

14 October 2025

Lətif Hüseynov

Relations between the judiciary and the other two powers of the State

Baku, 14 October 2025

Ladies and gentlemen,

Dear colleagues,

Dear friends,

Let me start by warmly thanking Mr. Inam Karimov, Chairman of the Supreme Court of Azerbaijan and Mr. Ramiz Rzayev, the President of the Azerbaijani Union of Judges, for having invited me to this highly important event. It is indeed a great honour and privilege to be in the midst of this illustrious gathering of my professional community and to deliver a keynote speech.

The subject chosen for today's international conference is relevant, challenging, and timely. It goes undoubtedly right to the heart of the rule of law and the separation of powers.

In my presentation, I would like, first, to share with you some general thoughts concerning the relationships between the judiciary and the other two branches of government, and secondly, to discuss how my Court - the European Court of Human Rights - has contributed to shaping domestic constitutional architecture insofar as it relates to those relationships.

Turning to the first part of my presentation. It is only intended to provide some initial food for thought on the topic, which, I have no doubt that the other speakers will elaborate on.

Separation of powers as a normative concept is not simply limited to separation or division of functions. First and foremost, it implies the existence of checks and balances between the three powers in the interest of society as a whole. This necessarily generates a certain level of tension between the three powers, and the lack of such tension might imply that one branch is no longer holding the others to account, allowing another to dominate the rest. Therefore, the tension between the judiciary and the two other powers of the State should not always be seen as a threat

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to the judiciary; but rather as a sign that the judiciary is properly fulfilling its constitutional duty of holding the other powers accountable¹.

Furthermore, relations between the judiciary and the other two powers also imply a certain level of dialogue and cooperation between them. Whilst all three powers share responsibility for ensuring that there is a proper separation between them, neither that principle nor that of judicial independence should preclude dialogue between the powers of the State. Rather, there is a fundamental need for respectful discourse between them that takes into account both the necessary separation as well as the necessary interdependence between the powers².

All this being said, it is of fundamental importance that the judiciary must remain free from inappropriate connections with and undue influence by the other powers of the State. To put in the words of the European Court of Human Rights in the case of *Guðmundur Andri Ástráðsson v. Iceland*, to which I will refer in detail later, “a certain interaction between the three branches of government is not only inevitable, but also necessary,” so long as one does not “unduly encroach upon another’s functions and competences”³.

Before moving on, allow me one final reflection. It is evident that nowadays the judiciary has evolved in something far more significant than Montesquieu’s *bouche de la loi*. It has become one of the most influential actors in the constitutional system.

There are several reasons behind this noteworthy development, but speaking as a judge at a human rights court, I will only mention one. Nowadays, increasingly more cases with a human rights dimension find their way onto a judge’s docket. Thus, judges, in accordance with the principle of *jura novit curia*, are bound to decide on novel issues relating to, among many others, bioethics, climate change, immigration, and in many cases, often in the absence of clear legislation. These developments place the judiciary to the forefront of public attention, with the accompanying mix of criticism and appreciation.

The recent landmark judgment of the European Court of Human Rights in the case of *KlimaSeniorinnen v. Switzerland* concerning climate change⁴ clearly showed that climate law and policy cannot remain outside the remit of judicial oversight. Although the Court emphasised that primary responsibility for navigating the complex scientific, economic, and other issues posed by climate change lies with the domestic legislative and executive branches, it meant to say that separation of powers would, in fact, be

¹Consultative Council of European Judges (CCJE). Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy, at para. 9.

² *Ibid.*, at para. 11.

³ *Guðmundur Andri Ástráðsson v. Iceland*, no. 26374/18, 1 December 2020, § 215.

⁴ *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024.

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breached, if the executive or legislature were to deprive the judiciary of its capacity to hold the other two branches to account.

The Court clarified that “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. The remit of the courts is complementary to those democratic processes. The task of the judiciary has always been – and continues to be in an age of climate change – to ensure the necessary oversight of compliance with legal requirements⁵. Especially from an intergenerational perspective, there is a “risk inherent in the political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making” and this, the Court stated, “adds justification for the possibility of judicial review”⁶.

With these considerations in mind, I will now turn to the second and main part of my presentation.

I will discuss how the case-law of my Court, as a supranational judicial institution, has influenced, and, to a certain extent, shaped the functional and institutional relationships between the three branches of power in the Contracting States. Given the time constraints, my aim is not to offer an exhaustive review of our case-law, but rather to highlight several key and very diverse cases that have come before us in this regard. I will argue that the principle of separation of powers can no longer be viewed as something exclusively national but is increasingly gaining an important international dimension.

As you might know, the European Court of Human Rights has developed extensive jurisprudence on judicial independence, which is closely related to the subject under discussion today. But, again, owing to time limitations I will not go into that broad issue.

A noteworthy remark is warranted here. The Court has never sought to impose any particular constitutional model governing the relationships or interactions between the branches of government. However, its case-law does set out the limits of what is permissible and what is not in such relationships or interactions.

The first judgment (*Stafford v. UK*)⁷ in which the European Court of Human Rights explicitly stated that the separation of powers (between the executive and the judiciary) had assumed growing importance in its case-law concerned the question whether members of the executive could be involved in sentencing decisions. It was imperative – the Court held – that the sentencing decision was taken by a judicial authority.

⁵ Ibid., § 412.

⁶ Ibid., § 420.

⁷ *Stafford v. the United Kingdom*, no. 46295/99, 28 May 2002.

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This aspect, namely the separation of powers between the executive and the judiciary, has been highlighted on numerous occasions in the Court's subsequent case-law. In this regard, it appears appropriate to refer to the *Ástráðsson* case, which I mentioned earlier.

This is a key judgment, in which the Court clarified and refined the concept of a "tribunal established by law" and its interaction with the two other requirements of "independence" and "impartiality" under Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial.

The case arose after Iceland restructured its court system in 2017, creating a new Court of Appeal. Judges for this new court were to be selected through a rigorous and transparent process, in which various bodies and institutions, including the Minister of Justice and Parliament, played a precise role. I will not go too much into the detail about the case, but suffices, for our purposes to note that part of the process/procedure was disregarded, namely the Minister of Justice replaced four of the top-ranked candidates with four others who had been ranked lower, without providing a proper explanation. Moreover, Parliament, who was required to vote on each nominee separately, approved instead the entire list of candidates with a single vote.

The Court applied three cumulative criteria to determine whether a given tribunal could be regarded as "established by law". Firstly, the breach of domestic law must be manifest – that is objectively and genuinely identifiable. Secondly, the breach must concern the ability of the judiciary to perform its duties free of undue interference and thereby preserve the rule of law and the separation of powers, and not a breach of purely technical nature. Thirdly, the national courts must provide effective review and remedy of those irregularities in the appointment⁸.

The Court stressed that breaches of the law regulating the judicial appointment process may render the participation of the relevant judge in the examination of a case "irregular"⁹. According to the Court, if a tribunal is not established in accordance with the law, this, in itself, may suffice to constitute a breach of the right to a fair trial¹⁰.

The criteria laid down in *Astradsson* have been applied in the context of serious irregularities in the judicial appointments in Poland, following legislative reforms aimed at reorganising the judiciary. These reforms have affected courts of all levels, including the Constitutional Court, the Supreme Court and lower courts. The European Court of Human Rights found that the legislature and the executive in Poland had acted in manifest contradiction to national law by refusing to swear in properly elected judges,

⁸ *Guðmundur Andri Ástráðsson v. Iceland*, §§ 244-252.

⁹ *Ibid.*, § 226.

¹⁰ *Ibid.*, §§ 289-290.

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thereby exerting unlawful external influence on the judiciary and impairing the legitimacy of the election process¹¹. In *Reczkowicz v. Poland*, the Court concluded that the manifest breach of the domestic law arose “from non-compliance with the principle of the separation of powers and the independence of judiciary”¹². In *Advance Pharma v. Poland*, which dealt with irregular appointees to judicial posts within the Civil Chamber of the Supreme Court, the Court found that the failure by the President of the Republic to comply with the interim measures preventing him from making appointments, amounted to a manifest breach of the domestic law and noted that the conduct of the State’s highest executive authority which, by deliberate actions disregarding a binding judicial decision interferes with the course of justice, can only be characterised as “blatant defiance of the rule of law”¹³.

One of the institutional models for judicial appointments provides for the involvement of a judicial council responsible for selecting candidates for judicial appointments, on the assumption that this body will serve to counterbalance the influence of legislative and/or executive branches of government in the process. For this reason, such a judicial council needs to be itself independent, particularly as it functions as a regulatory body of judicial self-government. The Court has dealt with judicial councils in the context of reforms undertaken in Poland since 2017, which transformed the until then independent National Council of Justice (NCJ), composed mainly of judges elected by judges, into a body elected mainly by Parliament based on political loyalty criteria. In *Grzeda v. Poland*, the Court found that the fundamental change in the manner of electing the NCJ’s judicial members, considered jointly with the early termination of the terms of office of the previous judicial members, meant that its independence was no longer guaranteed. In more general terms, the Court pointed out that “any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies”¹⁴. In a similar case against Poland, the Court emphasised the need to protect a judicial council’s autonomy, notably in matters concerning judicial appointments, from encroachment by the legislative and executive powers, and to preserve its role as a bulwark against political influence over the judiciary¹⁵.

It is important to note that, in the case of Poland, the above-mentioned issues relating to the independence of the judiciary and separation of powers were of a systemic or structural nature. This was evident, above all, from the large number of applications lodged with the Court by Polish judges. By 2023, 323 applications were pending before

¹¹ *Xero Flor w Polsce sp. z.o.o. v. Poland*, no. 4907/18, 7 May 2021, § 287; *M.L. v. Poland*, no. 40119/21, 14 December 2023, § 171.

¹² *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021, § 276.

¹³ *Advance Pharma sp. z.o.o. v. Poland*, no. 1469/20, 3 February 2022, § 334.

¹⁴ *Grzeda v. Poland*, no. 43572/18, 15 March 2022, § 323.

¹⁵ *Zurek v. Poland*, 10 October 2022, § 148.

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the Court against Poland which raised issues relating to various aspects of the reorganisation of the judicial system in Poland.

In *Dolinska-Ficek and Ozimek v. Poland*, for the first time in the context of separation of powers, the Court resorted to Article 46 of the Convention concerning the execution of Court's judgments and indicated measures to be taken by the Polish Government to implement the judgment. The Court held that "in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State is required"¹⁶. The respondent State was required to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future¹⁷.

Interim measures under Rule 39 of the Rules of Court were also used by the Court as an important tool in responding to challenges to judicial independence in Poland. As you might know, the Court grants requests for interim measures only in exceptional circumstances, when applicants would otherwise face an imminent risk of irreparable harm to a core Convention right. Since January 2022, the Court has received more than sixty such requests from judges facing suspension, the lifting of their immunity, or transfer against their will. In seventeen of those cases, interim protection was granted.

Apart from the instances mentioned above concerning an interference by the executive and/or legislator in judicial appointments, the Court has also made clear that the legislative branch cannot improperly intervene in the adjudicatory process. In *Vegotex International S.A. v. Belgium*, the Court emphasised that whereas the legislature is in principle not prohibited from regulating via new provisions with retrospective effect (in civil law matters), the principle of the rule of law and the notion of fair trial enshrined in the Convention preclude any interference by the legislature in the administration of justice, designed to influence the judicial determination of a dispute, except on compelling grounds of public interest¹⁸. The Court has established a rich and extensive jurisprudence in which it protects the judiciary from encroachment on its judicial function by the legislature. It has consistently held that any reasons adduced to justify legislative intervention with the administration of justice must be treated with the greatest possible degree of circumspection¹⁹.

So far, I have spoken about cases in which the Court has intervened to safeguard the judiciary from interference by the executive and legislative branches. However, the Convention also requires respect for the separation of powers in upholding

¹⁶ *Dolinska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021, § 368.

¹⁷ *Ibid.*, § 369.

¹⁸ *Vegotex International S.A. v. Belgium*, no. 49812/09, 3 November 2022, § 92.

¹⁹ *Ibid.*, § 93.

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parliamentary autonomy. Two examples illustrate this point - *Karácsony v. Hungary* and the more recent case of *Green v. the United Kingdom*.

In *Karacsony v. Hungary*, a group of opposition members from the Hungarian parliament challenged a disciplinary sanction that had been suggested by the speaker of the house and adopted by the plenary session. The applicants contended, among other things, that they had not had an effective remedy to challenge this sanction outside of parliament. The Court, nevertheless, clearly stated that in the light of the generally recognised principles of parliamentary autonomy and the separation of powers, members of parliament cannot be considered entitled to a remedy to contest a disciplinary sanction outside of parliament, but that the existence of procedural safeguards to protect the opposition members²⁰ in that context was compelling. Thus, the Court highlighted the established importance of parliamentary autonomy and allowed for a clear separation between the legislature and judiciary in this field.

The rule of parliamentary immunity was upheld by the Court in its recent judgment in the case of *Green v. UK*²¹. The key question in this case was whether the right to privacy required the implementation of *ex ante* and *ex post* controls to prevent Members of Parliament from revealing information subject to court injunctions. The Court's position was that speeches made by Members of Parliament in Parliament are covered by absolute immunity, no matter the cost, even when binding judicial decisions may be frustrated. The reason behind this rigid approach is clear: not to upset the institutional balance between the legislature and the judiciary.

As I stressed at the outset, this *tour de force* was meant only to act as the setting of the stage for the remaining insightful presentations. To conclude and to return to the broader points I made earlier, the separation of powers is not only a matter of constitutional architecture for the sake of the rational organisation of powers. It is a matter of liberty for each person and for society as a whole. It is a basic condition for the effective protection of fundamental rights and freedoms.

Thank you for your attention.

²⁰ *Karacsony v. Hungary*, nos. 42461/13 and 44357/13, 17 May 2016, § 157.

²¹ *Green v. the United Kingdom*, no. 22077/19, 8 April 2025.