CHAPTER 14

The Interlaken High Level Conference

As earlier passages of this book have made clear, the Court has for many years been faced with a constantly accelerating growth in the number of applications that reach Strasbourg. Notwithstanding substantial increases in its resources and a continued streamlining of its procedures, it has been unable to cope satisfactorily with this situation, in that the number of applications disposed of each year is less than the number of new applications received. The increasing backlog of cases means that applications take too long to process and that it is increasingly difficult for the Court to fulfil its responsibility of delivering clear and coherent judgments that are of a quality that will ensure that their authority continues to be recognized by the Contracting States.

In a memorandum dated 3 July 2009 the President of the Court, Jean-Paul Costa, who had previously launched an initiative to hold a high level conference on the Court's future, announced that Switzerland was prepared to host such a conference during its chairmanship of the Committee of Ministers. Both short- and long-term reform measures to address the Court's difficulties were to be discussed. Against this background, the Swiss government convened a High Level Conference that was held in Interlaken on 18 and 19 February 2010 and that was attended by representatives of the Council's 47 member States, with over 30 States being represented at ministerial level. The objective of the Conference was to lay the groundwork for future reform, an objective achieved by the adoption of a joint declaration that consisted of an action plan defining a series of short- and medium-term measures and setting a timetable for their implementation. From the outset it was clear that States were not interested in examining possibilities such as the *certiorari*-type proceedings of the United States Supreme Court, which enables judges to 'pick and choose' cases with which they wish to deal.

At Interlaken much emphasis was placed on the introduction of national measures to ensure that human rights violations were first addressed at the domestic level. It was accepted that the Court cannot ensure respect of Convention rights on its own and that the Court and the States have a shared responsibility in this area.

A further point emphasized in the declaration is the need for an effective filtering mechanism, either within the existing bench or as an adjunct to it, to dispose rapidly of obviously inadmissible cases. The declaration also calls on the Committee of Ministers to render the supervision of the execution of

Opposite: *Fylakio Centre for irregular migrants in Greece.*

SOME CASE-LAW PRINCIPLES

Recurrent in the Court's case-law are a certain number of principles that it applies in interpreting the Convention. These principles include:

- The special nature of the Convention, as an instrument for the collective enforcement of the engagements undertaken by the Contracting States.
- The notion that the Convention is a living instrument, to be interpreted in the light of today's conditions.
- The recognition that, in determining whether to impose restrictions on guaranteed rights or to take positive measures to secure those rights, the Contracting States may enjoy a certain 'margin of appreciation' or freedom of choice.
- That the task of the Court is often to determine whether a fair balance has been struck between the various interests, public and private, at stake.
- That the Convention is intended to guarantee rights that are practical and effective.
- That expressions appearing in the Convention are to be given an autonomous meaning.
- That the Court's role is subsidiary, the primary responsibility for securing the Convention rights and freedoms lying with the Contracting States.

The citations from leading judgments that follow record some of these principles.

'Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement".'

Ireland v. the United Kingdom (1978), § 239

'The Court must bear in mind the special character of the Convention as an instrument of European public order *(ordre public)* for the protection of individual human beings and its mission, as set out in Article 19, "to ensure the observance of the engagements undertaken by the High Contracting Parties".'

Loizidou v. Turkey (preliminary objections) (1995), § 93

'The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.'

Tyrer v. the United Kingdom (1978), § 31

'The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life … These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.'

X and Y v. the Netherlands (1985), § 23

'By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them … Nevertheless, Article 10 § 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.'

Handyside v. the United Kingdom (1976), §§ 48–9

'The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.'

Artico v. Italy (1980), § 33

'The Court is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries.'

A. and Others v. the United Kingdom (2009), § 154

CONSISTENCY OF THE CASE-LAW

Over the years the Court has developed an impressive amount of case-law. Inevitably, however, there has been some conflict within that case-law. Although head-on clashes between judgments or decisions are quite rare, the scope for marked or more subtle divergences, grey areas or weaknesses, contradictions, differences of nuance, gaps or anomalies in the reasoning has been somewhat broader.

The main causes are evident and numerous: the large number of judgments and decisions pronounced every year; the number of people drafting them (legal secretaries and reporting judges); the composition of the Sections, which favours geographical diversity and different legal systems; the existence of four Chambers in each Section; the assignment of cases concerning the same State or the same subject to different Sections; the fact that 10 of the 17 members of the Grand Chamber are drawn by lots in each case; and the renewal every six months of two of the five members of the panel of the Grand Chamber.

It is vital, however, that the Court shows consistency in its case-law, for therein lies its authority and its effectiveness as Europe's human rights watchdog. The purpose is to achieve a number of largely complementary objectives: to guarantee the equality of all States and all individuals before the Convention; to contribute to legal certainty by fostering foreseeability, in the interests of national authorities and citizens alike; and to provide a harmonious interpretation of the provisions of the Convention and its Protocols.

Monitoring the Court's case-law is the task of the Jurisconsult, who thus plays a key role in preventing case-law conflicts. All the Sections send their case files to him and, with the help of a small team of experienced lawyers, he examines all the drafts – essentially draft judgments and decisions – on the agendas of their weekly meetings. If necessary, the Jurisconsult prepares observations and transmits them to all the judges in the Court and to certain Registry officials. He points out anomalies or discrepancies in the reasoning, warns of departures from the established case-law, draws attention to similar cases that are already at a more advanced stage, suggests waiting for the Grand Chamber to pronounce judgment in a comparable case that has come before it and so on.

The Jurisconsult also assists the Case-law Conflicts Resolution Board, which is made up of the President of the Court and the Presidents of the Sections, and makes recommendations to the Court's judges and lawyers. He refers to the Board all important questions of interpretation of the Convention on which there appear to be divergences in the approaches adopted by the Sections, prepares memorandums on the subjects concerned, submits his analysis in the light of the case-law and proposes solutions to restore harmony. One such solution may be to invite a Chamber to relinquish a case or agree to its referral, so that the Grand Chamber can decide what approach to adopt. This may be the case, for example, when several Sections come up against the same difficulty but in respect of different countries.

Vincent Berger
Jurisconsult of the Court

the Court's judgments more effective and transparent and to review its respective working methods and rules.

Many of the Interlaken recommendations had previously been made in other forums – the Rome Conference in 2000, the Evaluation Group in 2001 and the Group of Wise Persons in 2006 – which demonstrates the difficulties in making real progress notwithstanding the States' frequently renewed commitment to ensuring the sustainability of the Court. However, the Interlaken Declaration, unlike previous instruments, contains an ambitious plan of action. Thus, by June 2011 – that is, within 16 months of the conference – the Committee of Ministers should follow up and implement the measures set out in the declaration that do not require the amendment of the Convention. By the end of 2011 States Parties should inform the Committee of Ministers of the measures taken to implement the relevant parts of the declaration, including those proposals where the States themselves are competent – that is, at the domestic level. By June 2012 the Committee of Ministers should issue terms of reference to the competent bodies with a view to preparing specific proposals for measures that require the amendment of the Convention, in particular proposals for a filtering mechanism and for a simplified procedure for amending the Convention. Between 2012 and 2015 the Committee of Ministers should evaluate to what extent the implementation of Protocol No. 14 and the Interlaken Action Plan have improved the situation of the Court, and before the end of 2019 the Committee of Ministers should decide whether, if the measures adopted prove to be insufficient, more far-reaching changes are necessary. That will most likely be the next occasion when the possibility for the Court to have recourse to *certiorari*-type proceedings (see above) will again be vented.

(The full text of the Interlaken Declaration is available on the Court's Internet site [www.echr.coe.int] and on the accompanying CD-ROM.)

THE 'FEMINIZATION' OF THE COURT

The Current Situation in the Court and How We got There

When I was recently asked by a member of the European Parliament about the number of female judges at the Court I was pleased to answer 17 women, 29 men and one vacant seat, which equals almost 36 per cent. This is not bad considering how it used to be.[1] We have to give credit to the Parliamentary Assembly and the Committee of Ministers of the Council of Europe for making it happen. Without their continued pressure as early as 1996 on the High Contracting Parties to nominate candidates of both sexes for election as judges it would simply not have happened. Or at least not in this century.

Until 1999 it was the practice that High Contracting Parties expressed a preference for one of the three candidates nominated and for the Parliamentary Assembly, as a rule, to follow it. In September that year the Assembly adopted a recommendation inviting States always to include candidates of both sexes in their lists. This was followed by tougher language in a resolution adopted in January 2004 in which the Assembly stated that nominations should henceforth be gender balanced – failing which nominations would be rejected – and that no preference should be expressed. In cases of equal merit, preference would be given to a candidate of the sex under-represented at the Court. The Parliamentary Assembly subsequently made it clear that it was prepared to consider single-sex nominations if that sex was under-represented, meaning less than 40 per cent of the Court's composition.

This new policy got Malta into trouble in 2006. The Parliamentary Assembly refused even to consider its nomination of three male candidates. When, after publicly inviting applications, Malta again submitted an all-male list, stating that the women applicants did not meet the requirements set out in Article 22 of the Convention, a stalemate resulted. Ultimately, it fell to the Court itself to offer a solution, which it did after a request from the Committee of Ministers of the Council of Europe. In its advisory opinion of 12 February 2008 the Grand Chamber of the Court noted that 'the criterion in question derives from a gender-equality policy which reflects the importance of equality between the sexes in contemporary society and the role played by the prohibition of discrimination and by positive discrimination measures in attaining that objective' (paragraph 49). The Court furthermore indicated that the Parliamentary Assembly's policy was too rigid. If no allowances could be made at all, it fell foul of the Convention itself.

This prompted the Parliamentary Assembly to refine its policy later that year, in that it was prepared in exceptional cases to consider single-sex lists where the candidates belonged to the over-represented sex provided that 'all the necessary and appropriate steps' had been taken to include the under-represented sex. The relevant Committee was unable to secure the requisite majority, thus prompting Malta to start its election process again and call for women candidates.

To create gender balance takes time, and the situation in the Court can be seen as merely reflecting the realities on the domestic level. Time will not fix it, not any day soon at least. The Parliamentary Assembly has shown that it is possible to speed up developments if the political will is there.

Why Gender Balance Matters

In an interview following her appointment,[2] Pauliine Koskelo, President of the Supreme Court of Finland, was asked to comment on the fact that she would be the first woman ever to hold this post. She stated that she believed it was important for the legitimacy of the Supreme Court over which she presides to reflect the population it is asked to serve, including the gender of that population. When she was appointed the first woman to serve on the Supreme Court of the United States of America, Sandra Day O'Connor, said: 'It is important to be the first but even more important not to be the last.'

It is known that a critical mass is necessary to make a difference. In a group of individuals of the same gender one or two of the other gender does not make any difference. On the contrary, their presence may give the (false) impression of gender balance and also comfort the view of those with the power to appoint/elect/nominate that nothing more needs to be done. The position of the individuals who are different from the group can be rather difficult. They might be considered as mascots or scapegoats. They risk being either marginalized or seen as representatives of their gender. If they are successful it is because they were promoted beyond their merits, and if they fail it will be proof that their gender is not right for the job.

It has further been argued that using too narrow a base of recruitment might lead to a loss of competence. To me this is self-evident. Why should you limit yourself to one gender when there are two?

Appearances are Important, but what about Substance?

Many women professionals I have met shy away from the thought that gender might influence the way they function as professionals – see, for example, the differences of opinion between Sandra Day O'Connor and Ruth Bader Ginsburg, who both served on the United States Supreme Court. The former is often quoted as saying that a wise female judge will come to the same conclusion as a wise male judge. Ruth Bader Ginsburg was making the opposing argument in a case that involved the strip-searching of a 13-year-old girl. 'They have never been a 13-year-old girl,' Justice Ginsburg said,[3] while several of her eight male colleagues had suggested that they were not troubled by the strip-search as such. She also added, in an interview she gave on the case two weeks after the hearing, that as a woman she had sometimes found her comments ignored in the justices' private conferences until someone else made the same point. The newly appointed Justice Sotomayor said in a speech 2001 for which she received mixed reviews: 'I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.'[4]

From left to right: Judges Tsotsoria, Vajić, Fura and Gyulumyan.

You can look at it as different cultures or languages, and in an international context like that of the European Court of Human Rights this becomes intellectually challenging and inspiring. Many studies have been carried out in order to analyse the differences of male and female language habits, and when you combine this with the fact that most of us in the Court, judges and staff alike, work in a language other than our native tongue, the results are much harder to analyse and the conclusions much more complex. In many cultures little girls are brought up to put their statements in the form of questions rather than in the affirmative and by using softer voices than boys. It becomes less evident in adults, but to some degree it is still there, more or less depending on the country concerned. This might in some circumstances be wrongly interpreted as insecurity or lack of determination and hence less persuasive. So how does this work in a judicial context like the Court? Has the feminization of the Court made a difference and if so, in what way?

The readers who have not stopped reading by now are really interested, hoping to partake of some revealing secrets from our deliberations. Unfortunately, they risk being disappointed, not only because I am not at liberty to disclose anything from our deliberations but also because I am part of the change myself, if there is one, and anything but an unbiased observer.

Without any scientific ambition whatsoever my random observations are outlined below.

Impact on Potential Applicants

The applicants are predominantly men. Will the presence of more women on the bench bring more female applicants to the Court? I do not think so, but I hope I am wrong. Some of the landmark cases were brought by women applicants, as my esteemed colleague and friend Judge Françoise Tulkens has shown in her article '*Droits de l'homme, droits des femmes. Les requérantes devant la Cour européenne des droits de l'homme*'.[5] One of her observations is that some problems of fundamental rights risk never being addressed by the Court since the female victims do not bring their complaints to Strasbourg to the same extent as men.

But there are also some subtler influences. It is certainly arguable that women lawyers will be more interested in litigating before the Strasbourg Court if it is perceived as a Court that is gender balanced. Indeed, it is probably accurate to say that today there are more women advocates appearing before the Court than at any other stage in its history, and although this can be explained by a variety of factors, the presence of greater numbers of women on the bench is certainly one of them. The perception of the Court as a forum that is likely to care about gender issues or to reflect the independent voice that women will bring to the discussion of any controversial issue must inspire women lawyers to feel that Strasbourg is a place that will listen to their concerns and be more attuned to their particular sensitivities. In addition, leading dissenting opinions from female judges are undoubtedly a source of inspiration for lawyers and law students – especially women – in the sense that they perceive in a closely argued legal text the independent and distinctive contribution women can bring to the bench. The dissents of Judge Tulkens in Strasbourg or Baroness Hale in the former House of Lords are good examples of this.

The Efficiency of the Court

The quality and efficiency of the Court stands and falls with the quality of the people working there, judges included. So if the Court is to recruit and keep the best individuals it must be an attractive workplace. Here leadership is of the utmost importance. The leadership of the Court is dominantly male, regrettably, and we can only speculate about why this is so. One reason is, of course, that there has not been much of a choice so far since most judges have been men. But even when the numbers start to equalize there are still not too many women candidates in positions of responsibility. One theory is that this is a result of women's own choices. A lack of role-models is another. There is abundant literature on the topic of leadership, and some experts allege that there are differences between male and female leadership. According to some studies, women leaders are less likely to take risks while focusing on the longer perspective. I believe that it is more a question of differences between individuals than of gender. But more importantly, different styles of leadership fit different persons. In a workplace of some 650 people there is room and need for variety, and in order to create variety in the leadership you must obtain a critical mass at the base. Only then can you choose the individual who is best suited for the job since the candidate will be judged on their merits and not reduced to being a representative of a gender with the preconceived perceptions that follow: 'We already had a female leader and it did not work, so why bother to promote women?'

A more mixed leadership might make it easier for the Court to adapt to the rapidly changing social environment. The Court has become younger, and several current judges have young children. This will sooner or later have an impact on how the Court works (meeting hours, schedules, working methods) as well as on social issues. The judges have finally, after more than ten years of struggle, managed to get an acceptable social cover and pension provisions, and the fact that previously there were no provisions made for parental leave for judges demonstrates in an unequivocal manner the fact that the demography of the Court has changed. The lack of proper social security arrangements appeared utterly incomprehensible to anyone studying the issue.

So how will we know when we have reached the goal of a gender-balanced Court? Is it a question of mathematics only or is it when there is a true sense that we all enjoy equal opportunities in our workplace, the Court? Or is it simply a question of 'bench-marking'?

Should the Committee of Ministers and the Parliamentary Assembly or indeed the Court itself feel that they can rest on their laurels as long as the gender-balance records of other prominent courts lag far behind the progress that has been made in Strasbourg? That is a risk of the healthier situation that has been brought about in recent years. Yet experience teaches us that to consolidate the gains that have been hard won in this area requires that nothing should be taken for granted and that a continuous effort must be made to assert the added-value of having a balanced bench. Perhaps even to upgrade it to that of a first-order value?

Marianne Nivert, a prominent figure in public and business life in Sweden, was asked many years ago if there is full equality between the sexes in Sweden and her answer was revealing: 'The day I meet as many stupid women as idiotic men in the corporate board rooms we will have reached full equality. And believe me, that day is far away!' That day is perhaps further away than she imagines, since the only truly sensible goal is to meet at least as many talented women in the boardroom as talented men. The synergy created by the combination of pursuing merit and gender balance at the same time should ideally contribute to reducing the overall level of mediocrity in the upper echelons of all enterprises.

Meanwhile, perhaps the time has come to change the French name of the Court and the fundamental rights it is mandated to protect. For some time now it has been suggested that a proper translation into French of 'human rights' should not be *'droits de l'homme'* but the gender neutral *'droits humains'*, in conformity with *Menschenrechten, diritti umani, derechos humanos* or *mänskliga rättigheter*, to mention a few examples. Recently the suggestion was reiterated by the former President of Ireland, Mary Robinson, when she was speaking in Paris at the commemoration of the 60 years of the Universal Declaration of Human Rights. It is no minor matter for the French-speaking world, but we know how the word can influence the thought, so it should matter to all of us as well as getting a normal, gender-balanced Court for the benefit of all, men and women alike.

Elisabet Fura

Judge at the Court

1. One woman, 33 men and six vacant seats. Such was the composition of the Court on 31 October 1998, the last day of the part-time old Court. Elisabeth Palm (Sweden) was the female judge. She had been a member of the Court for ten years by then. In the years before, women judges had also been rare and far between. Only Helga Pedersen (Denmark, judge between 1971 and 1980) and Denise Bindschedler-Robert (Switzerland, judge between 1975 and 1991) had preceded Elisabeth Palm. In the Commission the situation was slightly better, while in 1998 it included three women out of 33 commissioners. However, we still have some way to go before we can talk of a truly gender-balanced court. The important conclusion is perhaps that it is moving in the right direction. (**Editor's note:** By 1 July 2010 the number of female judges had increased to 18.)
2. Interview by Karmela Bélinki called 'Högsta domstolens högsta kvinna' ('The Supreme Woman of the Supreme Court') published in the Finnish women's magazine *Astra Nova* 2006, issue 3–4.
3. M.K. Cary, *Ruth Bader Ginsburg's Experience Shows the Supreme Court Needs More Women*, published 20 May 2009, Thomas Jefferson Street blog (www.usnews.com).
4. 'Debate on Whether Female Judges Decide Differently Arises Anew', *The New York Times*, 3 January 2009.
5. L. Caflisch *et al.* (eds.), Liber Amicorum *Luzius Wildhaber: Human Rights – Strasbourg Views*, Norbert Paul Engel, 2007.

This photograph shows, from left to right, Françoise Tulkens, Nina Vajić, Antonella Mularoni, Snejana Botoucharova, Elisabeth Palm, Viera Strážnická, Hanne-Sophie Greve, Margarita Tsatsa-Nikolovska and myself. It was taken in 2002, after one of the lunches that Elisabeth Palm, the first female Vice-President of the new Court, had taken the initiative to organize so that the female judges could get to know one another better.

Wilhelmina Thomassen
Judge at the Court, 1998–2004