

# “To be a judge means to be criticized from all sides”

## An interview with Angelika Nußberger

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Angelika Nußberger was the German judge at the European Court of Human Rights (ECtHR) for nine years; her term of office came to an end at the turn of the year. Back at her chair at the University of Cologne, the German jurist and Slavist looks back with us on her years at the Court, which she also headed as Vice-President since 2017. A conversation about legal challenges in today's world, the various criticisms of the Court, the success and failure of the numerous reforms of the human rights system in recent years – and about what she will miss from her daily work at the Court. The original German version of the interview is available [here](#). Thanks to Julian Hettihewa for assistance with the translation.

### **You have now spent 9 years at the Court. Is there a case that will remain in your memory in particular?**

If you want me to pick out one: One case that moved me deeply was the case of Yuliya Tymoshenko. That was a very political case, given that there had just been a change of government in Ukraine. The dossiers on many former members of the government who had been arrested were on the desks of us judges. This case included the question of whether this was a genuine abuse of power under Article 18 ECHR, i.e. the use of legal restrictions for an “ulterior purpose”. That was very exciting. I was also relatively young at the Court at the time, so this case is particularly memorable to me.

### **The Court deals with so many things – from the protection of privacy, to migration, to religious freedom, to insufficiently independent legal proceedings in individual states... Is there any area that stands out for you where you would say: this is where the biggest or most pressing questions lie?**

In many areas of law, it is always the latest questions or the most recent developments that are brought before the Court. One of the most pressing issues in family law is surrogacy, which was also pending before German *Bundesgerichtshof* and the French *Cour de Cassation* and then came to us. Questions of this kind must be decided by the Court because applicants are not satisfied with the answers they receive from the national courts. This applies to all issues, including refugee protection, for example, where applicants sound out how far they can get at national level and then address the ECtHR in the hope that the Court is willing to contradict

the national courts. This is basically how the system is designed to ensure that the latest developments are brought to the ECtHR. I also expect that the issue of a “third sex” will end up before the ECtHR. Not for Germany, of course, because we have the decision of the Federal Constitutional Court, but in other countries where the courts say “no” to this, or politicians say “no”, I can imagine that the ECtHR will deal with it.

**Let us talk about two areas that are currently receiving a lot of attention. Firstly, the area of digitalisation: in recent years, cases uncovered by whistle-blowers have shown that some states are massively abusing the new technical possibilities. The ECtHR has had to deal with surveillance cases and other Internet-related legal issues on several occasions. Do the old ideas about private life fit here, or do we need new concepts in a digital world?**

I think that you can always start from the concepts that you originally developed. The challenge is then to check whether they still fit. If you take the [Delfi case](#), for example, as an example of the responsibility of platform operators, you see the variety of new communication structures. Against this background, you have to ask yourself whether the ideas of civil liberties that were fought for in the 19th century still fit. Take the example of freedom of the press and the idea of protecting journalists as those who form opinions. Today, the question arises as to whether not everyone who posts an opinion on the Internet as a blogger could be seen as a journalist. Is it still possible to hold on to a professional term of “journalist”? Is there still such a thing as a professional opinion maker these days? There are many things to rethink. Of course, privacy is also different if it is a digital privacy and completely different interventions are possible. At the moment, the [Big Brother Watch case](#) is pending, which also raises questions about new possibilities in the digital world. I think everyone is struggling to redefine the boundaries of the spheres.

**Secondly, the area of migration: Decisions on the protection of asylum seekers were, for example with the case of M.S.S. v. Belgium and Greece or the Hirsi case, enormously important and guiding for European migration policy. But human rights and migration always show a tension. They are about the protection of those who are not citizens. How much does that play a role in your eyes? Is the Court’s protection mandate all the greater?**

The status, the nationality, does not matter at all. The connecting factor for the ECtHR is jurisdiction. We do not protect citizens, but all people who fall under the jurisdiction of the respective state. In migration cases, this is precisely the question: Who is under the jurisdiction of which state? This question has arisen, for example, for people who are at sea: To what extent are they already under the jurisdiction of the destination state? Or to what extent are those who knock on the door of a consulate in a foreign state, as in the [case](#) against Belgium, involved? It is a question of the “inside-outside”, but not in relation to nationality, but in relation to the fundamental question under international law, for whom the state must assume responsibility. The question of participation does not arise for us at this point. The extent to which people must be involved in democratic processes is a different issue, not when they are on the border, but when they live in the country.

**One more question after this: In some cases, migration law cases raise particular problems in terms of procedural issues. Applicants are often absent, for example in the case of N.D. and N.T. v. Spain, both identifiability and provable contact with lawyers was an issue. Are the existing procedural rules always suitable for migration law cases?**

In principle, the ECtHR only grants individual protection. So only those who approach the Court in their own name can obtain protection. Of course, it is in the interest of NGOs to bring exemplary cases to the Court to show where problems lie. We had a Belgian case before the Grand Chamber which concerned a Roma family which, as was claimed, had not been received in an acceptable manner in Belgium and then returned to Romania. The lawyers brought this case before the Grand Chamber but had already lost contact with the family. Although we would have liked to have thought about an answer to the legal questions, without contact with the person concerned, it is no longer an individual case; then the ECHR is no longer the right instrument. The Court's mission is to protect individuals and not to resolve abstract legal questions. The identification of complainants is about factual issues. Procedural law makes it clear that individual rights must be decided. The fact that this can then have implications for thousands of others is another aspect. Moreover, the question does not only arise in refugee cases. Another example is the [Gross decision against Switzerland](#), which concerned euthanasia. The complainant had taken precautions so that her lawyer could not know that she had committed suicide, and so he continued the case. She wanted to use the Court as a legislature, so to speak. Here, too, the Court said "no". Also in the [case S.A.S. v. France](#), the Burka case. There, the French government argued that the complainant was an "abstract construct", that she did not exist at all; here, the Court contradicted this argument. The question therefore arises again and again, and the Court must answer it on the basis of the relevant facts.

**The ECtHR is under political pressure like never before. There are exit debates in England and Switzerland; Russia openly refuses to implement certain judgments and last year it almost broke with the Council of Europe. On the one hand, critics accuse the Court of having gone too far with its dynamic interpretation of the Convention; others complain that the Court gives only insufficient answers to serious human rights violations, such as those in Turkey, and that it yields to critical states like England. What is your response to these critics?**

To be a judge means to be criticized from all sides. Judges can never please everybody – they agree with one party and disagree with the other. The criticism will always come from one side or the other, depending on who feels confirmed. The situation of the ECtHR is special compared to national courts in that there are fundamentally different ideas about what the role of the Court is. There are those who say that the Court should go further and intervene more in the national legal systems. Others think that it should rather have a reserve function. In the case of Turkey, the Court has based itself on the principle of subsidiarity and has taken the view that it cannot rule on cases concerning the legal consequences of the attempted coup as long as national legal remedies still exist. In doing so, it set a very

high threshold, which it also applies elsewhere. Doubts as to the effectiveness of national remedies are not enough; it must be absolutely sure that no legal protection is available. It is indeed very unsatisfactory that this may mean years of waiting for those concerned, but it is a systemic issue, because the whole system is based on cooperation with the Member States. If you go ahead and decide before the national authorities have made their decision, the response will be that the national courts should have been heard first.

Criticism of certain judgements, for example by Russia or Turkey, can be countered and it can be explained why the Court did not decide politically at all, but on the basis of the Convention. Criticism of the system can be answered by explaining that the Court is trying to fulfil its mandate of effective human rights protection in the best possible way within the framework of the guidelines, that is to say, in particular the principle of subsidiarity.

I think that the main attack against the Court is over. The Swiss referendum was very clearly in favour of the Court. A different outcome would certainly have been very problematic. In England, too, in view of the Brexit, the ECHR is no longer so much in focus. The Russian crisis could also be resolved in 2019, although it remains to be seen how the Russian Constitutional Court will continue to apply the law on the review of individual ECtHR decisions. I currently see a somewhat calmer phase in the member states' relations with the ECtHR. But it will probably always be the case that when particularly controversial judgments are issued, criticism will come from both sides, i.e. from those who want to go further and those who want more restraint. When you consider that this year, we are celebrating 70 years of the ECHR, it is remarkable that the Court has been able to hold on for so long and to demonstrate its authority.

**Following-up on that: The ECHR was created in response to the horrors of the Second World War and is also understood as a warning system against totalitarianism. In recent years, the rule of law and human rights have come under greater pressure again in European states. Can the Court play a role in putting a stop to this “backsliding”?**

One should not assume that the Court can really change the world. If a state experiences a military coup and the human rights situation is then taken up in an inter-state complaint, as was the case in Greece at the time, there is, as the case at the time shows, the possibility of leaving the Council of Europe and denouncing the ECHR. This option is inherent in the system, which means that the Court does not have an absolute stop-option for such situations. Greece did re-enter the system after that, but it was possible to resign for the time being. So, we cannot delude ourselves that we can actually prevent the establishment of a dictatorial regime. We can see in some European countries that developments are moving in a direction that can no longer really be described as democracy. It would be nice if the Court succeeds in strengthening civil society in such a way that a different direction could be taken again. But experience shows that it can hardly do that. What it can do, however, is to give needlesticks, important needlesticks, and to support those who stand up for the preservation of democratic order. Recently, the Court has applied Article 18 on several occasions and has been very clear about the threat

to democracy; this is being closely watched. We must not have any exaggerated expectations that it is really possible to stop a state at an inclined plane, but at least we can strengthen the civil society that is opposed to it.

**In 2010, the Interlaken-process was launched because it became apparent at the time that the Court had become a victim of its own success and was at risk to suffocate under the weight of the enormous number of complaints. Ten years and numerous reforms later, the statistics look better, but the problem has not really been solved. Do we need a new debate on restricting access to the Court, for example, should it focus only on the most serious violations of the Convention?**

From my personal point of view, I would confirm that the process was not so successful because in fact, the only thing that has been achieved is to filter out more quickly those applications that were manifestly inadmissible or unfounded. But the cases that were really well-founded are still pending in such large numbers that, at the current rate, the Court will, purely arithmetically, need ten to twelve years to process them. It is not clear how it will do this if other cases come in at the same time. Besides, no one wants to wait ten years before one gets a judgment. I do not see any answers yet, and so I am very critical. In general, a lot has been done to speed up the proceedings. But the basic problem remains that there are 10,000-15,000 cases pending, which are not standard cases on prison terms or concerning the enforcement of court decisions, but other, serious cases. I would have liked to see the Interlaken-process not simply closed with the conclusion that everything is fine. The hard core of the cases remains and we have to think creatively about how to deal with them, for example whether we should not create a different body to deal with the less important cases, as the Commission used to do, so that the Court can concentrate on the more important cases. In my opinion, the problem has not yet been solved.

**How did you feel about the daily work at the Court, the way it deals with each other, especially across language barriers?**

The different languages are a moment of habituation. You develop different language practices with your colleagues. With some you speak English, with others French, and when you speak English and the answer comes in French, you don't wonder. The question of language is actually only relevant if you are working specifically on the texts of judgments and, in the case of individual terms, consider whether or not they mean the same thing in the different languages. This is, however, a problem that we are familiar with in national law in a similar form. Apart from that, after the Strasbourg period, it seems almost strange to me that everyone speaks the same language.

If you ask me about the everyday life at the Court in general, there are various elements that make it very beautiful. One thing are the chamber sessions, which I have always looked forward to. There is an intensive legal discussion and debate with colleagues with whom you have worked for years, so you really know them well and try to find the best answers together. This kind of cooperation, where we really pull together and listen to each other – I loved that more than anything and I will

certainly miss it. Writing an essay together with someone is also nice, but to come to a result with seven people from different legal cultures is something I really liked.

The other thing I appreciated very much about my everyday life was the being together. We had our offices nearby in the corridors in the Court, one had a real closeness to colleagues, one could always go to the neighbour and exchange views.

On the other hand, moving from the Court to the university means a different degree of freedom. At the university you have a very great deal of freedom, for example on the focus of your work. At court you get cases and have to deal with things you never dreamt of in life. There are many terrible cases of human rights violations. But you have to deal with them, there is no way around it.

**Your successor Anja Seibert-Fohr took office at the beginning of the year. Have you exchanged views beforehand? Did you give her any advice?**

Mrs Seibert-Fohr and I have known each other very well since many years, so it was not that we only met when she was elected. After all, she was a member of the UN Human Rights Committee, and we talked a lot about the different cultures of decision-making. The ECtHR also visited the Committee once. Specifically, in the run-up to the handover of office, we also met several times, so that I was able to introduce her to colleagues. I did not give her any tips in that sense, because I think that it is very individual how one fills the office. But I told her a lot from my experience: what I found important, what less. And we talked about the German cases that I was still working on and that are now passing into her hands. Also, although I am no longer a judge, I am still in the formation in various cases that are still processing. For about ten cases of the Grand Chamber and as many chamber cases I will go back to Strasbourg and take the opportunity to meet Anja. I am sure we will continue to exchange ideas and information in the future.

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