary at national level. As a matter of fact, this issue has been broadly dealt with by numerous scholars[5], which would make a further analysis about it redundant. Instead, the purpose of the present analysis is to study possible challenges to the independence of supranational judges themselves.

The importance of studying judicial independence also from this perspective has emerged from a recent major attempt to influence the way the European Court of Human Rights interprets the law.

This work intends to shed light on a key phenomenon which the scholarship in the last years has not thoroughly investigated, namely on challenges to the independence of the European Court of Human Rights (hereinafter "the Court"). Furthermore, the work also intends to tackle the possible reasons behind such challenges (*i.e.*, what is the goal that players seek to achieve by watering down the Court's independence) and the possible outcomes.

To perform such analysis, the work will be structured as follows: the first part will provide a clear example of a challenge to the judicial

account the *desiderata* of other players. A further definition of judicial independence as the freedom to adjudicate only upon the law is also endorsed in H. Molbaek-Steensig, A. Quemy, *Judicial Independence and Impartiality: Tenure Changes at the European Court of Human Rights*, in 34(3) *Eur. J. Int'l Law* 581-613 (2023).

[3] See, *inter alia*, CJEU, no. c-791/19, *European Commission v Republic of Poland*, 15-07-2021 and ECHR, no. 20261/12, *Baka v Hungary*, 23-06-2016.

[4] See article 253 TFEU according to which «[t]he Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt» and article 21(4) of the European Convention on Human Rights according to which «[d]uring their term of office the judges shall not engage in any activity which is incompatible with their independence».

[5] See, *ex multis*, L. Bachmaier Winter, *Judicial independence in the Member States of the Council of Europe and the EU: evaluation and action* in 20 *ERA Forum* 113, 127 (2019) doi.org/10.1007/s12027-019-00551-3; I. Jelić, D. Kapetanakis, *European Judicial Supervision of the Rule of Law: The Protection of the Independence of National Judges by the CJEU and the ECtHR* in 13 *Hague J. Rule Law* 45, 77 (2021) doi.org/10.1007/s40803-021-00155-5 and R. Manko, *On judicial independence*, European Parliamentary Research Service (available at the following link On judicial independence).

independence of the Court coming from several member states of the Council of Europe. This part will also argue that the major institutions of the Council of Europe have not acquiesced to such blatant challenge but, quite on the contrary, they have vehemently reacted to it. The first part will, furthermore, argue that – adopting a comparative overview – similar challenges to the independence of the judiciary have already occurred in other countries/judicial systems.

The second part will delve into the alleged reasons behind such curbing attempt and will argue that they do not appear to be supported by an analysis of the Court's recent case-law. In light of this, part two will also argue that the possible actual rationale of such challenges is to let national states (and not supranational judicial bodies) become the drivers of policy changes.

The third part will consider that – although it is not yet clear what may be the future evolution of challenges to the Court's judicial independence – the Court possesses the necessary constitutional strength to face these challenges to its independence.

Finally, part four presents the relevant conclusions.

2. Challenges to the judicial independence of the ECtHR: a new perspective (?)

On May 22, 2025, a group of nine European Heads of Government (of Denmark, Italy, Austria, Belgium, Czech Republic, Estonia, Latvia, Lithuania and Poland) signed a letter[6] expressing their intention to «cooperate» in the pursuance of the following goals: to gain more «room nationally to decide on when to expel criminal foreign nationals»[7], to gain «more freedom to decide on how our authorities can keep track of for example criminal foreigners who cannot be deported from our territories»[8] and to «be able to take effective steps to counter hostile states that are trying to use our values and rights against us»[9].

Clearly, the above are goals of a political nature which Governments that have been democratically elected by their citizens have the full right to pursue.

What shall be noted from a Public Law standpoint, however, is that the letter implies that to reach the above goals a revision of the European Convention on Human Rights (or at least of its interpretation) is necessary.

In other words, the signatories recognize that «it is necessary to start a discussion about how the international conventions match the challenges that we face today. What was once right might not be the answer of

[6] The full text of the Letter is available at the following link Lettera_aperta.
[7] See page 2 of the Letter.
[8] *Ibid.*
[9] *Ibid.*

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tomorrow»[10]. Therefore, what is proposed is to adapt the Convention to the ever changing social and economic context, to allow the Convention to change following the «ebb and flow»[11] of social and economic events. The push towards a different and more flexible interpretation of the Convention, as well as the underlying paradox of such approach will be deeply dealt with in section 3 below.

Furthermore, the States also recognize that the main (if not only) source of the problem is the Court, *recte* the way it has been interpreting the Convention over time. In fact, the Court is accused of having extended its protection too much, in a way that prevents national governments from pursuing the – political – goals for which they have been elected[12].

In the letter's wording it is held that «as leaders, we also believe that there is a need to look at how the European Court of Human Rights has developed its interpretation of the European Convention on Human Rights. Whether the Court, in some cases, has extended the scope of the Convention too far as compared with the original intentions behind the Convention, thus shifting the balance between the interests which should be protected. We believe that the development in the Court's interpretation has, in some cases, limited our ability to make political decisions in our own democracies»[13].

According to the signatories this path is particularly noticeable in cases concerning migration issues in which the Court has interpreted the convention in a way that has «resulted in the protection of the wrong people»[14].

Considering the above, the purpose of the letter is clearly to put somehow pressure on the Court to revise the interpretation of the Convention in a manner that better aligns with the political *desiderata* of the signing parties.

Just two days after the release of such letter (therefore, on May 24, 2025) the Secretary of the Council of Europe Alain Berset issued a harsh response defending the independence of the Court[15]. In his response he claimed that «[t]he defence of the Court's independence and impartiality is our foundation […]. Debate is healthy, but politicising the Court is not. In a society governed by the rule of law, no judicial body should be subject to

[10] See page 1 of the Letter.
[11] To use the words of the dissenting opinion of Justice Sutherland in the well-known case *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[12] This point echoes the longstanding questions on the limits of judicial review (*i.e.*, how further can judicial review go without interfering with the people's will?) and on the so-called counter-majoritarian difficulty. For a deeper analysis on the topic see B. Friedman, *The History of the Countermajoritarian difficulty, part one: the Road to Judicial Supremacy* in 73(2) *N. Y. U. L. Rev.* 333 (1998).
[13] See page 2 of the Letter.
[14] *Ibid.*
[15] See *Council of Europe Rejects Political Pressure on ECHR in Response to Meloni*, Euronews (May 24, 2025), www.euronews.com/my-europe/2025/05/24/council-of-europe-rejects-political-pressure-on-echr-in-response-to-meloni.

political pressure. Institutions that protect fundamental rights cannot bend to political cycles».

In his words, therefore, Mr. Berset explicitly refers to the letter as a blatant attempt to politicize the Court, thus undermining the core value of its judicial independence.

Although it may seem that having political players explicitly asking a judicial body to amend its decision-making path is something that never happened in history, it shall be recalled that this is not an unprecedented event. Indeed, a comparative overview within the Western Legal tradition shows that American Constitutional history has already (and is currently witnessing) instances where political players openly rejected the interpretation of the law given by the Supreme Court.

For instance, on April 20, 2023, House Resolution no. 314 was introduced into Congress. The title of such resolution «Acknowledging that the United States Supreme Court's decisions in the Insular Cases and the territorial incorporation doctrine are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of *Plessy v. Ferguson* that have long been rejected, are contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law» speaks for itself.

Without delving into excessive details, the issue of the so-called "Insular Cases" (which were decided roughly in the late 1890s and early 1900s) was whether inhabitants of the US territories could be entitled to a birthright of citizenship even if they were not born in the United States[16]. The original answer of the Court was negative.

In the early 2020s it was thought that a revision of the "Insular Cases" was due mainly because of their discriminatory nature[17]. Notwithstanding this shared thought, the Supreme Court refused to grant certiorari in *Fitisemanu v. United States*[18].

The disappointment for a failed revision of the Insular Cases was probably the reason which led to the introduction of the above-mentioned bill (which was introduced into Congress but was never adopted).

The main issue that emerges from the analysis of the language employed in the present bill, both in its title and in the final resolutions (in

[16] One of the most significative and interesting cases in this regard is *Downes v. Bidwell* 182 U.S. 244 (1901).

[17] In the concurring opinion of *United States v. Vaello Madero* U.S. 596 (2022), Justice Gorsuch held that «the time has come to recognize that the Insular Cases rest on a rotten foundation». It was also held, as the title of the bill clearly expresses, that the rationale behind the insular cases was the same one of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which established the separate but equal doctrine.

[18] *Fitisemanu v. United States*, No. 20-4017 (10th Circuit. 2021). The issue in the case was whether people born in American Samoa could be entitled to a birthright American citizenship.

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which it is stated that «The House of Representatives [...] rejects the Insular Cases and their application to all present and future cases and controversies involving the application of the Constitution in United States territories»[19]) is that the political power (in this case the Legislative branch of Government) is not just expressing its view on the decision-making path followed by the Supreme Court, which would have been totally legitimate under the First Amendment. To the contrary, the purpose of the bill is to expressly reject the interpretation of the Constitution adopted by the Supreme Court in the exercise of its constitutionally assigned duties[20].

Therefore, the fact that political power seeks to pressure a court to change its interpretation of a piece of legislation (be it the interpretation that the European Court of Human Rights is giving of the European Convention on Human Rights or the interpretation that the Supreme Court is giving of the United States Constitution), poses a serious threat to the freedom of the judges to adjudicate «according to law»[21] and, more broadly, to the principle of separation of powers which is a cornerstone of the rule of law.

The parallel between the letter signed by European heads of Government and the Bills introduced into the United States Congress shows that in spite of some differences that may exist between the two scenarios – the Letter pressures the European Court of Human Rights to adopt a more permissive interpretation of the Convention, while the analysed bill interprets the Constitution itself – paths of undermining judicial independence present relevant similarities across time and across different countries. Therefore, understanding paths of court-curbing attempts becomes pivotal in today's scenario to better identify (and address) challenges to the freedom of judges to adjudicate only pursuant to law.

3. The ground(less)ness of the critiques to the ECtHR

It is now worth considering the legal arguments that are put forward in the letter signed by the group of nine European Heads of Government. The letter refers to the too broad interpretation of the Convention that the Court has been adopting concerns migration issues «We have seen, for example, cases concerning the expulsion of criminal foreign nationals where the interpretation of the Convention has resulted in the protection of the wrong people and posed too many limitations on the states' ability to decide whom to expel from their territories»[22].

The letter itself, however, does not explicitly refer to specific instances in support of its legal arguments. Hence, to investigate the

[19] See paragraph (4) of the final resolutions.
[20] For the sake of completeness H. Res. 314 is not the only bill that expressly rejects the rulings of the Insular Cases. In fact, on March 26, 2021, a bill having the same title of H. Res. 314 was introduced into Congress (but was never adopted).
[21] D. J. Barron, *cit.*
[22] See page 2 of the Letter.

ground(less?)ness of the above claims, a comprehensive analysis of the case law of the Court has been carried out. In particular, the analysis has covered both final judgements and *interim* judgements and has been limited to cases occurred in the last years (since 2018, but the major focus has been on the early 2020s), especially having as one party one of the countries whose governments have signed the letter. The results that have been obtained have been classified according to their outcome (violation/no violation of the relevant provisions)[23].

The study of the Court's decisions available after the above selection proves that there are no elements to conclude that the Court never took into account the needs and the administrative and logistical issues that States were experiencing, especially with respect to migration issues. In fact, as will be detailed *infra*, there are multiple instances in which the Court expressly acknowledged the challenges that States were facing.

It is also true, however, that the analysed case law shows that while the Court often acknowledged such challenges, it does not always accept them as a justification for the alleged breaches of the Convention.

In any case, the analysis of the Court's case law shows that the Court has always adopted well-grounded decisions that carefully evaluated both the legal and the factual scenario. Moreover, there are many instances where the Court has rejected the claims brought by individuals and sided with the states (the same states that signed the letter) on migration issues.

For instance, on July 18, 2023, the Court decided case *Camara v. Belgium*[24]. The case concerned an application for international protection in Belgium. The applicant reported that in the period between the filing of his

[23] This research has been performed on the HUDOC database. Specifically, I looked up for any case decided from 2018 to July 2025 addressed against one of the of the States signing the Letter and relating to migration issues and/or asylum right (results have been filtered through the use of Boolean operators). I then read all the retrieved decisions to filter only those relating to possible violations of human rights in the fields of migration and/or of asylum seeking (which predominantly deal with alleged infringements of Articles 3 – Prohibition of Torture – and 8 – Right to respect for private and family life – of the Convention). This research was meant to exclude cases dealing with human rights issues in the field of migration law only as *orbiter dicta* and not as main topic under scrutiny. By way of example, in ECHR, no. 1828/06 *G.I.E.M. S.r.l. and others v. Italy*, 28-10-2018, the partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque underscored that the Court is subject to «strong headwinds» (§57 -59) by populist movements because its decision-making allegedly favors criminality and immigration. Although this remark effectively underscores that the Court's decision-making was criticized by some political players long before 2025, *G.I.E.M. S.r.l. and others v. Italy* is a case that deals with the confiscation of real estate properties and the presumption of innocence, and has been, therefore, not subject to the present analysis. Moreover, because for each State under scrutiny the Court has delivered on average tens of decisions on possible infringements of human rights relating to asylum seeking and migration law, this article does not intend to carry out an analysis of each of these decisions. Instead, when selecting the examples to include under Section 3 of this article, preference has been given to the chronologically most recent decisions.

[24] ECHR, no. 49255/22 *Camara v. Belgium*, 18-07-2023.

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application for asylum and the assignment of a safe place he was forced to live for 112 days in degrading conditions[25]. A further issue was that there had been a decision by a local Belgian Court establishing that the applicant should receive adequate accommodation, which was allegedly not complied with by Belgian authorities.

The decision issued by the Court clearly indicated that the Court took into consideration and weighted all the arguments put forward by the parties (the lack of adequate accommodation on one hand and the skyrocketing number of asylum seekers in Belgium[26] on the other one). The Court concludes that, notwithstanding the difficult situation that Belgium was facing, there had been a (systemic) violation of article 6 of the Convention for failure to comply with a Court's final decision[27] (and a consequent hindrance of the rule of law principle). In support of its legal reasoning, the Court quoted decisions in which it had ruled in similar ways[28]. Therefore, there appears to be no shift in the interpretation that the Court is giving to the Convention. Quite on the contrary, the Court showed that it maintained its well-established line of thought. Furthermore, in the same decision, the Court sided with Belgium rejecting the claim of violation of article 8 of the Convention due to failure to exhaust the remedies available at national level[29].

Moreover, in another case concerning Belgium[30] always involving asylum applications, the Court completely sided with Belgium holding that «the applicant's detention had not jeopardised his health and that his state of health had not deteriorated» and that «the domestic authorities had acted with the requisite diligence, that the length of time for which the applicant had been at the Government's disposal – approximately 13 months – could not be regarded as excessive».

The same kind of reasoning could be applied to migration claims against other countries, such as Denmark. Indeed, when adjudicating upon *Sharafane v. Denmark*[31] the Court considered a possible violation of article 8 of the Convention arising from a *de facto* permanent ban to enter the country

[25] *Ivi*, § 21 «The applicant explained that, during the 112 days between the filing of his asylum application on 15 July 2022 and his being assigned a place in a reception centre on 4 November 2022, he had slept on a makeshift mattress provided by associations or on cardboard boxes after the mattress had disappeared from the spot where he had left it. He recounted having slept at the Nord and Midi railway stations, or in the vicinity when police had not allowed the homeless to remain in the station at night. He had also slept in parks the names of which he did not know».
[26] *Ivi*, §114 – 116.
[27] *Ivi*, § 117.
[28] ECHR, G. Ch., no. 28342/95, *Brumărescu v. Romania*, 28-10-1999; ECHR, no. 34638/18, *M.K. and Others v. France*, 8-12-2022.
[29] *Camara v. Belgium*, § 136.
[30] ECHR, no. 52548/15, *K.G. v. Belgium*, 6-11-2018, press release is available at the following link Judgment K.G. c. Belgique - detention of a migrant for security reasons.
[31] ECHR, no. 5199/23, *Sharafane v. Denmark*, , 12-11-2024.

issued against an individual who was convicted for illegal possession of drugs. As done in *Camara v. Belgium*, when establishing that Denmark had breached article 8 of the Convention, the Court grounded its decision, *inter alia*, on similar rulings[32]. Also in this regard, therefore, the Court followed its previous case law and there appears to be no sign of the Court, having «extended the scope of the Convention too far as compared with the original intentions behind the Convention».

Indeed, also with respect to Denmark there are some instances in which the Court decided to side with the state and not with applicants. In fact, on November 12, 2024, the Court ruled on *Al-Hebeeb v. Denmark*[33] concerning, again, a possible violation of article 8 of the Convention following the expulsion of a settled migrant. In this case the Court carefully weighted the interest of both parties and evaluated whether the assessment carried out by Danish authorities was in line with the standards of protection established over time by the Court and with the proportionality assessment. In light of this the Court concluded that «the interference with the applicant's private and family life was supported by relevant and sufficient reasons»[34] and that there was no breach of article 8[35].

The same reasoning applies also with regard to States other than the ones that have signed the letter urging for a shift in the interpretation of the Convention. such as Spain. In fact, in case *N. D. and N. T. v. Spain*[36]

[32] For instance, ECHR, no. 47160/99, *Ezzouhdi v. France*, 13-02-1999, and ECHR, no. 41643/19, *Abdi v. Denmark*, 14-09-2021.

[33] ECHR, no. 14171/23, *Al-Hebeeb v. Denmark*, 12-11-24.

[34] § 73. More in detail, the Court held that «It is satisfied that very serious reasons were adequately adduced by the national authorities when assessing his case. It notes that at all levels of jurisdiction there was an explicit and thorough assessment of whether the expulsion order could be considered to be contrary to Denmark's international obligations. The Court points out in this connection that where 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 weighed up the applicant's personal interests against the more general public interest in the case, it is not for the Court 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. In the Court's opinion, such strong reasons are absent in the present case».

[35] To avoid any redundancy the same path of reason could be applied also to the case of Italy (another signatory – and promoter – of the Letter). In fact, the case law of the Court shows that, especially in migration issues, the Court has been always very careful in evaluating the arguments put forward by each party, in assessing whether the measures adopted by a State were proportionate and in basing its decision, *inter alia*, on its previous case law and practice. By following this path, records show that there are some instances in which the Court found a State in breach of certain provisions of the Convention (see, for instance, ECHR, no. 21329/18, *J. A. and others v. Italy*, 30-3-2023, and others in which it was held that Italy was fully compliant with its duties established in the Convention (see, for instance, ECHR, no. 18787/17, *W.A. and others v. Italy*, 16-11-2023).

[36] ECHR, nos., 8675/15, 8697/15, *N. D. and N. T. v. Spain*, 13-02-2020. The issue was a possible violation articles 3 and 13 of the Convention and of article 4 of Protocol 4,

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concerning the collective expulsion of aliens, the Court expressly acknowledges and considers the difficulties of Spain in preventing the entry of hundreds of aliens who «deliberately take advantage of their large numbers and use force [...] to create a clearly disruptive situation which is difficult to control and endangers public safety»[37] and notes the efforts undertaken by Spain in this regard[38]. In holding that Spain did not violate the Convention the Court also held that «it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the [...] border fences [...], taking advantage of the group's large numbers and using force»[39].

The above analysis, therefore, makes it clear that, contrary to what has been alleged in the letter signed by the Heads of Government of nine European states, there has been no shift in the Court's interpretation of the Convention that could be considered as too broad or too «far as compared with the original intentions behind the Convention». Indeed, the Preamble of the Convention itself establishes that the original intentions of the Convention were to achieve a «greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms». And the protection of the fundamental freedoms is the core goal of all the previously analysed decisions.

In sum, there have been no modifications of the decision-making path of the Court following the «ebb and flow» of economic and social events. This position is also sustained by the fact that – in addition to criticising in many ways the Court's judicial review – the letter does not mention one single example/case sustaining the arguments therein enshrined, and none of the political leaders who have signed it have better clarified, to date, the contents of the letter.

Indeed, nothing in the decisions of the Court prevents the states from or hinders their power to pursue the «effective political democracy». As a matter of fact, the decisions of the Court have never imposed to the State

arising from an alleged «ill treatment» (§ 3), which said aliens would have faced if returned to Morocco.

[37] § 201.

[38] As held in § 232 «The Court notes the efforts undertaken by Spain, in response to recent migratory flows at its borders, to increase the number of official border crossing points and enhance effective respect for the right to access them».

[39] § 231. For the sake of completeness, in ECHR, no. 13337/19, *H. T. v. Germany and Greece*, 15-10-2024, (concerning the expulsion of an asylum seeker from Germany to Greece where he was detained by Greek authorities) the main issue was, *inter alia*, a possible violation of article 3 of the Convention. In the case, although the Court acknowledges that «Greece is still facing a challenging situation in dealing with a large number of new asylum applicants», that «significant progress has been attained by Greece in putting in place the essential institutional and legal structures for a properly functioning asylum system» (§ 62) and that «the European Commission considered that Greece had made significant progress» [with regard to the proper management of asylum seekers], it was held that article 3 of the Convention was infringed.

under scrutiny the duty to change its internal provisions (unless in cases of systemic violation of the rights protected by the Convention, as was the case of *Camara v. Belgium*).

Clearly, the fact states are free to follow the political course that is chosen by the democratic will of their people does not mean that the Court should tolerate a *laissez-faire* by the national governments, free from any form of judicial review. To the contrary, governments shall exercise their political will in compliance with the Convention which, as recalled by Secretary Alain Berset in his statement, Member States have freely chosen to ratify. In this framework the task of the Court is to oversee compliance to these voluntarily undertaken obligations[40].

Therefore, if the previous analysis has shown that the Court's case law does not fully support the argument that the Court has prevented national governments from pursuing their political goals, the analysis must focus on the possible underlying rationale of the letter signed by the nine European Heads of Government.

As recalled under section 2, the major points that the letter puts forward are essentially two: first that the Convention shall be interpreted to adapt it to the «challenges that we face today», but – second point – the interpretation should not be the one proposed by the Court because such interpretation puts too many constraints on the States.

The first point does not appear to be grounded. In fact, the Court's case law has historically always interpreted the Convention as a «living instrument which [...] must be interpreted in the light of present-day conditions»[41]. Such evolutionary interpretation of the Convention is the reflection of the idea that «law can progressively achieve an ideal of justice and freedom through the careful work of judges»[42].

Notably, some scholars have argued that one of the major limits of an evolutionary interpretation of the conventional text is that this kind of interpretation may conflict with the principle of subsidiarity, which is a key

[40] The wording used by Secretary Berset «The European Court of Human Rights is not an external body. It is the legal arm of the Council of Europe — created by our member states, established by sovereign choice, and bound by a Convention that all 46 members have freely signed and ratified. It exists to protect the rights and values they committed to defend» implies that States have freely chosen to be part of the legal framework of the Convention, committing themselves to protect some rights. This commitment entails, *inter alia*, the duty to respect the Convention and the decisions of the Court.

[41] ECHR, no. 5856/72, *Tyrer v. The United Kingdom*, 25-4-1978, § 31; see also ECHR, no. 39594/98, *Kress v. France*, 7-6-2021, § 70; ECHR, no. 23459/03, *Bayatyan v. Armenia*, 7-7-2021, §102. One of the few instances in which the Court departed from such evolutionary interpretation is ECHR, G. Ch., 52207/99, *Bankovic and others v. Belgium and others*, 12-12-2001, in which the Court refers to the original intent behind the Convention claiming that «The Convention was not designed to be applied through the world, even in respect of the conduct of Contracting States» (§ 80).

[42] G. Romeo, A. Pin, *Kelsenian Originalism in Europe* in 58 *Vand. J. Transnat'l L.* 670 (2025).

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principle of the Convention[43]. Because asylum right and immigration law are fields where the political direction of the national government matters a lot, respecting the principle of subsidiarity becomes pivotal. A possible justification of the Letter under the principle of subsidiarity seems, however, unconvincing. In fact, as the decisions analysed under this section have showed, the Court has not based its decision-making on judicially created provisions but on a scrupulous evaluation of the factual and legal circumstances under scrutiny.

Indeed, it may be argued that it is not in the Court's interest[44] to engage in judicial activism specifically in the field of asylum right and immigration law, in which field the Court itself is aware that its decisions are easily politicized[45].

In addition to endorsing an evolutionary interpretation of the Convention, the letter also claims that the Court has «extended the scope of the Convention too far as compared with the original intentions behind the Convention»[46]. This argument seems in contrast with the need to adopt an evolutionary interpretation which would allow the Convention to better face today's challenges.

In other words: while on the one hand the Heads of Government are stating the need for a more flexible interpretation of the Convention – which, indeed, the Court has always carried out – on the other hand the same Heads of Government are pushing the Court to adopt a minimal interpretation of the Convention: an interpretation whereby the conduct of States in the compliance with the Convention would be assessed in a more permissive way.

The actual purpose of the Letter, therefore, is not to push the Court to adopt a more flexible interpretation of the Convention, but to push the Court to allow States to adopt a more flexible interpretation of the Convention.

[43] Both the Preamble of the Convention and Protocol 16 make an explicit reference to this principle. The scholarship has held that the so-called margin of appreciation doctrine – whereby Staters enjoy a certain degree of autonomy in applying the Convention, is an expression of such principle. In this respect see M. Bosnjak, K. Zajac, *Judicial Activism and Judge-Made Law at the ECtHR* in 23(3) *Human Rights L. Rev* 13 (2023), according to whom «The biggest brake on the accumulation of judge-made law at the ECtHR is the principle of subsidiarity».

[44] Assuming that the Court's interest is understood as the desire that its decisions are fully complied with by the States.

[45] See footnote 23 and case-law cited. Furthermore, it is worth noting that, because the Court is aware of the risk of politicization, and hence of possible noncompliance with its decisions, it has historically allowed for a wide margin of discretion to be adopted, specifically in cases involving asylum seekers (see in this respect A. N. Reyhani, G. Golmohammadi, *The Limits of Static Interests: Appreciating Asylum Seekers' Contributions to a Country's Economy in Article 8 ECHR Adjudication on Expulsion*, in 33(1) *Int'l J. Refugee Law*, 10 (2021) and case-law cited. On the relationship between States' margin of appreciation and the Court's case-law in immigration law see also D. Thym, *Respect for Private and Family Life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?*, in 57 *Int'l & Comp. L. Quart.* 87, 112 (2008).

[46] Page 2 of the Letter.

This fight about the interpretation that ought to be given to the Convention underscores the longstanding argument that the interpretation of a legal source entails a political component. In fact, as highlighted by Kelsen «the choice between the different meanings of a legal norm, […] is determined by norms other than legal, and this means by political norms. Hence the authentic interpretation of the law by a legal authority may be characterized as a political interpretation»[47].

In sum, what is proposed is to relinquish the Court's judicial activism in interpreting the Convention and to adjust the interpretation of the Convention by resorting to a minimal interpretation of the Convention itself which would be more observant of the original will of the states.

This, in turn, underscores a departure from the idea of «legal interpretation that pursues legal evolution through the judiciary»[48] in favour of an approach – typical of conservative governments[49] – that places states, and especially their governments, as the drivers of social changes.

4. Guarantees safeguarding the judicial independence of the ECtHR

The previous sections have argued that the allegation according to which the Court is giving the Convention a too broad interpretation, thus hindering the freedom of the states to pursue their political goals, does not appear fully grounded in the legal reasoning developed by the Court in migration issues.

Even though such arguments may be considered as groundless, the challenge to the Court's judicial independence is still standing.

Given that this challenge is very recent in time and that there are no previous records of similar challenges to the Court's independence (*i.e.*, the issuance of a letter whereby certain heads of government state that there is a problem with the way the Court interprets the convention and commit themselves to restore the balance with respect to the interpretation of the Convention) it is hard to foresee the possible future course of events.

It may happen – as it is highly plausible – that the letter remains an isolated instance (maybe followed by some sort of declaration/press conference) of hindrance to the Court's freedom to adjudicate only upon the law, as interpreted.

Adopting a less optimistic forecast, it could be foreseen that this letter is paving the way for justifying a diffuse non-compliance with the Court's rulings. Of course, this is a path that future studies shall carefully

[47] H. Kelsen, *Value Judgments in the Science of Law, in What Is Justice? Justice, Law, And Politics In The Mirror Of Science*, Oakland, 209, 1957.
[48] G. Romeo, A. Pin, *op. cit*, 671.
[49] See *It is time to reform the ECHR*, in *Financial Times*, 12-06-2025, available at the following link It is time to reform the ECHR suggesting that the Letter was sent by Heads of Government who are «facing growing challenges from the far right».

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investigate. Indeed, the scholarship[50] has shown that states' compliance with a supranational court's ruling also depends on their «homogeneity»[51], meaning the existence of «common cultural reference points» and «long tradition of common history, religion, culture and human values»[52]. If, however, national governments start conveying the idea that the decisions issued by international adjudicatory bodies (in this case the Court), do not reflect the basic values of the States, this may become a powerful tool to justify – both *vis-à-vis* the Court itself and the citizens (and electors) of that State – a reduced compliance with the rulings issued by the Court. This consideration is further reinforced by the fact that, as recalled above, «human rights tribunals cannot function effectively if they are perceived to be illegitimate»[53]. Clearly, stating that the Court's decisions no longer reflect the core values of a state plays a pivotal role in decreasing the Court's legitimacy in the eyes of the public.

Adopting an even less optimistic view of the above-described instance, it could even be said that the letter may pave the way to future threats to exit the Council of Europe in case the Court will be unwilling to accommodate the interpretation of the Convention desired by political parties. The scholarship has, indeed, shown[54] that exit threats are most effective when «states explicitly use the threat of exit to voice their demands for reform»[55]. Therefore, should the Court be reluctant to accommodate certain political *desiderata*, States could also threaten to leave the Council of Europe to achieve a more accommodating interpretation of the Convention.

In consideration of the high importance that the attempt to water down the Court's freedom to adjudicate only pursuant to law and the different consequences that this may bring in the near future, it is important to investigate whether the Court possesses the political strength to resist against challenges that are posed to its independence. The scholarship[56] has brilliantly studied whether the institutional features of the Court would enable it to face a considerable amount of political pressure.

In fact, it has been held that «the ECtHR is quite well-equipped to prevent or withstand eventual attacks on its structural features and judicial personnel thanks to decentralization of the system, rather high level of judicial self-government and institutional safeguards of judicial

[50] L. R. Helfer, A. M. Slaughter, *Toward a Theory of Effective Supranational Adjudication* in 107 *Yale L. J.* 335 (1997).
[51] *Ibid.*
[52] *Ibid.*
[53] K. Dzehtsiarou, *European Consensus And The Legitimacy Of The European Court Of Human Rights*, Cambridge, 143, 2015.
[54] I. von Borzyskowski, F. Vabulas *When Do Withdrawas Threats Achieve Reform in International Organizations?* in 4(1) *Global Perspectives* 2 (2023).
[55] *Ibid.*
[56] The most complete work is the one authored by J. Petrov, *The Populist Challenge to the European Court of Human Rights* Jean Monnet working Paper 3/18 (available at the following link The Populist Challenge to the European Court of Human Rights).

independence»[57].

More in detail, given that the Convention regulates almost every aspect related to the operation and the jurisdiction of the Court and the appointment of judges, and given that the parties to the Convention are 46, it would be difficult that all the signatories of the Convention agreed to ratify an amendment to the Convention itself for the only purpose of watering down the guarantees of judicial independence of the Court's judges.

However, as recognized by the scholarship already some years ago «that does not mean that individual states or groups of like-minded states cannot start a campaign against the Court and influence its functioning informally through political feedback channels»[58], which is exactly the current case.

Furthermore, the independence of judges (understood as individuals) is also well protected by the Rules of Court which establish a considerable degree of autonomy in the hands of Court's judges. In fact, only the President of the Court may amend the composition of the Court's sections[59], judges may not be dismissed from their office unless the judges themselves (taking the decision with a two-thirds majority) so decide[60] and they hold office for a period of nine years, which may not be renewed[61].

The guarantees provided for both in the Convention and in the Rules of Court establish a strong decentralization or detachment of the judges from the national political powers (which are the players most likely to curb the Court), which in turn creates a strong protection of the independence of the supranational judiciary.

If, therefore, the guarantees enshrined in the Convention and in the Rules of Court appear to be strong enough to allow the Court to resist curbing attempts from political players, is there really any risk which such initiatives might entail for an effective protection of human rights at international level?

The answer appears to be positive.

First this is because, as the scholarship has duly noted «human rights tribunals cannot function effectively if they are perceived to be

[57] J. Petrov, *op cit*, 3.

[58] *Ivi*, 19.

[59] Rule 25(4) «The President of the Court may exceptionally make modifications to the composition of the Sections if circumstances so require».

[60] Rule 7 «No judge may be dismissed from his or her office unless the other elected judges in office, meeting in plenary session, decide by a majority of two-thirds that he or she has ceased to fulfil the required conditions. Any judge may set in motion the procedure for dismissal from office». Analogous protection is also enshrined in article 23 of the Convention «No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions».

[61] Article 23 of the Convention «The judges shall be elected for a period of nine years. They may not be re-elected».

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illegitimate»[62]. It follows that «just like any other (international) court, the ECtHR needs legitimacy support for its proper and effective functioning. [...] For legitimate and effective functioning, courts need the diffuse support of the public»[63].

Clearly, contracting states are bound to comply with the Court's rulings[64], but if one country's citizens (*recte*, voters) are dissatisfied with the Court's decision-making path, it may be easier for such country not to comply with the Court's rulings, at least in states in which the Convention does not enjoy (by operation of law or *de facto*) the same hierarchical value of the Constitution[65].

This perspective, furthermore, raises another serious concern (which could be dealt with by future contributions), namely, can we truly call independent (*i.e.*, able to decide only «according to law») a judicial body whose decision-making path is influenced by popular opinion? Isn't there a sort of compromise between full application of the law and effective compliance that any judicial authority must accept?

To date, however, records show that «state compliance with the ECHR judgements is nearly universal»[66]. In fact, considering the Annual Report of the Committee of Ministers relating to 2024[67], over the last year 894 cases were closed by Committee of Ministers[68], out of an average of about 1,000 new cases[69].

[62] K. Dzehtsiarou, *cit*, see note 53.
[63] J. Petrov, *cit.* 27 ss.
[64] As established in article 46 (1) of the Convention which states that «The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties».
[65] By way of example, article 90 of the Turkish Constitution rules that «In the case of a conflict between international agreements [...] concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail». The Convention, therefore, has a legal status between ordinary law and the Constitution. This, however, has not resulted in a full observance of the Convention. In fact, the scholarship has held that «Turkish first instance courts did not imply this provision in effective way, because of their conservative legal approach or their lack of technical knowledge about the provisions of the European Convention on Human Rights» (A. Özkan Duvan, *The Judicial Application of Human Rights Law in Turkey*, in 3(1) *CHKD* 60 (2015)). Another example of this is Poland, where the Polish Constitutional Tribunal held that article 6 of the Convention is in partial violation of the Polish Constitution (decision K 6/21 of November 24, 2021, of the Polish Constitutional Court).
[66] D. Hawkins & W. Jacoby, *Partial Compliance: A comparison of the European and Inter-American American Courts for Human Rights*, Paper prepared for delivery at the 2008 Annual Meeting of the American Political Science Association, Boston, MA, August 28-31, 2008, (available at the following link Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights).
[67] Which may be viewed via the following link Annual Report 2024 - Department for the Execution of Judgments of the European Court of Human Rights.
[68] Page 37 of the Report.
[69] Data on annual new cases are available on page 136 of the Report (992 new case in 2024, 1043 in 2023 and 1046 in 2022). Therefore, data show that on average around 90% of the cases decided by the Court are closed by the Committee of Ministers).

Furthermore, there is no clear indication that the number of cases closed by the Committee of Ministers is declining (therefore suggesting a path of possible non-compliance with the Court's rulings, especially concerning some countries)[70].

5. Final Considerations

This work has analysed a new form of challenges to judicial independence, *i.e.*, curbing attempts to a supranational adjudicatory body like the European Court of Human Rights.

The letter recently signed by nine European Heads of Government represents a crucial attempt to influence the decision-making path of the Court. While the letter may be considered as an invitation to adapt the interpretation of the Convention to the ever-changing social and economic scenario, the actual purpose is to pressure the Court to allow for a (minimal and self-restraining) interpretation of the Convention which would allow States to be the drivers of policy changes.

However, the analysis of the Court's recent case law, particularly in the field of migration, reveals no clear evidence of an unjustified expansion

[70] By way of example, 3 cases were closed with regard to Denmark in 2024 (they were 1 in 2022 and 2023, while the number of pending cases from 2022 to 2024 has been, respectively 4, 7 and 9). With respect to the open cases, it is noted that «The authorities submitted four action plans, two action reports and two communications» (page 62). With respect to Belgium, 23 cases were closed in 2023 and 14 in 2024 compared to a total of 36 and 27 pending cases in the same years (page 48). Although it may seem that these data show a diffuse non-compliance with the judgements of the Court, these numbers appear to be in line with the ones of other states. For instance, considering Croatia, 26 cases were closed in 2023 and 36 in 2024 compared to a total of 67 and 64 pending cases in the same years (page 55); considering France, 14 cases were closed in 2023 and 20 in 2024 compared to a total of 42 and 39 pending cases in the same years (page 67); considering Germany, 5 cases were closed in 2023 and 6 in 2024 compared to a total of 12 and 9 pending cases in the same years (page 71). With respect to Italy, instead, data seem to show a diffuse non-compliance with the Court's rulings. In fact, 25 and 15 cases were closed respectively in 2023 and 2024 compared to a total of 249 and 310 pending cases in the same years (page 82). With regard to the pending cases, it was noted that «The authorities submitted seven action plans, nine action reports and eight communications[…] In particular, it was possible to close one leading case concerning the longstanding problem of the excessive length of administrative proceedings upon the adoption of a wide range of measures which generated positive trends with regard to the elimination of the backlog and the reduction of the average length of these proceedings» (page 83). Therefore, talking about a nearly universal compliance with the Court's rulings with respect to Italy would not be an accurate depiction of the actual situation. It shall be noted, however, that data relating to the number of cases closed in 2023 and 2024 are in line with data relating to the previous years. In fact, as the report itself shows, also in 2019 – 2022 the number of cases closed was significantly lower than the one of pending cases (2019: 198 pending cases and 86 closed cases; 2020: 184 pending cases and 42 pending cases; 2021: 170 pending cases and 73 closed cases; 2022: 187 pending cases and 32 closed cases). It shall be noted that especially since 2023 the number of closed cases out of the total of pending cases has started to decline. The situation concerning Italy should, therefore, be monitored in the coming months to understand whether this path will continue or be reversed.

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of the Convention's scope. On the contrary, the Court has consistently applied its established jurisprudence (which has evolved according to the social and political changes) balancing individual rights with state interests.

While the institutional safeguards protecting the Court's independence appear robust and well rooted in the framework of the Convention (having existed for more than 70 years), the possible underlying risk is the progressive watering down of the Court's authority through political (and sometimes populistic) rhetoric.

Of course, it should be kept in mind that a border exists between freedom of speech and (unlawfully) trying to influence the decision-making path of a court. Clearly, stating that it is up to political power to stand up for a more accommodating interpretation of the Convention falls within the latter category.

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