APPLYING AND SUPERVISING THE ECHR

The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings

Workshop held at the initiative of the Polish Chairmanship of the Council of Europe's Committee of Ministers

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ADDRESS BY MR ADAM DANIEL ROTFELD

Minister of Foreign Affairs of the Republic of Poland

Excellencies, ladies and gentlemen,

It is my pleasure to welcome you this morning – as the Chairman of the Committee of Ministers of the Council of Europe – to the workshop on the improvement of domestic remedies.

I am very pleased that the workshop takes place within the 57th meeting of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights. This provides us with a unique opportunity to share national experiences and discuss domestic solutions in the field of effective remedies, with particular focus on the excessive length of judicial proceedings.

The Polish Chairmanship of the Council of Europe put forward the initiative of organising such workshop bearing in mind one of the priorities of its Presidency – and notably – strengthening human rights and ensuring the effectiveness of the European system of human rights protection.

I believe that this workshop constitutes also a timely prologue to discussions planned within the agenda of the Third Summit of the Council of Europe, which will be held in Warsaw on 16-17 May 2005.

Ladies and gentlemen,

The positive influence of the European Convention on democratic societies is remarkable and well known. However, we should remember that the success of the Convention still depends to a large extent on the interaction between the domestic systems of human rights protection and the European umbrella held by the European Court of Human Rights in Strasbourg.

In my short speech I wish to draw your attention to the memorandum adopted by the Plenary Court on 21 March 2005. We can find there some important issues concerning the European Convention system, which – according to the Court – deserve special attention during the Third Summit. Let me now address some of these issues.

Firstly, it goes without saying that the system's effectiveness demands various steps to be taken at national level. Two main things should be indicated in this regard: a rapid ratification of Protocol No. 14 as well as conscientious implementation of the Recommendations adopted by the Committee of Ministers in May 2004.

Especially as regards the Recommendation on the improvement of domestic remedies, it should be noted that states were urged to ascertain that domestic remedies exist for anyone having an arguable complaint of a violation of the Convention, and that these remedies are effective. It has been almost a year since this Recommendation was adopted. It is hoped that the member states not only translated this Recommendation into national languages, but also took action with a view to its full implementation.

Of course, the process of reviewing the effectiveness of the existing domestic remedies may take more than one year. However, the states were encouraged to do all they can in order to ensure that effectiveness of domestic remedies is being given a priority.

I should also mention that the efforts for ensuring the effective system of domestic remedies are co-ordinated and encouraged within the European Commission for Democracy through Law (Venice Commission). The participants to this workshop are presumably familiar with the draft report on national remedies in respect of excessive length of proceedings, prepared by the Venice Commission in March 2005. I believe that such initiatives should be promoted and brought to the attention of all decision-makers in the member states.

Secondly, the Court's memorandum points out some main challenges ahead of the European System of human rights protection. The Governments should take note of the fact that Protocol No. 14 will not by itself decrease the number of cases coming to Strasbourg, nor will it resolve the problem of the Court's existing caseload. What is particularly important in this regard, is that the system requires further changes. Long-term options and strategies need to be formulated.

In other words, we must ask ourselves how do we imagine the European system of human rights in the future? What system do we want to leave the generations to come? It is the vision of the system in the 21st century, which should guide our next steps and actions.

I subscribe to the idea that the Third Summit of the Council of Europe should address the questions indicated above. Moreover, comprehensive discussions should be launched both at international as well as national levels, in order to identify likely scenarios and prepare adequate responses. These long-term strategies will allow for a better co-ordination of the Government's action. They may also provide the Court with necessary input for a continuing dialogue with Governments aimed at preserving its efficiency.

As Minister for Foreign Affairs of the Republic of Poland, I can assure you that during the Third Summit there will be plenty of opportunities to focus on the Court's future. It is also the Summit's aspiration to offer a framework for discussions on the long-term strategies for the European Convention system. The debate should

include independent experts, eminent academics, as well as distinguished national and international judges.

Thirdly, the challenges for the system include the accession of the European Union to the European Convention on Human Rights. This issue also involves an examination of the EU's internal remedies in accordance with the principle of subsidiarity. The negotiations on the EU's accession will require a close look at the institutional and procedural solutions.

The exchange of experiences between the European Union and the Council of Europe should be developed both before as well as after accession. I believe that both organisations have much to offer in terms of initiatives in the field of improving effectiveness of national legal systems. By way of example – the proposal for an EU directive on certain aspects of mediation in civil and commercial matters (presented by the Commission) reflects a trend which is also close to the Council of Europe's efforts aimed at ensuring a better access to justice.

Ladies and gentlemen,

Let me now say a few words about some legal initiatives of the Polish Chairmanship of the Committee of Ministers. We have prepared them convinced that strengthening human rights requires a forward-looking approach. We should constantly react to new challenges and needs. On the eve of the Third Summit we should think in what areas the Council of Europe action is not sufficient yet and requires a more creative attitude. Poland would like to contribute to this reflection and has prepared some ideas for consideration.

At this seminar we are discussing means by which we could better guarantee appropriate quality of domestic legislation and practice as regards the right to a fair trial. However, we should not limit ourselves to this aspect of Article 6 but we should also think about the subjects entitled to this right. In this context let me draw your attention to the important evolution of the Court's case-law extending the guarantees of Article 6 to the victims of crimes. This issue is worth our deeper examination and drawing conclusions. Maybe we should consider institutionalising this tendency in a new Protocol to the Convention.

Protection of victims of crimes is becoming a more and more important part of the actions of the Council of Europe established to defend the rights of the most vulnerable groups of persons. Poland is ready to support them. In this task we should not forget about a particular category of victims – children. Their right to protection from all forms of violence is also present in the case-law of the European Court. Nevertheless, the effective protection of children from domestic violence still faces many obstacles both in law and in practice of many states.

In our opinion the action of the Council of Europe should be a package comprising all the relevant measures: education, social policies and standard setting. However,

awareness raising and social policies are not sufficient if legal regulations are not precise.

Therefore, drawing inspiration from the case-law of the European Court, Poland would like to propose – for further reflection – to examine an idea of drafting a legal instrument on protection of children from domestic violence. Such an instrument should aim at facilitating the implementation of their rights by removing possible gaps in the law or practice that reduce the level of their protection against violence.

Ladies and gentlemen,

This seminar and these initiatives aim at strengthening the effectiveness of the European Convention on Human Rights system. However, we should not forget about the remaining conventions and protocols of the Council of Europe amounting now to about 200 instruments. This rich and diverse treaty system constitutes a real treasure, which requires our special attention and constant efforts. While planning and drafting new instruments we should – at least from time to time – look backwards and draw conclusions. The Third Summit provides us with a good opportunity in this respect.

Some conventions have never entered into force. Some have become obsolete. Some require amendments or improvement of practice. Some have been forgotten but still may be useful. Other should be adjusted to the new requirements and challenges. Some are worth opening for the accession of countries outside the Council of Europe.

Therefore Poland proposes to carry out a comprehensive review of the Council of Europe convention system with the intent of strengthening its effectiveness, updating to new requirements and promoting common standards. It would be a demanding task. Nevertheless, it would streamline the Council of Europe convention system and in this way increase its efficiency and confirm the unique role of the Council of Europe as a standard-setting pan-European organisation able to respond to the new challenges of the 21st century.

Let me once more express my strong conviction that this workshop will contribute to a better understanding of how to ensure an effective system of remedies at national level.

I also believe that your presentations and discussion will constitute an important contribution to the actions taken with view of reducing the caseload of the Court. Indeed, we should remember that the practical measures and remedies within your national legal systems are the key to success.

Before I give the floor to Mr Wildhaber I wish to express my gratitude – on behalf of the Polish Chairmanship – to the Secretariat of the Council of Europe for their constructive assistance in preparing this workshop.

I hope you will be having a thought-provoking discussion.

Thank you for your attention.

ADDRESS BY MR LUZIUS WILDHABER

President of the European Court of Human Rights

Mr Chairman, Minister, ladies and gentlemen,

I see so many eminent specialists among you that I will go straight to the heart of the problems. And I wish to make three remarks.

The first remark is one that I should perhaps not make as President of our Court. But I want to insist on the importance of effective remedies, both at the domestic and the European levels. The Convention is all about remedies. In a sense, the existence of effective remedies is more important than the wording of the Convention itself. This being said, I shall withdraw my remark at once and shall proceed to the second remark.

Our Court says in its case-law that the states are responsible for organising the judicial system so that it can live up to the requirements of Article 6 of the Convention. The same is true, of course, of our Court, and much to my regret, I am bound to say that the Council of Europe and its member states have not organised and equipped our Court in a way that would allow it to fulfil its tasks properly. The figures that we use differ all the time, but the direction of the figures is always the same. The consolidated figures for the year 2004 show that some 44 100 applications were submitted to the Court; we pronounced 734 judgments; 20 350 cases were declared inadmissible or struck out; some 11 160 applications were disposed of for administrative reasons; and some 12 000 cases could not be handled in this time-span and remain pending. The Secretary General has commissioned two audits, one from the internal auditor, one from an external British auditor. I shall not give you all the details of the audits, but in essence they say that the Court would need the double of its budget and of its staff to cope with all incoming applications, and if it were to cope with its backlog speedily, it would need still more means. The Court's budget is at present 40 million euros; the external auditor says that by 2007 the budget should rise to 165 million euros; the total budget of the Council of Europe stands at 186 million euros.

In the real world, the Court will not get 165 million euros in 2007, for all sorts of reasons. All in all, the alternatives are quite self-evident. There are in reality, five options.

Firstly, you continue with the present system and give the Court more money. Not 2% more, but massively more, double the budget, as the audits advocate. This is unlikely to happen.

Secondly, access to the Court might have to be restricted. This was of course discussed in the context of Protocol No. 14, and the outcome was Article 35, which by

itself will not be sufficient to turn the tap, although Protocol No. 14 should nevertheless be ratified speedily.

Thirdly, more and more cases should be dealt with by the national courts within the domestic legal systems. This would in a sense be ideal. However, our experience shows that up to now this has not been easy to bring about.

Fourthly, an approach that is always popular in politics is to do nothing and let the backlog accumulate further.

Fifthly, in a complex world, the solution is likely to be a complex and a mixed one. This is what I believe will happen. In the light of the two authoritative audits, to do nothing cannot be an option. The steady increase of applications to the Court is a sign of the success of the Court and the Convention. In no way can it be blamed on the Court.

My third remark is focused on the topic of today's seminar. The length of proceedings is the classical category of what we call "repetitive cases". Some have spoken of "clone cases" but the files we get are not "clone" files. Each one is different and has to be read and studied separately, before we can know whether the case is a repetitive one.

There are perhaps between twenty and thirty categories of repetitive cases, and they reach from the non-execution of final court judgments via the composition of national courts, the lack of payment of adequate indemnities for expropriations, claims for restitution of nationalised property, or widowers' children rents, all the way to follow-up cases in situations of conflict or civil war. However, the problem of the length of proceedings is the most widespread one and concerns about half the member states, normally those who do not have effective remedies. In some of the past years, fully 60% of our judgments on the merits concerned the length of proceedings. It is my conviction that in a field where there are literally hundreds of judgments of our Court, the problem should be repatriated into the domestic legal systems. You do not need a European Court of Human Rights in order to find out that ten years in one instance is somewhat long.

Our Court's case-law has perhaps shifted the focus too much to the question of the payment of an indemnity. Let us not forget that the primary aim of the finding of a violation must be the *restitutio in integrum*, the repair of the violation of Article 6 of the Convention, and this must mean that first and foremost the procedures which have lasted too long must be brought to an end. If you speak of domestic remedies, you should never forget that aspect.

And now I wish you a lot of success. If you are successful, you will have served well the applicants, the national courts and governments, and finally our Court. Let us therefore hope that you will be successful.

PRESENTATION OF THE WORKSHOP

IMPROVING DOMESTIC REMEDIES WITH PARTICULAR EMPHASIS ON CASES OF UNREASONABLE LENGTH OF PROCEEDINGS

Mr Krzysztof Drzewicki,
Former Chairperson of the CDDH,
Chairperson for the Workshop

I have the great pleasure to welcome the initiative of the Polish Chairmanship of the Council of Europe to organise a *Workshop on the Improvement of Domestic Remedies, with particular emphasis on cases of unreasonable length of proceedings*. The very choice of the theme, so significant for effective protection of human rights, is a success in itself. Our expectations are however far greater – the Chairmanship has intended to address the problem of domestic remedies with the aim of their improving through appropriate legislative and judicial endeavours. A search for proper national solutions to the problem of effective remedies may best be achieved by a wide debate and exchange of experience – the aims expected for the achievement by this Workshop.

1. IDENTIFICATION OF THE UNDERLYING PROBLEM

The problem of the length of judicial proceedings has become more and more important because for decades it has continued to be on the regular increase and has expanded geographically in Europe.[1] Upon close glance, the European situation can tentatively be characterised by distinguishing two groups of states affected in substantially different ways by the "malaise" of protracted proceedings.

A first group of states have shown apparent symptoms of a more serious stage of development of this "malaise" – a structural stage.[2] It affects widely and profoundly the whole organisational and functional system of judiciary bringing about multidimensional and persistently paralysing effects and consequently a large-scale denial of fair trial. Such a situation has traditionally been discernible in Italy (albeit

1. The submission that excessive length of judicial proceedings is an all-European issue was made by O. Jacot-Guillarmod, "Rights Related to Good Administration of Justice (Article 6)", in R. St-J. Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights*, Dordrecht-Boston-London: Martinus Nijhoff Publishers, 1993, pp. 394-395.

predominantly in civil cases), but it has recently made substantial progress in Austria, France, Croatia, Czech Republic, Greece, Hungary, Poland, Portugal, Slovakia, Ukraine, Russia and others.

A second group is made up of established and well-functioning democracies traditionally renowned for their efficient administrations of justice (e.g. Nordic countries, Germany, the Netherlands, Ireland or the United Kingdom). Although some increase of length-of-proceedings cases has been recorded in these countries, on the whole however they still show the ability to counteract symptoms of unreasonable length of proceedings before their courts.

From yet another perspective it is often submitted that most of the cases involving breaches of the "reasonable time" guarantee come from civil law jurisdictions and involve much longer periods of time than would normally be found in common law courts.[3] It is in this context that one should note a complex case from a common law country concerning defamation proceedings against applicants for producing and disseminating an allegedly defamatory leaflet within an anti-McDonalds campaign. As established by the European Court of Human Rights, the very trial took place "between 28 June 1994 and 13 December 1996. It lasted for 313 court days, of which forty were taken up with legal argument, and was the longest trial (either civil or criminal) in English legal history".[4] Such a "record-breaking" length of proceedings might actually be perceived in many other countries as a reflection of very high performance of the administration of justice.[5]

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2. The notion of "structural" phenomenon stems from the concept of "structural violence" submitted by Johan Galtung, who points to the profound and comprehensive nature of political, socioeconomic and cultural obstacles to the enjoyment of human rights. Another definition of structural violation was proposed by P. Jambrek, "Individual complaints v. structural violence: reactive and proactive role of the Strasbourg court of law", in *In our hands.The effectiveness of human rights protection 50 years after the Universal Declaration. Proceedings, European regional colloquy (Strasbourg, 2-4 September 1998)*, Strasbourg: Council of Europe Publishing, 1998, pp. 75-81.
3. See D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, London, Dublin, Edinburgh: Butterworths, 1995, p. 229.
4. See *Final Decision as to the Admissibility of Application No. 68416/01, 6 April 2004*, pp. 8-9, and the judgment: Case of *Steel and Morris v. the United Kingdom*, judgment, 15 February 2005, para. 19. The complex character of this record-breaking trial is also reflected in the following facts: transcripts of the trial ran to about 20 000 pages, there were about 40 000 pages of documentary evidence, and in addition 130 witnesses gave oral evidence.
5. Among the protracted proceedings the most "famous" is the Greek case of "olive grove", which within temporal jurisdiction of the European Court lasted "only" 9 years, although in the domestic proceedings it was instituted in 1933 – see the case of *Yagtzilar and others v. Greece*, judgment, 6 December 2001, paras. 27 and 31. Other well-known lengthy cases took, before reaching Strasbourg, 28 years – case of *Brigandi v. Italy* (19 February 1991); 18 years – case of *Tusa v. Italy* (27 February 1992) or 19 years – case of *Poiss v. Austria* (23 April 1987).

2. CAUSES OF THE EXCESSIVE LENGTH OF JUDICIAL PROCEEDINGS

Identification of causes is usually a helpful device in designing a strategy for preventing and remedying a phenomenon at stake. Such a diagnosis is however not an easy task because there is no single cause generating or contributing to excessive length of judicial proceedings. Its causes differ from country to country and are deeply determined by a prevailing legal system and legal culture.

One may cautiously submit about the whole of Europe that excessively long judicial proceedings have been caused above all as a side-effect of gradual strengthening of the judiciary as the "third power". It has appeared to be a natural, though delayed, reaction against gradually increasing strength of the "second power". This process has thus been generated by the increased importance of the rule of law leading to increased calls for controls of the legality of government action by the courts as well as the development of complex economies and technological innovations calling for more conflict resolution by the state, including through the courts. The development of human rights protection largely through judicial guarantees contributed in itself to the increase of cases submitted to the courts, and consequently to longer duration of their judicial determinations.

The whole post-war period in Europe may be characterised as a period of constant extension of the scope of judicial powers. It may tentatively be subsumed into three dimensions:

- *ratione materiae* extension of judicial powers to new issues and areas;
- extension of judicial powers to pre-judicial stages of proceedings; and
- extension of judicial powers to post-judicial stages of proceedings.

The first group concerns issues and areas, which earlier were not under the jurisdiction of the courts of law but were later given judicial guarantees. This trend is best reflected by the process of establishing constitutional courts, administrative courts and labour and social security courts. Some of the new courts have emerged from the existing courts of law but have been granted more autonomous positions within the judiciary. All these courts have usually been granted further powers. Within this category of extensions one should not overlook the extension of judicial guarantees to regulatory offences (all of them or on appeal solely), technical areas (in the field of maritime law, patent law, etc.) and to appellate stages of disciplinary procedures of professional corporations (e.g. medical, veterinary, academic, military and other ones).

The second category of powers demonstrates extensions of judicial guarantees to pre-judicial stages (e.g. determinations on pre-trial detention, their further extensions, appeal to courts against certain decisions of prosecutors in the course of the investigative stage of proceedings).

The third category of powers shows the extension of judicial guarantees to post-judicial phases, such as questions falling within the enforcement, executive and penitentiary proceedings, as reflected in the activities of bailiffs and penitentiary courts.

While identifying the causes of increasing length of judicial proceedings in Europe one cannot overlook those, which are specific for individual countries or their groups. It seems that the peculiar situation in Italy has become strongly embedded in legal culture. Yet another specific feature is characteristic of new members of the Council of Europe from formerly autocratic countries (e.g. Spain, Portugal and central and eastern Europe). This group of countries has been undergoing profound transformations of their systems of governance, including the administrations of justice. They had thus not only to cope with an all-European modern increase of judicial powers (the above first and second categories of extensions) but also to arrange for a profound reconstruction of their judicial systems and restoration of the independence and impartiality of the courts. In addition, judges from Central and Eastern Europe had also to meet challenges in new areas, previously unknown to them, like those resulting from market economy.[6]

In conclusion it may be submitted that we have to do with a fairly diversified range of causes of the lengthy judicial proceedings. Before addressing them they must first be precisely identified. Otherwise the recommended countermeasures may prove to be futile and ineffective.

3. COUNTERACTING THE UNDUE LENGTH OF JUDICIAL PROCEEDINGS

Bearing in mind the multitude and diversity of causes contributing to the excessive length of judicial proceedings in Europe it must be concluded that any efficient countermeasures should consequently be designed in a way tailoring them to the nature of causes addressed. The choice of proper remedies should thus be preceded by a comprehensive diagnosis of the causes at stake.

Under pressure from the democratic societies the countries affected by the "malaise" in question started to address the phenomenon of undue length of proceedings and to adopt remedial measures. In numerous countries special programmes of organisational and financial support for the judiciary have been launched. But only in

6. See N. Mole, "European human rights law in national and international practice: common experiences and differences", in *Report of the Seminar "Implementation of human rights: the efficiency of justice in the Council of Europe and its member states"*. Netherlands Ministry of Foreign Affairs and NCJM, Dutch Section of the International Commission of Jurists, The Hague, 19-20 April 2004, Leiden: NJCM, pp. 92-93 mentions among the main obstacles to the efficiency of justice in the new Council of Europe member states: underpaid, under-resourced and inefficient judiciary, its undervalued nature within the societies and lack of "judgecraft" or judicial skills.

some of them have these efforts brought the envisaged results.[7] In other countries the improvement of the proceedings has appeared to be slow or hardly perceptible, often resulting in further accumulation and not reduction of the backlog.

The end result has in any event contributed to the continuing sense of the denial of justice. The ineffectiveness of measures taken in many countries generated further internationalisation of the problem of excessive duration of judicial proceedings. This trend has become discernible in the activities of numerous bodies of the Council of Europe, with a leading role assigned to the European Court of Human Rights.[8] Its legal basis contains an explicit standard to that end. Under Article 6 para. 1 of the European Convention on Human Rights, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal". This provision gave the European Convention a pioneering position in the normative formulation of the protection against undue length of judicial proceedings and, more importantly, in developing the jurisprudential concepts and criteria for assessment of "reasonable time" standard.

In the course of time, the number of cases concerning alleged violations of the right to trial within reasonable time has been regularly increasing. At present, this category of cases constitutes the largest number of complaints on a single issue. As submitted elsewhere, "[I]n 2003, out of total 703 judgments delivered, a third – 263 – were about the length of proceedings in national courts".[9] Actually, it means that there were many more complaints lodged with the Court on this single issue but they had been disposed of at stages of registration, admissibility or friendly settlement. This shows not only that the European Court has to devote more of its time than ever before to the length-of-proceedings cases but above all one may conclude that our legal systems have not always been able to ensure efficient justice within a reasonable time.

The European Court of Human Rights worked out its doctrine on the reasonable time rule of court proceedings, including criteria for assessment of their length.[10] The Court has pointed out that the Convention places a duty on the states parties

7. In the case of *Buchholz v. Germany* (6 May 1981, paras. 39-63), the European Court of Human Rights appreciated the legislative, organisational and budgetary measures taken when the German Government had experienced the backlog of labour court business in the 1970s. Since those measures were largely successful in expediting the proceedings before the labour courts, the Court did not find a violation of the "reasonable time" standard in this case.
8. In addition to the work of existing intergovernmental bodies and the Parliamentary Assembly, length of judicial proceedings is also on the agenda of a newly established body – the European Commission for the Efficiency of Justice (CEPEJ). For more see P. Albers, "The Role of the CEPEJ in Promoting the Efficiency of Justice", in *Report of the seminar "Implementation of human rights: the efficiency of justice in the Council of Europe and its member states"*, *op. cit.*, pp. 51-56.
9. See N. Mole, *op. cit.*, p. 89.

to organise their legal systems so as to allow the courts to comply with the requirements of Article 6, including that of trial within a "reasonable time". For decades, however, the Court has been hesitant to elaborate on the issue of taking specific remedial actions against undue length of judicial proceedings, in spite of having at its disposal a "dormant" arrangement of Article 13 under the guise of the right to an effective legal remedy. The European Court's typical determination in such cases contained a traditional conclusion whereby once a violation of "reasonable time" standard from Article 6 para. 1 is found there was no separate examination of an alleged breach of the right to an effective remedy under Article 13.

Likewise, the Committee of Ministers, within its powers of supervising the execution of judgments (Article 46 para. 2 ECHR), confined itself to requiring of states "regular" remedial measures of individual and general character.[11] Thus for years the Committee of Ministers made no effective attempt to encourage states in setting up effective domestic remedies. One must, however, admit that in the context of the restrictive interpretation of Article 13 in conjunction with Article 6 by the Court, the Committee's liberty has been fairly limited.

Confronted with a continuous "flood" of cases against excessive court proceedings and low progress in remedying the situation at domestic levels, the European Court decided to change fundamentally its attitude in regard to the provision of legal remedies in regard to allegations of unreasonable length of proceedings.

4. SHIFTING THE INTERPRETATION

The change in question came with the Court's judgment in the case of *Kudła v. Poland* of 26 October 2000 in which the Court departed from its "half-way" approach and stressed that it was important to make sure whether there was an effective remedy in such cases in order to conform with Article 13 of the Convention. The Court consequently found violation in the fact that in addition to violation of Article 6 itself there was also a breach of Article 13 by the very absence of an effective domestic remedy in Poland against excessive duration of judicial proceedings. Obviously, these new elements of the judgment constitute its *ratio decisionis* and not *obiter dicta*. Therefore, along with Poland, all other states parties were actually invited to reconsider their positions on the issue of introducing domestic remedies to address judicially protracted proceedings, be they criminal, civil or

10. For more see N. Mole and C. Harby, *The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights*, Strasbourg: Council of Europe, 2001, pp. 23-24, and D.J. Harris, M. O'Boyle, C. Warbrick, *op. cit*, pp. 222-230.
11. For more on the procedure for execution of judgments and their supervision see *Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights, on 10 January 2001 at the 736th meeting of the Ministers' Deputies*. The Rules replaced earlier instruments on the application of executive provisions of the European Convention.

otherwise.[12] On the whole one must appreciate the Court for the very profound and comprehensive examination of the problem in the light of earlier jurisprudence and for designing a vision of new arrangement of domestic remedies concept in the future Europe.

It should, however, be noted that this highly commendable approach was adopted in the circumstances of the Court's crisis with length-of-proceedings cases, the crisis which control organs of the Convention contributed themselves to substantiate. This "self-contribution" of the Court was generated as an accumulated effect of its own jurisprudence. Two main developments support such a submission.

First, the steady increase of cases under Article 6 para. 1 made the Court apply the criteria for assessment of excessive duration of proceedings more liberally and flexibly. This trend brought about above all a gradual shortening of time-periods for assessing whether a proceeding was excessive or not. Until about mid-1990s only very serious and substantial delays of the domestic judicial proceedings resulted in finding a violation of the Convention. Subsequently, a lot more of much shorter proceedings were considered excessively long. With a feedback effect, the more liberal interpretation prevailed, the more and more new applications were filed with the Court.

Second, the increase of applications against allegedly unreasonably long proceedings showed the embarrassing inability of the Court to deal with them in a fully judicial way and in "a reasonable time". This became discernible when the Court abandoned its earlier practice of profound assessment of the facts and law of individual cases.[13] Instead, the Court moved gradually to "an overall assessment" and subsequently to an even more "summary" assessment by reference to a general formula whereby "an accumulation of identical breaches" of "reasonable time" requirement "constitutes a practice that is incompatible with the Convention". Such resort to a pattern of structural violations was merely followed by a statement that the length of proceedings in a specific case constituted a "further example of the practice referred to above".[14] By such a brief and "quasi-automatic" examination of cases by resort to a generalised assessment, the Court marked a departure from indi-

12. An overview of national arrangements providing domestic remedies, based upon replies to the questionnaire, was drawn up by the Venice Commission. See European Commission for Democracy Through Law (Venice Commission), *Preliminary Draft Report on National Remedies in respect of Excessive Length of Proceedings, Study No. 316/2004*, Strasbourg, 4 March 2005, CDL (2005) 013, pp. 1-62.
13. See M.-A. Eissen, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights*, Strasbourg: Council of Europe Publishing, 1996, Human Rights Files No. 16, pp. 20-21, who recalled that the Court began its examination of cases "with a statement marked by an intellectual modesty, relativism and realism": "the reasonableness of the duration of proceedings covered by Article 6 […] must be assessed in each case according to its circumstances".

vidual consideration of specific circumstances of submitted applications. It dealt with cases as clusters or aggregates and not as individual complaints. This way the Court became rather an administrative body than a judicial institution. Needless to say, conceptual value of those judgments has appeared to be very poor for development of case-law and legal theory.

One may submit therefore that the European Court of Human Rights contributed to the crisis of the whole system. When additional financial and staff resources designed for overcoming the crisis did not bring about the expected results, the Court reacted by a change of its position on Article 13. The principle of subsidiarity, formerly somewhat overlooked in many instances, became the main instrument for pointing to domestic legal orders as targets to be addressed. The *Kudła* judgment forwarded therefore so vigorously a message that the main thrust of addressing length-of-proceedings cases was to encourage domestic legal systems to establish effective remedies.

Following the impetus given by the Court in this crucial judgment, several solutions have been put forward by member states and in order to ensure the existence of effective remedies. This process was further encouraged by the conclusions of the European Ministerial Conference on Human Rights, held in Rome on 3-4 November 2000, thus a few days after the *Kudła* judgment had been delivered. In a legal parlance reflecting broader meaning than that of Article 13 ECHR, Resolution I boldly encouraged member states to "ensure that the exercise of the rights and freedoms guaranteed by the Convention benefits from an effective remedy at national level".[15]

Consequently, the question of domestic remedies became an essential part of the task to guarantee the long-term effectiveness of the Court, the task translated to specific terms of reference for the Steering Committee for Human Rights (CDDH) and the Liaison Committee with the European Court of Human Rights. Reflections of the former focused on three areas, including that of "prevention of violations on a national level and improvement of domestic remedies".[16]

Within this dimension of endeavours for guaranteeing the long-term effectiveness of the Court, the work by the CDDH and its subordinate body – the Committee of

14. For manifestations of those trends in case-law see *Salerno v. Italy,* judgment of 12 October 1992, para. 19, and *Bottazzi v. Italy,* judgment of 28 July 1999, paras. 22-23, as well as the dissenting opinion of one judge on the latter.
15. See Resolution I paras. 10 and 14 i. The President of the Court, Mr Luzius Wildhaber, emphasised in his speech that the *Kudła* judgment was explicitly referred to as one of five major challenges facing the Court. See *Proceedings. European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights, Rome, 3-4 November 2000*, Strasbourg: Council of Europe Publishing, 2002, pp. 39 (texts adopted by the Ministerial Conference are reproduced *ibidem*, at pp. 165-174).

Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) – contributed to the adoption of Recommendation Rec (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies. Its text goes beyond a mere set of recommended guidelines for states parties and the appendix thereto also contains an extensive examination of the workings of Article 13, opportunities of its dynamic reinterpretation in regard to the whole catalogue of substantive rights of the Convention and for the needs of developing domestic remedies. Not surprisingly, both the Recommendation and its appendix contain separate sections devoted specifically to domestic remedies against unreasonably long proceedings.[17]

At the same time, the Committee of Ministers and the member states also reinforced their action to come to grips with the root problems both in the context of the execution of the European Court's judgments and on the inter-governmental level and notably through the setting up of the CEPEJ and tasking it with examining a set of issues from the perspective of reforming domestic judicial systems.

5. CHALLENGES AHEAD

All the above developments prompt further action within the broader goal of strengthening the European Court of Human Rights which has been continuously encountering an ever-increasing number of applications, among which those against unreasonably lengthy judicial proceedings unequivocally prevail.

This is why today we should concentrate on what has been achieved so far with respect to the improvement of domestic remedies in order to help ourselves to better see what remains to be done. Therefore the purpose of this Workshop is to share national experiences. Three rapporteurs will present this afternoon the Czech, Italian and Polish approaches. I would like to encourage participants to a lively, rather informal, exchange of views. It is good to note that, so far, 18 member states have already sent information to the Secretariat on national experience.[18] I would like to encourage the others to do so in the future. This will help the DH-PR in the work entrusted to it by the CDDH.

For these needs, let me recall briefly the background of this exercise. Our Workshop is placed in the context of the follow-up to the Committee of Ministers' 114th session (12-13 May 2004). At that occasion, the Ministers decided that the Council of Europe had to ensure "the effectiveness of the implementation of the European

16. See Final Activity Report of the CDDH "Guaranteeing the long-term effectiveness of the European Court of Human Rights", adopted by the CDDH on 8 April 2004 (see para. 6 and Section A) in *Guaranteeing the long-term effectiveness of the European Court of Human Rights. Collected texts*, Strasbourg: Council of Europe, 2004, pp. 8-12.
17. See item III of the operative part of the Recommendation and paras. 20-24 of the appendix thereto. See both texts – *ibidem*, pp. 69-76.
18. Cf. document DH-PR (2004) 012.

Convention on Human Rights at national and European levels", which means, *inter alia*, that the Ministers' Deputies will review, on a regular and transparent basis, the implementation of a number of major recommendations addressed to member states. Among them, Recommendation Rec (2004) 6 of the Committee of Ministers to member states on the improvement of domestic remedies became the main reference point.

Taking into account national examples of good practice, member states were recommended to "ascertain, through constant review, in the light of case-law of the Court, that domestic remedies exist for anyone with an arguable complaint of a violation of the Convention, and that these remedies are effective, in that they can result in a decision on the merits of the complaint and adequate redress for any violation found". They were called to "review, following Court judgments which point to structural or general deficiencies in national law or practice, the effectiveness of the existing domestic remedies and, where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court". Finally, member states were recommended to pay particular attention to the "existence of effective remedies in cases of an arguable complaint concerning the excessive length of judicial proceedings".[19]

Let me insist on the importance of the topic, both for the Parties to the ECHR and for the Court:

- For the Parties to the ECHR – Having in mind the subsidiary character of the supervision mechanism set up by the Convention, it is for member states to ensure that domestic remedies are effective in law and in practice, and that they can result in a decision on the merits of a complaint and adequate redress for any violation found. The nature and the number of applications lodged with the Court and the judgments it delivers show that it is more than ever necessary for the member states to ascertain efficiently and regularly that such remedies do exist in all circumstances, in particular in cases of unreasonable length of judicial proceedings.

- For the Court – The availability of effective domestic remedies for all arguable claims of violation of the Convention should permit a reduction in the Court's workload as a result, on the one hand, of the decreasing number of cases reaching it and, on the other hand, of the fact that the detailed treatment of the cases at national level would make their later examination by the Court easier. The improvement of remedies at national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court.

19. See items I-III of the operative part of Recommendation Rec (2004) 6 in *Guaranteeing the long-term effectiveness of the European Court of Human Rights. Collected texts*, p. 70, *op. cit.*, note 16.

The DH-PR has been called, at this stage, to collect and assess information. But it is clear that the next step will be to ensure proper assistance to member states which request help in the implementation of this Recommendation. Let us hope that this Workshop will be fruitful in providing the DH-PR with "food for thought" for its further work in this field.

STATE OF DEVELOPMENTS FROM THE ECHR PERSPECTIVE

GUARANTEEING THE LONG-TERM EFFECTIVENESS OF THE ECHR: THE IMPORTANCE OF EFFECTIVE REMEDIES

Mr Michal Balcerzak, Nicholas Copernicus University, Torun, Poland

Let me start by saying that it is a great privilege for me to have an opportunity to address some preliminary issues at this workshop. Having regard to the distinguished speakers who opened today's workshop, as well as eminent experts who are going to present their interventions later, I have to say that I consider my task here as an *entrée* rather than the main course.

Nevertheless, I should start by stressing that hardly anyone would be in a position to undermine the importance of domestic ways which are used to redress human rights violations. The remedies provided for in internal legal systems of the State Parties are crucial both in terms of the long-term, as well as the short-term effectiveness of the system. It is interesting that we rarely clarify what we mean by the **long-term effectiveness** as distinguished from the **short-term one**. It may *prima facie* appear as a secondary consideration, but in fact it is not insignificant.

Controversial as it may sound, I am of opinion that **both Protocol No. 14 as well as the Recommendations of the Committee of Ministers (adopted in May 2004) which deal with effectiveness, concern a short-term perspective.** These instruments were designed to improve the effectiveness of the system in the short run, that is to prevent it from a breakdown. But they are relevant in a perspective of four or six years. My submission is that **the so-called long-term perspective concerns decades rather than years.** We should not avoid discussing the desired vision of the Convention system in a more distant future.

In these terms, domestic remedies have a main role to play. In the long run, **the point of gravity of the system cannot lie in the Court and its Registry.** There is a serious need to **decentralise the Convention system** and truly base it on an assumption that domestic legal protection is a front line. It follows that we should strive at **restoring the true meaning of the principle of subsidiarity.** The priority must be given to these domestic actions which allow for **improved and better tailored domestic remedies.** In fact, it is not the Council of Europe who has a primary task of ensuring an efficient remedial protection of human rights – it is a challenge for the member states.

To sum up my first argument – there is hardly any vision of the Convention system in a long perspective without domestic remedies. But also – let us take a step forward and ask ourselves the following question: **is there any long-term vision of the system at all?** If not, perhaps it is time to elaborate one?

As I am supposed to deal with the issue of effective remedies, I decided to discuss briefly the right to an effective remedy, as guaranteed under Article 13 of the European Convention. Firstly, it should be reminded that **the right to an effective remedy is an accessory guarantee**, which means that it has actually no independent role to play in the Convention system. An applicant may not claim a violation of Article 13 *in abstracto*, i.e. with no link whatsoever to a material right or freedom secured by the Convention or additional protocols thereto. The dependent character of Article 13 is similar to Article 14 of the Convention (prohibition of discrimination).

The dependence of Article 13 does not imply that the application of this guarantee must be preceded by violation of the rights and freedoms established by a national authority. Initially the European Commission of Human Rights took an opposite view, having assumed that the words *are violated* (in French: *ont été violés*) in the text of Article 13 require a pre-emptive establishment of the alleged violation. In fact such interpretation would deprive this guarantee of its meaning – if a violation has already been established in domestic law, then an applicant must have had recourse to an effective remedy before a national authority. Fortunately, that ambiguity was cleared up by the Court in its *Klass v. Federal Republic of Germany* judgment of 1978.

The line of reasoning adopted by the Court in the *Klass* judgment was confirmed five years later in the *Silver and others v. the United Kingdom* case of 1983. In the same judgment the Court elaborated on the specific attribute of the "claim" which may give rise to an issue under Article 13: *where an individual has an* ***arguable claim*** *to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before national authority in order both to have his claim decided and, if appropriate, to obtain redress* (§ 113 of the *Silver* judgment). It should be noted that the Court has never formulated any specific hints as regards the "arguability test". Some criteria were put forward by the European Commission of Human Rights in the *Boyle and Rice v. the United Kingdom* case*:* in the Commission's view such a "claim" should (a) concern a right or freedom guaranteed by the Convention; (b) not be wholly unsubstantiated by the facts; and (c) give rise to a *prima facie* issue under the Convention. The Court's case-law has not explained further the arguability test introduced in the *Silver* judgment. It seems that the arguability is determined by the Court *ad casum.*

Effectiveness of a remedy **does not require certainty as to a favourable outcome**, but on the other hand **no prospects for success would not satisfy the requirements of Article 13 either.** The remedial effectiveness inherent in Article 13 corresponds with the obligation to exhaust the domestic remedies before lodging an

individual complaint to the Strasbourg Court (Article 35 (1) of the ECHR). The case-law of the Court clarified that there is no obligation to exhaust remedies which are ineffective or unavailable. The standard of remedial effectiveness in both Article 13 and Article 35 (1) seems to be uniform.

Let me refer also to one of the milestones in the Court's jurisprudence which concerned Article 13. In the ***Kudła v. Poland*** **judgment** of 26 October 2000 the Grand Chamber of the Court reversed its **case-law as regards the relationship between Articles 6 (1) and 13 of the Convention.** The Court has decided that there was no absorption of the safeguards of Article 13 by those of Article 6 (1) where the alleged violation concerned the right to trial within a reasonable time. Therefore the Court has found it necessary to examine separately the applicant's complaint under Article 13. One of the most significant reasons for such a change in the established case-law was the growing frequency of violations of the reasonable time requirement laid down in Article 6 (1). The Court has underlined **"the important danger" that exists for the rule of law within the national legal orders** of the States Parties when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy (§ 148 of the *Kudła* judgment). **It took almost four years before Poland adopted new legislation introducing a separate remedy against unreasonable time of proceedings.** The Polish experience with the new Act will be discussed later this afternoon by Mr Kazimierz Jaskowski, Judge at the Supreme Court of Poland.

Summing up a short overview of the guarantee enshrined in Article 13 of the Convention, I wish to raise another issue and notably, **can we speak of a "European standard of effective remedies"**? On the one hand – yes, we have some guidance from the Court of **how to assess effectiveness of the available remedies.** But on the other hand, European standards in terms of effective remedies **should not be understood as obligations to shape the domestic solutions in the same way.** Domestic remedies can hardly be unified across Europe. Another issue is whether the member states could not **benefit from exchanging experiences with domestic remedies.** I believe that a right opportunity to do so would be provided within the **follow-up process of the Recommendation Rec (2004) 6 on the improvement of domestic remedies.**

My third and last point concerns **domestic courts** and their role in ensuring both the short-term, as well as long-term effectiveness of the Convention system. I wish to refer to an idea submitted by some experts and academics of **setting up national human rights courts** which would be linked by a "special" bond with the Strasbourg Court and could provide a new perspective to the procedural protection of human rights within member states of the Council of Europe. Although I agree that radical solutions are sometimes necessary in terms of improving effectiveness of remedies at the domestic level, the idea of establishing national human rights courts sounds debatable for one basic reason: **the great majority of States Parties to the**

Convention already have human rights courts, which we know as constitutional courts. Is it not better to equip these courts with adequate tools and allow them to be effective in providing procedural protection "at home" rather than setting up new judicial bodies?

It should be remembered that though many domestic legal systems provide for a **constitutional complaint, such mechanism is often far from being a perfect remedy to stop the flow of cases to Strasbourg.** Of course, constitutional courts cannot deal automatically with every single case which could end up in the ECHR. Nevertheless, let me just take the example of my own country, where applicants as a matter of fact cannot bring a constitutional complaint to challenge violations of human rights if the normative basis of the authorities' actions does not raise a suspicion of being contrary to the Constitution. **Applicants from Poland can challenge the law but not a violation of human rights which occurred in application of legally correct basis.** I believe that the scope of the constitutional complaint should be reconsidered and made somewhat broader.

My second argument against special human rights courts would be made by a comparison with EU law. Domestic courts are regarded as courts of the Community law. Why should we not say it loudly that **every court in member states of the Council of Europe is in fact a court of the European Convention**? As we know, the Convention has so far been incorporated into every legal system of the States Parties. **Every national judge must know and apply the jurisprudence of the Court.** I am very strongly tempted to say that the **domestic courts should see the European Court as a precedent-setting authority.** It is also rarely heard of, but in my humble opinion the Strasbourg Court is a court of precedents. Nothing to be ashamed of.

Summing up, if there is any relief coming for the ECHR or – with some exaggeration – any hope left for the effectiveness of the Convention system, it is from the side of domestic courts and domestic judges. And bearing in mind the fact that judges are usually not eternal, I want to conclude by saying that for the long-term effectiveness of the system we should turn our attention not only at the direction of domestic remedies, but first and foremost at **university education and professional training of those who apply European Convention in practice.**

Thank you for your attention.

EFFECTIVENESS OF REMEDIES FOR COMPLAINTS OF LENGTH OF PROCEEDINGS – RECENT CASE-LAW AND PROBLEMS[20]

Mr Michael O'Boyle, Registrar of Section 4,
European Court of Human Rights

In the time allotted I cannot seek to cover the field which is very extensive – I propose to limit myself to a discussion of a few points concerning the concept of "effectiveness" in the Court's case-law and to mention some of the problem areas as reflected in pending cases.

One of our judges has recently been discussing the ECHR with a group of judges from the USA. He mentioned the large number of cases concerning length of proceedings currently pending before the Court and asked how US judges dealt with the issue. He was surprised to hear one judge saying that in his court there was simply no problem at all and no complaints of protracted procedures. When asked how that Court achieved this he replied that there was a very effective rule in operation which worked miracles. Judges were told that if there were delays they would have to pay any damages out of their own pockets! This rule had a very immediate deterrent effect. Needless to say, there is nothing in the Court's case law which supports such an extreme position since the guiding principle is that it is left to each of the states to find its own cure for the problem in the light of its distinct legal tradition.

What emerges from the cases is that indeed there is no uniform remedy – or as the court has put it in its ***Kudła v. Poland*** judgment – no prevailing pattern in the member states as to the form such a remedy should take. The cases reveal very different approaches in the different jurisdictions – in some countries a constitutional remedy (Slovakia) – in others an administrative remedy (Spain) – in others (Poland and Italy) tailor-made remedies brought into effect as a result of the Strasbourg proceedings.

The issue of remedies for length of procedure cases is intimately bound up with the question of the effectiveness of the Court and the principle of subsidiarity. Thus the Court recognised in ***Kudła v. Poland*** when it held that Article 13 required the state to introduce an effective remedy in respect of such complaints – and most recently in ***Michalak v. Poland*** "that if Article 13 were to be interpreted as having no application to the right to hearing within a reasonable time – individuals will be systematically forced to refer to the court in Strasbourg complaints – which should be addressed in the first place within the national legal system. In the long term the

20. Reproduced from speaking notes.

effective functioning on both the national and the international level of the scheme of protection set up by the Convention is liable to be weakened."

The force of the Court's remarks is borne out by the very large number of cases raising these issues pending before the Court against a wide variety of states – Italy/Poland/France/Croatia/Slovakia – to name but a few; and the high percentage of the Court's judgments (roughly 60%) devoted to such issues.

The key question addressed time after time in the decided cases is whether there exists an effective remedy – either for purposes of the non-exhaustion rule or under Article 13. So – what does the Court mean by "an effective remedy"?

Easy to state – not so easy in practice to apply!

The Court has held in ***Mifsud v. France*** – that Article 13 offers an alternative: a remedy is effective if it can be used either to expedite a decision by the courts dealing with the case or to provide the litigant with adequate redress for delays which have already occurred. Various points should be made in this context.

A remedy need not be a judicial one although this would be the ideal remedy. If it is not, the powers and safeguards of the administrative body concerned are relevant – the key test is whether the remedy in any given case is capable of having a significant effect on the length of the proceedings as a whole – is it capable of speeding them up or preventing them from being unreasonably long?

In ***Mota v. Portugal*** the national remedy in respect of a complaint concerning length of criminal proceedings was essentially an administrative one – he had the possibility of applying either to the Attorney General or a Judicial Service Commission for an order to expedite the proceedings under 108/109 Code of Criminal Procedure. The Court was satisfied that this would lead to the taking of necessary steps either to fix an immediate hearing date or closing the judicial investigation – the Government had shown that such a remedy worked in practice – it was therefore a remedy to be exhausted.

In ***Holzinger v. Austria*** – dealing with civil proceedings – the Court also considered effective a remedy under Art 91 of the Courts Act which enabled a person to request the court responsible for the delay to transmit to the superior court a request to speed matters up and to fix a time limit for the next procedural step – the court was obliged to transmit the request to the superior court which could make the order in question or alternatively agree itself to the request. Again the Court found such an arrangement to be effective on the basis of demonstrable practice.

The emphasis in these cases is on the question of practice. Has the State actually shown on the basis on examples of decided cases that the remedy works in practice? The State must be able to point to actual cases where the remedy for length complaints has actually been granted.

In ***Hartman v. the Czech Republic*** the Court did not consider a constitutional appeal to be effective because it was not shown to make it possible to compel courts to expedite proceedings or to provide compensation for any damage resulting from their excessive length. There was thus a breach of Article 13 of the Convention.

Similarly in ***Doran v. Ireland*** – a case of civil length – the cases cited by the Government did not indicate that a constitutional remedy before the Supreme Court was available to the applicant in respect of a complaint of length – or that there was the possibility of a court remedy for damages.

All the cases concerning non-exhaustion of domestic remedies stress the following: that while the remedy must be an accessible one in practice – mere doubt as to the prospects of success is not a valid excuse for not seeking to avail of it.

In the same vein, the Court has held that Article 13 requires a remedy to be put in place; but the effectiveness of such a remedy does not depend on the certainty of a favourable outcome (the ***Kudła*** judgment).

A question has arisen frequently as to the moment at which the Court assesses whether there is an effective remedy. Normally, the Court will examine whether there was a remedy **at the time of the introduction of the application.**

However, in length cases the Court has significantly departed from this rule "on an exceptional basis". It will consider the issue of whether there was a remedy at the moment it considers the issue of admissibility. In this way it has rejected cases for failure to comply with the exhaustion rule – ***Brusco v. Italy***, ***Nogolica v. Croatia***, ***Andresik v. Slovakia*** – and recently ***Michalak v. Poland***, all provide examples of this approach.

SOME PROBLEM AREAS

The fact that the Court has upheld a remedy as being effective in previous cases is not necessarily the end of the story.

Pending cases reveal a variety of knotty problems.

In cases concerning Slovakia, the Court has upheld the new constitutional remedy but is now confronted with the following issues:

1. Certain situations are not covered by the remedy developed by the Constitutional Court – e.g. where the proceedings have terminated – the remedy only covering pending cases;

2. The case-law of the Constitutional Court adopts a different approach to the assessment of duration, splitting the case into different procedural phases and assessing the length of these individually – as compared with the time-honoured approach of the Strasbourg Court which examines the "global" length of the proceedings;

3. There are also important issues concerning the smaller amounts awarded by the national courts compared to what would be awarded in comparable cases before the Strasbourg Court. This is, for example, a major contention in cases concerning awards under the Pinto law. The matter is now pending before the Grand Chamber in a series of Italian cases (***Scordino v. Italy (No. 1)***). The issue before the Grand Chamber concerns the Court's assessment of the sums awarded by the national courts. At what point should such sums be considered too low? And to what extent is it legitimate to compare the amounts awarded by the national courts with the national country "tariff" that the Court applies systematically in its judgments in order to achieve a measure of consistency. What is acceptable – 30%, 50% or 70% of the applicable tariff? What weight should the Court give to the fact that the amounts awarded in Italian cases are a reflection of the Court's earlier finding in its ***Bottazzi*** judgment that there existed in Italy an administrative practice in violation of Article 6 (1) of the Convention?

In addition, is the reasonableness of the quantum of the award to be assessed "not merely in the light of the duration of the proceedings but the value of the award judged in the light of the standard of living in the state concerned, and the fact that under the national system the money will be paid more promptly that would be the case if the matter fell to be decided by the Court under Article 41"?

As can be seen these issues before the Grand Chamber go to the heart of the issue of "subsidiarity" which – as I indicated at the beginning of my statement – is a distinctive feature of this whole area.

In conclusion, the many decided cases reflect a strong desire of the Court – for obvious pragmatic reasons related to the capacity of large numbers of such cases to encumber its docket – to repatriate this question to the national courts once it is satisfied that the general problem is being dealt with in a reasonable manner by the provision of an effective remedy.

The contentious questions concerning quantum, noted above, to be decided by the Grand Chamber, reflect a certain disquiet about the extent of redress afforded by certain national courts for quite significant delays in procedure. As is traditional in other areas of Convention law, what, at the end of the day, is to be considered as a "reasonable" solution to the problem of length of proceedings and what level of award is appropriate at national level (or, to use the language of "subsidiarity", what might be regarded as not "manifestly inadequate") – are questions of the highest importance in this area which are now in the lap of the Grand Chamber.

EFFECTIVE REMEDIES, NOTABLY IN THE CASE OF UNREASONABLE LENGTH OF PROCEEDINGS: RECENT DEVELOPMENTS IN THE COMMITTEE OF MINISTERS' SUPERVISION OF THE EXECUTION OF JUDGMENTS

Mr Fredrik Sundberg, Department for the Execution of Judgments, Directorate General of Human Rights

The question of the introduction of effective remedies in respect of violations of the right to trial within a reasonable time did not have any particular priority in the Committee of Ministers' execution control before the *Kudła* judgment of October 2000.

Execution practice at the time required mainly effective general measures for the future. The Committee of Ministers usually left the states concerned to evaluate whether or not it was appropriate to create an effective domestic remedy for the period until the general measures reforms became effective.

It should be noted that the Committee of Ministers did not normally consider the creation of effective remedies as part of the obligation to take general measures unless a specific violation of Article 13 had been established. general measures were instead usually limited to structural changes making new violations of the European Convention on Human Rights (the "ECHR" below) impossible or at least improbable.

This state of affairs suffered only rare exceptions, such as the creation of the Italian remedy (the so-called "Pinto Law") against unreasonably lengthy proceedings in 2001 (announced to the Committee of Ministers in 2000 as part of the major new action plan to solve this long standing problem – see the Committee of Ministers' Interim Resolution on the subject: (2000) 135). Another exception was when existing remedies had been found inefficient by the Court or the then Commission in the context of the examination of the admissibility of the complaint (see e.g. *Manoussakis v. Greece*, where notably the excessive length of proceedings before the Greek administrative courts made it unnecessary to have recourse to them in order to exhaust domestic remedies).

This situation reflected the views of the governments at least at the time. It has survived even after the *Kudła* judgment, as Recommendation Rec (2004) 6 on effective remedies, one of the five major recommendations of the Committee of Ministers to the member states adopted in the context of the efforts to guarantee the long term effectiveness of the ECHR system, continues to consider that the states have a margin of appreciation in deciding whether or not it is appropriate to create an effective

remedy for "clone" cases awaiting the structural reforms or whether it is better that such cases be decided by the European Court – see the explanatory memorandum.

This margin of appreciation has, however, suffered some limitations following the Committee of Ministers' 114th meeting in May 2004 and the adoption of the Declaration "Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels" in which the Committee of Ministers notably requested the Ministers' Deputies "to take specific and effective measures to improve and accelerate the execution of the Court's judgments, notably those revealing an underlying systemic problem".

One of these limitations came from the Court itself in the *Broniowski* case where the Court held that it was for the state concerned, and for the state concerned only, to set up the effective remedies required to solve all clone cases. Indeed, the Court stopped its own examination of such cases awaiting the setting up of an effective domestic remedy. This judgment was adopted notably in response to a formal call by the Committee of Ministers, also from May 2004, that the Court assist the Committee of Ministers' execution control by identifying as far as possible in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem. The follow up to Broniowski has been slow and the Court has only rendered a handful of similar judgments since, leaving the great majority of cases revealing systemic or structural problems to follow the ordinary procedure and rules before the Committee of Ministers in the context of its execution control.

The Committee of Ministers has, however, itself improved its execution control on this point. Today, relying on the Committee of Ministers' request to the Deputies in the above mentioned Declaration of May 2004 and the commitments of Heads of States and Government at the Third Summit, the Deputies do look into the question of domestic remedies in all cases, whether or not a violation of Article 13 has been identified or not and this in particular in cases relating to excessively long proceedings.

If that examination reveals that the rapid creation of a domestic remedy would be of major assistance to prevent clone cases and is realistic in the circumstances, respondent states will be strongly encouraged not to limit their general measures to structural changes, but to create also effective remedies. These calls are particularly important where the reforms are unlikely to be able to prevent effectively all new violations, a typical example being reforms aiming at addressing the problem of unreasonably long proceedings. They are also important in situations where reforms may take considerable time creating a strong likelihood of clone cases awaiting the entry into force of the reforms. Another important improvement of importance in this context are the Deputies' efforts to ensure that respondent states adopt, in cooperation with the Secretariat, comprehensive action plans for the exe-

cution of judgments within a maximum of six months from the date the judgments become final.

On the basis of the above developments in the practice of the Court and the Committee of Ministers, to which should be added the review carried out by the Steering Committee for Human Rights on behalf of the Deputies of the implementation of the Committee of Ministers' five recent recommendations on the national implementation of the ECHR, the issue of ensuring effective remedies for ECHR violations has come in the fore front of the efforts to guarantee the long term effectiveness of the ECHR system, not only as a matter of policy, but also as a matter of day to day practice. The experience of the next few years will show how successful this major attempt at improving the efficiency of the ECHR system will have been.

NATIONAL EXPERIENCES

WITH REGARD TO REMEDIES AGAINST UNREASONABLE LENGTH OF JUDICIAL PROCEEDINGS

THE CZECH EXPERIENCE

Mr Vít Alexander Schorm, member of the DH-PR for the Czech Republic

The Czech Republic is no stranger to the problem of length of proceedings. There are several hundred applications pending before the European Court of Human Rights, which has already delivered several dozen findings of violation of Article 6 § 1 of the Convention and also a number of inadmissibility decisions on the ground that the application was manifestly unfounded.

The Czech legal system offers a number of methods of expediting proceedings for the purposes of Article 6 § 1 of the Convention. Parties are entitled to request an acceleration of administrative proceedings or of the preparation for trial of criminal cases, i.e. the preliminary proceedings before the case is brought to court. The draft new Criminal Code also provides that the criminal courts shall be able to take account of undue length of proceedings when determining a sentence.

The Court described the situation concerning judicial proceedings proper in its *Hartman v. the Czech Republic* judgment of 10 July 2003 (§§ 43-51). In its defence the Government referred to the possibilities of appealing to a higher authority, appealing to the Constitutional Court or claiming compensation for damage caused by the length of proceedings. By comparison with the *González Marín v. Spain* judgment (of 5 October 1999), it would seem that the Czech system is similar to that existing in Spain – a hybrid system which is both preventive and compensatory in nature.[21]

Upon closer examination of the situation, the Court eventually dismissed the Government's preliminary objection of failure to exhaust domestic remedies, thereby partially abandoning its existing precedents with regard to the Czech Republic, since

21. A "preventive system" is a system in which the remedy available makes it possible to speed up proceedings subject to delay. A "compensatory system" is a system where a right to compensation (usually pecuniary) exists for undue delay. A "hybrid system" combines both approaches. Austria and Portugal have preventive systems, France and Italy have compensatory systems, while Spain, Slovakia, Croatia and Poland have a combination of the two.

it had previously recognised the appeal to the Constitutional Court as a remedy to be exhausted (*Český v. the Czech Republic*, decision of 31 August 1999).

The Court repeated that appeals to a higher authority were not in themselves an effective remedy because they did not give litigants an individual right to compel the state to exercise its supervisory powers (*Hartman* judgment, § 66). The Court accepted that the Constitutional Court could speed up the course of proceedings but noted that it was not empowered to take practical steps to expedite the proceedings complained of or to award compensation for delays that had already occurred (*Hartman* judgment, §§ 67 and 68). The first of these observations, relating to the lack of authority to take practical measures is somewhat debatable, as we shall see below. As for the second, the Court was also not convinced that lodging a claim for damages against the state could enable parties to obtain compensation for non-pecuniary damage – as incurred above all by litigants in cases relating to length of proceedings. Czech law has indeed traditionally confined itself to recognising only pecuniary damage, except in the field of protection of personal rights (one's name, reputation and so on).

The Czech Republic accepted the Court's decision with regard to Articles 13 and 35 § 1 of the Convention. As a result, failure to exhaust domestic remedies became an invalid argument in respect of numerous applications concerning dilatory proceedings. The chief need was also for a legislative response, and the Czech Republic decided not to reconsider existing legislation but to consolidate it with regard, first, to preventive remedies (which has been accomplished) and, second, to compensatory ones (still at the stage of a bill going through Parliament).

A. CONSOLIDATING PREVENTIVE REMEDIES

The purpose of preventive remedies is to expedite judicial proceedings and therefore to prevent further delay.

There were two basic options here (which are reflected in the Court's case-law): either to give the Constitutional Court enhanced powers in the light of the criticism voiced by the Court in the *Hartman* judgment, or to amend or transform the appeal to a higher authority into a remedy of a different nature. It was the latter option that was chosen, not by amending the appeal to a higher authority but by adding something extra to the existing procedure: an "application for determination of a time-limit for completion of a procedural measure".

This remedy is provided for in Section 174a of the Czech Courts and Judges Act (the equivalent of a Code on Organisation of the Courts). It is the next step following appeal to a higher body, a remedy which must have been exhausted beforehand, and applies to all kinds of judicial proceedings. It is modelled on the procedure laid down in Section 91 of the Austrian Courts Act, which the Court's case-law has

acknowledged as a remedy which must be exhausted before applying to Strasbourg (*Holzinger v. Austria* (No. 1), judgment of 30 January 2001, §§ 20-25).

Application for imposition of a time-limit is a remedy open to any party to proceedings who deems that they are subject to undue delay and is designed to end that delay. The request must be made to the court responsible for the delay and is considered by the superior court (in the supreme courts[22] the decision on the application is taken by a division other than the one dealing with the case).

The request must be processed speedily: if it is not flawed (and the law specifies the substantive criteria to be satisfied) a decision on it must be taken within approximately one month. The decision is taken after the court responsible for the delay has given its explanations; no hearing is held, and the decision is not open to challenge other than through an appeal to the Constitutional Court, which is normally always possible subject to the conditions set out in the Constitutional Court Act.

The decision has to set a precise time-limit within which the court dealing with the case must complete the procedural measure under consideration.

Section 174a of the Courts and Judges Act has been in force only since 1 July 2004, and it is too soon to draw any conclusions from practical experience. The Czech Republic has not yet used it as a defence argument before the European Court of Human Rights. This procedure clearly offers no solution to the problem of proceedings which have already lasted for too long. Other problems are also gradually emerging: for example, the higher court cannot decide what steps the lower court must take, as it is not for the former to assume the management of the latter's case. It has been suggested that there is a risk of interference with the independence of the court dealing with the case.[23] Moreover, it is sometimes hard to know which measure is to be completed at the stage reached in proceedings. Lastly, an application for imposition of a time-limit may become a further means of procedural obstruction, since the application must be forwarded to the higher court, which inevitably engenders delay despite the precautions taken.

We can nevertheless say that limited use has been made of the new Section 174a. Since most applications do not satisfy the statutory conditions and are consequently found to be inadmissible, only a small number are ultimately granted. Further thought must be given to this provision of the Courts and Judges Act. The

22. The Czech Republic has a Supreme Court for civil, criminal and commercial cases, and a Supreme Administrative Court for proceedings against the public authorities. An application for imposition of a time-limit cannot be lodged against the Constitutional Court, since the latter is not part of the ordinary court hierarchy (Article 91.1 of the Czech Constitution) and the Courts and Judges Act does not apply to it.
23. The new provision was subject to constitutional review. However, the Constitutional Court did not accept any of the objections raised by the court which had referred to it the question of the constitutionality of Section 174a of the Courts and Judges Act.

Supreme Administrative Court moreover organised a seminar for members of the judiciary before the legislation came into force, and another seminar is to be held in due course.

B. IMPROVING COMPENSATORY REMEDIES

As already mentioned, the law on state liability for damage caused in the exercise of public authority provides for compensation within the meaning of the Civil Code, that is compensation for material damage and loss of earnings, and possibly bodily injury, but not for non-pecuniary damage. Although there have already been attempts to assert an entitlement to protection of personal rights so as to obtain compensation for non-pecuniary damage, the outcome of such cases is not certain, nor is it equivalent to what may be achieved by applying to the European Court of Human Rights.

The Ministry of Justice chose to enhance the law on state liability for damage caused in the exercise of public authority rather than touch the Civil Code. The amendment bill provides that, in addition, and, where applicable, even in the absence of pecuniary damage, just satisfaction shall be awarded for non-pecuniary damage arising from a breach of the law by the public authorities.

As regards length of proceedings in particular, the key provision setting out the situations in which compensation is due has been clarified to specify that official procedure is also flawed in the event of failure to fulfil an obligation to carry out a measure or deliver a decision within a time-limit laid down by law, or, if the law does not determine a time-limit, within a reasonable time. This provision is intended to reflect Articles 5 and 6 of the Convention.

As to the criteria for determining the amount to be awarded, the extent of non-pecuniary damage caused should generally be assessed in the light of the circumstances, and compensation may even be non-pecuniary in nature. Regarding length of proceedings, the criteria to be applied are those normally used by the European Court of Human Rights to determine whether reasonable time has been exceeded:

- overall length of proceedings,
- complexity of the case,
- conduct of the party claiming compensation,
- the way in which the case has been handled by the authorities,
- the importance of the subject-matter of the proceedings for the party concerned.

The claim to compensation for non-pecuniary damage can be pursued before the courts. However, applications for compensation must first be addressed to the Ministry of Justice. Only if the ministry does not grant the sums sought or if no agreement is reached between the ministry and the claimant can the latter bring the case

to court. This system seems to have one basic advantage: it allows the ministry first to ensure that the amounts awarded are adequate in the light of the Strasbourg Court case-law and then to attempt to bring the courts handling these compensation claims to abide by that case-law.[24]

The amendment bill contains a transitional provision departing from the principle of non-retroactive application of the law, which also holds good in the case of the law on state liability for damage caused in the exercise of public authority. The law will therefore provide for an exception to the rule: if the right to compensation for non-pecuniary damage caused by length of proceedings is not time-barred, the law should apply to such non-pecuniary damage suffered in the past. If the party concerned has lodged an application complaining of the length of proceedings with the Court and claims compensation in the domestic courts within one year of the date on which the law comes into force, he will be entitled to compensation. This transitional provision should enable applications pending before the Strasbourg Court to be "repatriated".

For the time being this is only a bill, and it is impossible to predict its fate in Parliament. Compensation nevertheless remains the only possibly way to reduce the Court's caseload of applications for excessive length of proceedings.

In conclusion, one thing seems clear: improving domestic remedies is a matter of time. Just as with the application for imposition of a time-limit for completion of a procedural measure, we shall have to await the anticipated entry into force of the reform of the law on state liability for damage caused in the exercise of public authority in order to know for sure whether these changes in the legislation fully satisfy the Czech Republic's obligations under Article 13 of the Convention. The Constitutional Court was conceived as the Article 13 authority at national level. However, it cannot be overloaded with tasks, as that would lead to a devaluation of its role as guardian of the constitutional system and of human rights at domestic level.

24. It can be noted that the Grand Chamber of the Court, which has before it a number of cases against Italy that clearly raise the issue of how compensation awarded in the domestic courts is to be quantified, should refine this case-law in 2005 in order to make it more transparent.

THE ITALIAN EXPERIENCE

Mr Francesco Crisafulli, Legal Attaché, Permanent Representation of Italy to the Council of Europe

BACKGROUND TO THE ACT

Italy holds the inglorious record of the highest number of applications (lodged, declared admissible or resulting in a finding of violation) for breach of the "reasonable time" requirement.

My intention is not to understate the Italian authorities' responsibility for this situation, but we now know – and Mr Wildhaber has just reminded us – that this problem, although it has assumed a greater magnitude, and above all greater visibility, in Italy than elsewhere, is nonetheless not confined to this country but concerns approximately half the member states of the Council of Europe.

On account of the dilatory nature of its proceedings, Italy was accused of being the greatest "supplier" of applications to the Court and therefore the main culprit for an excess caseload on the verge of paralysing the European human rights protection system.

Incidentally, we now know that this was not the true picture: since the entry into force of the Pinto Act – the subject of my presentation, with which you are all familiar, at least in its general lines – the number of Italian applications has fallen drastically, and today the country is far from being the main source of the Court's caseload. This has not prevented the most prestigious bodies of the Council of Europe from foretelling in dramatic terms the possibility of the Court's paralysis (the past and present causes of which are clearly of a very different degree of gravity) and setting in motion the reform process which has produced Protocol No. 14 and the accompanying instruments.

The fact remains that Italy felt guilty, and that played an important part in its decision to draft an instrument designed to bring about an effective, and above all rapid, decrease in the number of "reasonable time" applications.

This was indeed the chief goal pursued by the initial drafters of the bill: reducing the number of applications to Strasbourg and, consequently, the Court's caseload. I am betraying no secrets – at most a piece of unofficial information – if I tell you that the idea of the Pinto Act originally developed here in Strasbourg out of discussions between two eminent Convention specialists, both directly involved, in very different capacities, in the work of the Court.

Law No. 89 of 2001, named the Pinto Act after the Italian member of parliament who initiated it, was thus the outcome of a debate that focused more on the Court

than on the applicant and addresses the Court's expectations rather than the problems of the Italian judicial system. In one respect this is where its advantage lies (reflected in the speed with which its effects were felt), but it also constitutes a limitation. Moreover, it was with the latter aspect of the initiative in mind that Mr Imbert, Director General of Human Rights, voiced certain reservations from the outset as to the appropriateness of the bill brought before parliament.

GENERAL LINES OF THE PINTO ACT AND ITS OPERATION

As you know, section 2 of the Act allows any party to criminal, civil, administrative and even tax proceedings (which in itself goes beyond the actual requirements of Article 6, which the Court has been very reluctant to deem applicable to tax cases) to complain of a breach of the "reasonable time" requirement and obtain financial compensation from a domestic court (the relevant court of appeal under the rules on territorial jurisdiction applicable to criminal proceedings involving judges). An appeal then lies with the Court of Cassation against the decision delivered by the court of appeal. However, the Act does not provide for any measures to expedite proceedings.

The application for compensation must be made either while the proceedings whose length is contested are pending or within six months of the date on which the decision ending the proceedings became final (section 4).

As a transitional measure, parties wishing to complain of the length of domestic proceedings ended over six months before the Act's entry into force could avail themselves of a provision allowing them to bring their case before the competent court of appeal within six months (subsequently extended to one year) from the date of the Act's entry into force, provided that they had already lodged an application with the European Court of Human Rights and the latter had not yet ruled on its admissibility.

The intention was that combined enforcement of this Act and Article 35 of the Convention would allow (and indeed has allowed) the Court to declare inadmissible for failure to exhaust domestic remedies a very large number of applications – not only those to come but also those already pending. The Italian Government accordingly wrote to the Court to inform it of the Act's entry into force and entered a general objection to the admissibility of all "reasonable time" applications pending.

UNUSUAL APPROACH BY THE COURT

In an initial test case (*Brusco*) the Court noted the existence of Law No. 89 of 2001 of its own motion (contrary to its usual practice concerning objections to admissibility) and made use of it "retroactively", so to speak, to reject the application (which had been lodged before the Act entered into force) on the ground of failure to exhaust domestic remedies.

Having thus, with this test-case finding of inadmissibility, established the principle by which it would subsequently be guided, the Court contacted all applicants who had lodged "reasonable time" complaints requesting them to apply to the domestic courts and warning them that, if they persisted in seeking a decision from the Court, they would run a serious risk of dismissal of their application in accordance with Article 35 (and the *Brusco* precedent). Those who refused to apply to the domestic courts (and there were some, since the Act was given a frosty reception by Italian lawyers, who did their utmost to boycott it) therefore saw their cases thrown out by a committee decision. The others had a choice: either abandon the proceedings before the Court (in which case the file was destroyed) or – what I believe to be the solution adopted in the majority of cases, or at least a very large number of them – request the Court to suspend consideration of the application pending the outcome of the domestic proceedings.

At present Italy (and the Court) is beginning to experience the rather undesirable side-effects of this approach, since applicants dissatisfied with the outcome of the domestic proceedings are reactivating their applications in Strasbourg, and we are facing a number of problems mostly linked to the conditions of the award of just satisfaction, determination of amounts and delays in the payment of the sums awarded.

I do not want to dwell on these matters here, since they are all the subject of proceedings pending before a chamber or even the Grand Chamber, and it would not be proper on my part to give the impression of wishing to exploit this opportunity to argue my case outside the courtroom, but I make no secret of the fact that the situation has taken a disturbing turn inasmuch as the Court seems to be questioning the remedy's effectiveness, which naturally goes much further than a mere finding of violation in one or more specific cases and jeopardises the Act's entire functioning and very existence.

I would merely like to say that, in my opinion, the chief issue now confronting the Court is how to strike a fair balance between the need for clarity and precision in its established precedents and the need to respect national margins of appreciation and to safeguard the particularities of each state's situation.

The first of these two requirements is inescapable for a Court which perceives itself as "constitutional" or, as Professor Balcerzak has suggested, "a court of precedent", whose task is to establish minimal rules and general principles intended as guidance for all European states. The second requirement, however, is not only dictated by the system as a whole but also necessary to ensure that the Court's case-law remains in touch with the reality which it is supposed to be shaping (but from which it is, at the same time, itself derived).

Whereupon I shall return to my main subject.

THE WORDING OF THE PINTO ACT: SOME COMMENTS AND CRITICISMS

On the positive side I would mention the fact that the Pinto Act specifically cites Article 6 of the Convention and reiterates expressly the main criteria laid down by the Strasbourg case-law for determining the reasonableness of the duration of proceedings, the state's degree of responsibility and the extent of the damage sustained by an applicant.

This has proved a very wise decision. In particular, it very recently allowed the Court of Cassation to find an easier solution to certain problems and thereby eradicate uncertainties or inconsistencies contained in judgments delivered by the courts of appeal. The wording of the Act has permitted the Court of Cassation to establish in practice the requirement that the appeal court must abide by the Court's precedents (in matters of compensation for breach of the "reasonable time" provision) without, however, obliging it to take a stance on the, in Italy, still thorny question of the efficacy of the Convention and its case-law in the domestic legal system.

Still on the positive side, I should also mention the concept of affording reparation for non-pecuniary damage through appropriate means of publication of decisions finding a breach of the "reasonable time" standard. This form of reparation (which also exists in other contexts in Italy) may, of course, be additional to the payment of compensation, but might also (why not?) replace it in certain circumstances which a court may deem incompatible with the awarding of monetary compensation. I therefore find it regrettable that in practice the national courts have never (as far as I am aware, but I think I am not mistaken) made any use of this possibility.

However, I would count among the negative aspects the wording of the provision determining the nature of the right that can be asserted in the national courts and the way in which the Act subsequently sets out the rules governing determination of the amount of compensation. This calls for a brief explanation.

Section 2 of the Act provides that "anyone sustaining pecuniary or non-pecuniary damage … on account of a failure to comply with the 'reasonable time' requirement in Article 6 § 1 of the Convention, shall be entitled to just reparation". I would say in passing, without dwelling on the subject, that the terms *pecuniary* and *non-pecuniary* were perhaps not the happiest choice, as one might draw a distinction between "non-pecuniary" or "non-material" damage (i.e. not admitting an exact assessment in financial terms but nevertheless endowed with economic value) and "non-economic" damage (in the literal sense of pain and suffering): this distinction is indeed referred to in some judgments of the Court of Cassation (not necessarily concerning Pinto appeals) and can be – and sometimes has proved – a cause of problems in interpreting the Pinto Act, especially in cases concerning legal persons.

Let us return, then, to the wording of the law, whose initial provisions apparently identify two logically distinct events: firstly, the breach of the "reasonable time"

requirement and, secondly, its consequence, namely the pecuniary or non-pecuniary damage arising from it. This would seem to suggest that the first element (violation) can exist without the second (damage).

That is indeed possible, and the case-law of the Court itself offers a few – albeit rare – examples in which the finding of a violation of Article 6 is not followed by the award of just satisfaction, since the Court holds the finding to be sufficient in itself for reasons which (unfortunately!) have never been explained (to the great misfortune of the governments, which are unsure where they stand, but also the applicants concerned, who for no apparent reason have been refused the benefit of an award usually bestowed generously on all and sundry). The Pinto Act would nonetheless seem to have elevated this possibility to the status of a general rule which is inconsistent with the Convention organs' most frequent practice.

On the other hand, in my view, the reference to damage is not entirely coherent with the concept of "just reparation" used immediately afterwards in the Act, which brings to mind the idea of flat-rate compensation more than genuine damages.

On the latter subject, it might be noted in passing that the Convention's concept of "just satisfaction" is much closer to "just reparation" than to "damages" (or compensation): the Court's judicial practice (not beyond criticism in my opinion) has indeed gradually transformed the nature of the reparation conceived by the drafters of the Convention, bringing it increasingly into line with real compensation, which is meant to be full and precise, covering separately the non-pecuniary and the pecuniary damage sustained, including all aspects of the latter (losses, lost earnings, etc.).

The criteria for calculating financial compensation laid down in the Pinto Act were taken from Article 2056 of the Civil Code (setting out the rules on quantification of compensation in cases of liability in tort). This accordingly brings us back to the concept of damage and compensation, and, by referring to this article, the legislators introduced criteria which may to some extent duplicate those to be applied in determining the very existence of a violation.

This has therefore very probably engendered a certain amount of confusion and has allowed a number of courts to find that a breach of the "reasonable time" requirement is not in itself sufficient to entitle an applicant to reparation and that damage, referred to in the Act as an (ulterior) consequence of the breach, must in turn be asserted if not proved.

In other words, the national courts have held, on a number of occasions, that damage cannot be considered *ipso facto* inherent in the very fact that the reasonable time requirement has been exceeded and that complainants must at least adduce evidence which, based on past experience and custom, allows the court to conclude that the delay has caused real damage and to assess that damage on an equitable basis.

This approach followed by the courts below has not been disowned by the Italian Court of Cassation, which has either endorsed it or else held that, as a court deciding points of law, it lacks jurisdiction to reassess what it regards as a question of fact (the existence and extent of any damage).

The ECHR severely criticised this approach in a case which has become quite well known (*Scordino*), in which, having examined a large number of judgments by the Italian Court of Cassation, it found that, given the state of domestic judicial precedents, an appeal to that court amounted to a remedy devoid of any prospect of success and applicants therefore did not need to exhaust it if their complaint merely concerned the amount of compensation awarded by the domestic courts.

Continuing this line of argument, the Court held that, since mere recognition of a violation by the courts was only the first aspect of the role served by a domestic remedy (the second being elimination of the violation and its consequences), lack of adequate compensation meant that applicants could not lose their status as "victims".

It therefore declared the Scordino application admissible, and in its decision on the merits subsequently found a violation of Article 6 whilst declaring itself unable, as the case stood, to settle the matter of Article 41.

The admissibility decision and the decision on the merits in the *Scordino* case raise a number of issues which are currently being examined by the Grand Chamber (and that is why I would be uncomfortable speaking about this if Mr Wildhaber had not already left the room).

In deeming insufficient the compensation awarded to the applicant by the domestic court and holding this insufficiency to be enough to maintain his status of "victim", the ECHR has, in my opinion, raised to the rank of a principle what was only a common judicial practice, namely, the virtually systematic award of just satisfaction. Yet there is no direct reference to this practice in the Convention, and it had not previously been enshrined as a general or absolute rule. On the contrary, there were certain exceptions to it, which, as I have already pointed out, were not based on expressly stated reasons and which, quite naturally, are even less comprehensible after the *Scordino* case.

I find it perfectly normal that a court required to award compensation on an equitable basis should consider itself free to determine in all conscience whether, in each individual case, damage has actually been incurred and whether or not, in the light of all the particular facts of a case, the complainant deserves compensation. Of course, if the court has this power, it is also entitled to assess the extent of the damage and therefore the amount of compensation needed.

I also find it normal for that court to believe that it is not required to give extensive, detailed reasons for the choices that it makes in this field. This does not mean that it is free to act arbitrarily: on the contrary, it must be assumed that the court has

relied on its knowledge of the facts and the various items of evidence in the file, together with its perception of the relevant circumstances, to reach its verdict. The fact remains that it is hard to give a detailed statement of the reasons underlying the quantification of compensation awarded on equitable principles, and – especially in the case of non-pecuniary damage – such compensation is assessed on a fixed scale.

My question is why this freedom of judgment is enjoyed by the ECHR alone and denied to the national courts, who are nevertheless expected to take responsibility for applying the Convention at first instance and safeguarding individual rights (and therefore constitute, as it were, a first tier of proceedings with the Court in Strasbourg acting as a court of appeal or court of cassation).

In asking this question I proceed from the principle that – as asserted in the Convention organs' own case-law – it is the national court that has control over the production of evidence and the assessment of the facts. There can be no denying that the existence and extent of damage is for the most part a question of fact. And I think this is confirmed by the *Scordino* judgment, in which, in what appears to me a contradictory fashion, the Court on the one hand considers it has sufficient evidence to hold that the amount awarded to the applicant by the domestic court was insufficient (to the point of preventing the domestic remedy from having its anticipated effects) but on the other hand then deems that the state of the case does not allow it to settle the question of Article 41. How is it possible to assess the adequacy of compensation without first knowing what amount would have been "sufficient" and therefore having a basis of comparison? Must we conclude from this that, for the Court, the basis of comparison consists solely in the sums it has awarded in earlier cases (on equitable principles and without giving express grounds) without it being possible for us to know the criteria on which both the payment made in each case and the choice of precedents were based? And does this not conflict with the principle of the freedom of the national courts to assess the facts of a case (and the facts are important, since the Court itself wishes to know more about them before taking its decision)?

In my opinion, another reason for perplexity lies in the Court's decision to dismiss the objection of inadmissibility for failure to exhaust domestic remedies raised by Italy because the applicant had not appealed to the Court of Cassation. Only a few months after the entry into force of the Pinto Act, the Court labelled the Italian Court of Cassation's doctrine – which was inevitably still being developed at that stage – as inefficacious, which was perhaps premature and entailed a considerable risk of depriving the Pinto remedy of a good part of its chances of strengthening and consolidating its effectiveness.

It must nevertheless be acknowledged that the *Scordino* case helped prompt the Court of Cassation to produce some clarifying decisions.

Indeed, at the beginning of 2004 the plenary Court of Cassation finally settled the matter by specifically stating that non-pecuniary damage is regarded in law as – if not *ipso facto* inherent in the delay in the strict sense – then at least a normal consequence of unreasonably long proceedings. As a result, the lower courts must presume its existence, save proof to the contrary.

I consider this to be a balanced solution – since *a priori* it cannot be ruled out that in some cases it may be shown that, despite the unreasonable length of proceedings, the complainant did not sustain damage justifying the award of monetary compensation – and I hope that it will in future satisfy the ECHR (which in a number of successive decisions has already demonstrated its confidence in this doctrine's development).

One ultimate aspect of the Pinto Act which is open to criticism lies in the last paragraph of section 3, which provides that the sums awarded by the courts of appeal shall be paid to the extent that resources permit, these resources being allocated annually in the budget.

To understand how and why this rule – which in truth seems odd – came about, you must realise that the Pinto bill went through some very sticky patches when the Parliamentary Finance Committee, which is responsible for examining the budget aspects of any bill entailing expenditure for the state, advised against it, holding that there were insufficient financial resources to meet the obligations that would be engendered by the future Act.

The provision in question enabled this obstacle to be overcome.

There are three comments to be made on this subject:

- If the Pinto Act did not exist the state would in any case have to discharge the financial obligations arising out of findings of violations by Strasbourg, and no one has ever thought to set a limit on these such as that included in the Act (which would in any case have been impossible);
- At the same time, it was easy to foresee that because the procedure before the courts of appeal was naturally far more easily accessible than that before the ECHR, the number of applications would rise dramatically;
- On the other hand, whether the judgment being executed originates from the European Court or the domestic courts, the sums to be paid in any case come within the category of mandatory judicial expenditure, and it is strange, to say the least, that a law – and what is more a law which seems to be based more on a compensation scenario than mere reparation – should lay down a precautionary limit on the amounts that can be paid.

In short, faced with the concerns of the Finance Committee, Parliament apparently chose the lesser of two evils by passing the law all the same, albeit with this restriction, which is nevertheless questionable as to its logic.

It must be said, however, that the Parliamentary Finance Committee's misgivings have not proved ill-founded. To give you some idea, the Act came into force in April 2001. By the end of that year, i.e. within approximately eight months, the courts of appeal had already registered 4 649 applications and ruled on 1 073. In the following two years, some 5 000 applications were registered annually (and the courts ruled on the same number), and in 2004, in the first six months alone, the number of applications registered had already reached 4 599.

According to another table of statistics that has come to my attention, between 2001 and the first half of 2004 the courts of appeal granted some 7 000 applications for compensation.

I do not have any information about the sums paid, but I believe that this gives everyone a rough idea. It is, of course, a veritable drain on the state's coffers.

I said at the beginning of my presentation that the Pinto Act was not intended to get to the root of the problem of unreasonably long proceedings but confined itself to introducing a compensatory remedy with the main aims of, firstly, of course, preventing Italy from constantly having to appear on the international scene in a dunce's hat, but also, and above all, satisfying the European Court's desire for a reduction in Italy's contribution to its caseload.

Once again, I am hardly divulging a secret if I point out that, as soon as the bill was published, the Director General of Human Rights, Mr Imbert, made no attempt to conceal his reservations, stating that this new remedy might meet the Court's requirements but would have no effect as far as execution of judgments was concerned.

This conclusion is to some extent understandable but perhaps a little too severe. Admittedly, the lack of any individual measures to expedite proceedings prevents the Act from settling problems arising in cases where the main proceedings are still pending. However, reasoning in terms of general measures, while the Pinto Act was certainly not intended to solve the structural problem of excessive delay in the Italian judicial system, it nevertheless introduced a domestic remedy which makes it possible to obtain compensation and has had the merit of forestalling further violation findings in Strasbourg. Is this not the main aim of such a measure? I think we must therefore dismiss the idea, sometimes voiced, that the only purpose of the Pinto Act was to "conceal" the problem from the Convention organs: a domestic remedy, as required by Article 13, indeed has the effect, and even the aim, of withdrawing (and therefore, inevitably, "concealing", if you like) as many cases as possible from the supranational judicial system in order to settle them at national level. A choice has to be made: either one wants remedies to be made available and accepts that some problems may no longer be apparent, or may be less apparent, at international level, or else one prefers "transparency" and does without domestic remedies.

However, I agree that it would be advisable to amend the Pinto Act in order to provide, *inter alia*, for measures to expedite proceedings which a court of appeal has found to be in breach of the "reasonable time" provision.

In fact, a bill along these lines is currently being considered by the Italian Parliament.

The text of this bill is long and complex, and I cannot go into particulars here; nor do I think that would serve any useful purpose, since the legislation may still undergo considerable changes before being passed – if it is passed.

I should like to point out, however, that the wording of the bill testifies to the misgivings experienced in Italy in respect of any measure enjoining the courts to adopt a certain approach to the conduct of proceedings. This reluctance is rooted in a particular interpretation (perhaps too broad and harsh) of the concept of the independence of the judiciary. At the same time, the question arises of the legitimacy, in equal treatment terms, of expediting proceedings in a specific case: something which quite obviously can generally be done, allowing for exceptions, only at the expense of another set of proceedings. And of course we must also ask ourselves how long a system of this kind could really be effective, since, in a context where judicial delay is endemic, it would inevitably lead to an enormous number of proceedings which had all been expedited under the measure and would merely displace the congestion without getting rid of it.

However, I should like to draw your attention to the fact that, unlike what appears to me to be the rule in states which already have experience of such measures for expediting proceedings, an application to deal with a case as a matter of priority and the corresponding order are envisaged not as stages in proceedings to establish that the "reasonable time" requirement has been exceeded but as preventive steps which parties can and must take as soon as they have reason to fear a prospect of delay and which constitute an admissibility criterion for a possible, and in any case subsequent, application for compensation.

THE POLISH EXPERIENCE

Mr Kazimierz Jaśkowski, Judge at the Supreme Court of Poland

INTRODUCTION

The 17 June 2004 Act on complaints against infringements of party's right to be tried without undue delay (Dz. U.-Journal of Laws No. 179, item 1843 – The 2004 Act) is the first legislative act in Poland to regulate this issue. The 2004 Act deals with criminal and civil court proceedings, including enforcement proceedings performed by court enforcement officers under the supervision of the court, and with proceedings before administrative courts.

The 2004 Act entered into force on 17 September 2004. During the period of the six months following that date, by virtue of its Article 18, the Act has permitted the lodging of complaints with Polish courts by persons who had earlier lodged complaints with the European Court of Human Rights (the Court) – due to not having their cases tried within a reasonable time (the Convention, Article 6.1) – in the course of proceedings concerning those cases, where the Court has not issued the decision regarding the admissibility of complaint. Polish courts have notified the Minister of Foreign Affairs of the complaints lodged on that ground.

Another issue relating to the fact of entry of the 2004 Act into force was its approach to the facts that had occurred earlier (before 17 September 2004). The Supreme Court's position in that regard has been – it seems – that of a compromise. Generally speaking, the Supreme Court has expressed the opinion that the 2004 Act does not deal with the issue of lengthy proceedings initiated before its entry into force. The Supreme Court has taken into account the fact that, the Court, while determining the period of proceedings to be recognised, had found itself not being competent to recognise the complaints regarding infringements of Article 6 of the Convention before 1 May 2003, i.e. before Poland was under an obligation to respect the decisions of the Court. However, as the Supreme Court stated in its resolutions of 19 January 2005 concerning civil proceedings (case SPP 113/04) and enforcement proceedings (case SPP 115/04), the 2004 Act is applicable to the lengthy proceedings being conducted at the date of the entry of the Act into force. Thus, where the proceedings determined to be lengthy before 17 September 2004, ceased to be such before that date, the 2004 Act does not apply.

ORIGINS OF THE 2004 ACT

The adoption of the act under discussion was in line with the adjustment of Polish law to the requirements of Articles 6.1 and 13 of the Convention and 45.1 of the Polish Constitution. It stipulates: "Everyone shall have the right to a fair and public

hearing of his case, without undue delay, before a competent, impartial and independent court." However, actually, it was the judgment of 26 October 2000 in the case of *Kudła v. Poland* (Application No. 30210/96) that gave rise to its adoption. As far as the scope of this discussion is concerned, the Court decided that the failure to be provided with a judgment within a reasonable time constituted a violation not only of Article 6.1 of the Convention, but also the violation of Article 13 (the right to an effective remedy before a national authority). The fact that as early as March 2005 the Court found two cases (*Charzyński v. Poland*, Application No. 15202/2003 and *Michalak v. Poland*, Application No. 24549/2003) inadmissible as the applicants failed to exhaust domestic remedies because they had not made an application under the 2004 Act, has been received in Poland with satisfaction. Additionally, the 2004 Act constitutes part of the law in the area of responsibility of the State for the damage caused by the failure to issue a decision or judgment (see: "Compensation", p. 53).

Before the adoption of the 2004 Act, a party in the proceedings enjoyed the right to file an application to the European Court of Human Rights (since 1 May 1993), and a complaint (a request for faster hearing of the case) of administrative nature to the president of the relevant court or the Minister of Justice. The legal bases for such measures were: the Common Courts System Law and the Supreme Administrative Court Act.

PRINCIPLES OF THE 2004 ACT

In accordance with the reasons for the government draft bill concerning the 2004 Act, the proceedings instituted in the course of a complaint against their lengthiness are incidental proceedings to be conducted within the framework of the proceedings concerning the substance of the case, i.e. of the proceedings being the object of the complaint. This statement is confirmed by particular provisions of the 2004 Act. Such approach to the proceedings in question, i.e. the idea of handling them as incidental proceedings, makes the interpretation of not always clear provisions of the 2004 Act, easier.

The 2004 Act applies to civil, criminal, administrative, and enforcement proceedings. The complaints are heard by the courts being superior to the courts against which the complaints have been lodged. Where the complaints have been lodged against enforcement proceedings, it is the circuit court that is to serve as the superior court in this respect. The complaints against the lengthiness of proceedings conducted before the Supreme Court or before the Supreme Administrative Court are heard by the courts against which the complaints have been lodged. At the Supreme Court, the complaints against the Civil Law Chamber are recognised by the Labour Law, Social Security and Public Affairs Chamber and the other way round. The complaints lodged against the Criminal Law Chamber are recognised by the Supreme Court Military Chamber and the other way round. The proceedings are single-

instance ones. Due to the fact that they are incidental proceedings, the Constitutional provisions granting a party the right to appeal against the judgments and decisions issued during the first instance proceedings (Article 78) and those providing for two-instance procedure (Article 176) do not apply. The idea behind a single-instance procedure is to shorten the proceedings initiated in the course of complaint against lengthiness of the process. So is fixing a two-month period, of instructional nature, for issuing the judgment or decision (2004 Act, Article 11). With the view to achieve the same, the Act has given the competence to hear the complaints to numerous second-instance courts. However, this practice may lead to issuing divergent judgments. To some extent, this may be prevented by giving the court hearing the given case the possibility to request the Supreme Court for a relevant preliminary ruling. Until now the Supreme Court has issued three such preliminary rulings.

The incidental nature of the proceedings under discussion can be seen in the fact that it is possible to lodge a complaint against the lengthiness of proceedings only in the course of the proceedings against which the complaint has been lodged (2004 Act, Article 5.1). This regulation is an express manifestation of the main goal of the Act, that is, the establishing of such legal measures that will enforce having cases tried in a reasonable time.

The parties may lodge complaints personally or through professional counsel – advocates or legal advisors. It is only where the complaints deal with the Supreme Court, and only in civil law matters, that they must be lodged by professional counsel. The above results from the regulation (2004 Act, Article 8.2) that – where the given matters have not been regulated in the Act – the regulations on complaint proceedings are to be applied accordingly to the complaint against the lengthiness of the proceedings, those procedural regulations to be the ones applicable to the proceedings being appealed against. A compulsory representation of the party has not been provided for in respect of complaint in the course of criminal procedure. Thus, complaints against lengthy criminal proceedings conducted by the Supreme Court may be lodged by the parties personally. That is why, in civil proceedings – as shown in the statistics attached hereto, the predominant number of the complaints lodged with the Supreme Court are returned to the parties without having been resolved. While lodging complaints, the parties may request having professional counsels appointed for them, where the parties cannot afford the costs thereof themselves. Then, having been provided with the parties' relevant declarations concerning their financial conditions, the court appoints counsels *ex officio*, their retainers being paid by the State.

The complainants pay a fixed fee in the amount of 100 zlotys (around 25 euros). They may be exempted from the said payment on the same grounds and principles as those applicable to the appointment of the counsel *ex officio*. It remained unclear whether the complainants lodging complaints against the lengthiness of the pro-

ceedings in the cases in which they were not obliged to pay the court fee were to be under the obligation to pay the said 100 zlotys fee. This question was clarified by the Supreme Court in its resolution of 19 January 2005 (case SPP 109/04), in which the Supreme Court stated that the complaints in the cases concerning the labour relationship were exempted from the 100 zlotys court fee. The principal Supreme Court's argument in that regard was that the complaint proceedings were of incidental nature in respect of the main proceedings being the object the complaint.

JUDGMENT ON LENGTHY PROCEEDINGS

After the verification of the admissibility of the complaint and of the court's competence to hear it, the court is obliged to verify the grounds for charging the proceedings as lengthy. The 2004 Act (Article 2.1) defines lengthy proceedings as the proceedings taking longer than it is necessary for clarification of the facts of the case and legal findings being material for resolution of the case or longer than necessary for closing of the enforcement proceedings. The prerequisites for assessment whether the proceedings have or have not been lengthy have been shaped as those used by the Court. Article 2.2 points out such their characteristics as: timely and accurate performance of court acts with the view to issue the judgement or decision as regards the substance of the case or the acts of the court or of the court enforcement officer performed with the view to carry out and close enforcement proceedings, while taking into account the nature of the case, its complexity as regards the facts of the case and legal issues, its importance for the complainant, the issues that have been resolved, and the conduct of the parties, in particular, the complainant. The lengthiness of proceedings may result not only from the court's idleness, but also from its activity (Article 1.1).

Having decided that the proceedings have been lengthy, the court may adjudicate two other questions (2004 Act, Article 12). It may instruct the court hearing the case to take relevant steps and adjudicate the award of an adequate amount of money, not exceeding, however, 10 000 zlotys (around 2 500 euros).

In case SPK 10/05, the Supreme Court found the proceedings in the given criminal case lengthy, where it took the court of appeal nearly 19 months to prepare the grounds for its judgment for the party, and adjudicated the award of 2 500 zlotys (around 600 euros).

Two cases concerned the relationship between the lengthiness of the proceedings and the court's performance. In one of those cases (III SPP 48/04), the Supreme Court found that the proceedings for granting a disabled pension were lengthy, and adjudicated the award to the complainant of 2 000 zlotys (around 500 euros). The proceedings in question were lengthy as a result of the court's of appeal performance where, while re-trying the case, the court reversed the first instance court's judgement for the second time sending the case back to it for hearing. This was contrary to regulations on civil law procedure. In those circumstances, the court of

appeal should have made a reformatory judgement since the hearing of evidence required only to be supplemented, while sending the case for re-trial to the first instance court has been provided for by law where the pronouncement of judgement requires the conducting the whole hearing of evidence proceedings. In the latter of the cases (SPP 106/4) the complainant maintained that the court's suspension of the proceedings was in violation of law. As a result, the proceedings were prolonged. The Supreme Court dismissed the complaint after having found that the suspension had had grounds in the regulations concerning the civil law procedure. It has then, indirectly, acknowledged that the application of suspension contrary to law may result in lengthy proceedings.

INSTRUCTIONS TO MAKE RELEVANT STEPS

Pursuant to Article 12.3 of the 2004 Act, upon the complainant's request, the court may instruct the court recognising the case from the point of view of its substance to make relevant steps within a particular time. The range of such instructions may not exceed the scope of assessed facts of the case and legal findings.

On the one hand the said provision gives the court recognising the complaint that the proceedings have been lengthy, the possibility to exert a binding effect on the court recognising the case form the point of view of its substance, while, on the other hand, it safeguards the court's independence. The court judgments and decisions to come will have to work our the thin borderline between the admitted intervention of the court recognising the complaint and the independence of the court recognising the case from the point of view of its substance. While setting that borderline it will be necessary to take into account at least two circumstances.

Firstly, it is to be pointed out that the procedure being the subject of this discussion functions within the judicial authority. That is why there is no danger that the constitutionally guaranteed independence of judicial authority will be infringed. Every court procedure provides for a possibility to have the first instance court judgement changed or reversed by a superior court, this by no means being an infringement of the first instance court's independence. However, this should be done with observance of the fundamental principles governing the court procedure. And, where the complaint against the lengthiness of proceedings should be taken into account, the parties in the proceedings are the persons who lodge the complaint, and – where they enter into proceedings – the State, represented by the president of the court whose proceedings have been appealed against (or the court enforcement officer). The other party in the proceedings conducted with the view to recognise the case from the point of view of its substance does not participate in the proceedings aimed at adjudicating the lengthiness of proceedings. This is the main reason why the court recognising the complaint against the lengthiness of proceedings may not issue binding decisions regarding the facts of the case and legal findings of the case being recognised from the point of view of its substance.

Secondly, we should not forget the aim of the complaint proceedings for adjudicating the lengthiness of the process, i.e. the enforcement of its faster performance. That is why the instructions under consideration should first of all set forth the particular time limit for undertaking relevant actions by the court hearing the case from the point of view of its substance. In the so far unique Supreme Court decision in which that solution has been applied (case III SPP 34/05) it has been found that the proceedings were lengthy due to the fact that the court failed to fix the date of the appeal trial for longer than nine months. The court was instructed to fix that date for the day not being later than one month following the date of the service of the judgment.

COMPENSATION

Pursuant to Article 12.4 of the 2004 Act, while hearing the complaint, the court may, upon the complainant's request, adjudicate the award from the State or – in the case of enforcement proceedings – from the court enforcement officer, of "an appropriate amount of money" not exceeding 10 000 zlotys (ca 2 500 euros).

The said provision does not define the prerequisites for fixing of the said "appropriate amount". It should, then, be assumed that it is to be fixed while taking into account all circumstances of the case. The court should consider the complainant's financial and moral losses. The said appropriate amount of money is, then, in its principle, of mixed nature. It is to be understood partly as damages in financial form, and partly as compensation for moral loss. The upper limit of the appropriate amount of money is not high. But, the amount adjudicated to be awarded in the course of simple procedure is to be paid within the two months following the date of filing of the complaint. Moreover, it must be taken into account that the complainant may seek full damages under the civil code.

And, as it is to be seen, under the 2004 Act, art 15, the party whose complaint has been heard, enjoys the right to seek from the State or, from the State and the court enforcement officer jointly and severally, a redress of the damage caused due to pronounced lengthy proceedings, this being done in the course of separate proceedings. The court decision to hear the complaint against the lengthiness of proceedings is binding upon the court in civil proceedings for damages or for compensation. This provision is in close conjunction with art. 417^1 § 3 of the Civil Code under which, if a damage was inflicted by the failure to issue a pronouncement or decision, where the obligation of their issue is provided for in legal provisions, the redress of such damage may be demanded after the non-compliance with law of such failure to issue a pronouncement or decision was stated in the course of appropriate proceedings, unless separate provisions provide otherwise. The said regulations make the situation of the party in civil proceedings who has been awarded with the pronouncement of lengthy proceedings, more advantageous. this situation is more advantageous since the party in civil proceedings is not charged with the burden of

proof that the court's or the court enforcement officer's performance was contrary to law. The said party must only prove suffered loss, the amount of the loss, and the reason and cause relationship between the loss and the court's or court enforcement officer's performance.

A party who has not, however, lodged a complaint against the lengthiness of proceedings enjoys the right to seek damages for the loss caused by lengthy proceedings – under the Civil Code, Article 417 (i.e. on general principles), after the final and binding judgment has been issued in the proceedings regarding its substance.

INFORMATION

The Supreme Court

Complaints before the Supreme Court

	2004	Until 31 March 2005	
	Civil and criminal	**Civil**	**Criminal**
Received	125	82	21
Dismissed	5	8	3
Allowed	1	2	1
Handled in another way*	92	110	11

* *In particular, returned to the party due to the lack of counsel (civil cases), rejected due to being lodged after the fixed time-limit, sent to other courts having relevant competence.*

The Supreme Administrative Court

Complaints against infringement of the right to be heard before court without unreasonable delay – received and handled

Movement of cases PP in 2004

	Received	**Handled**				**To be handled**
		In aggregate	*Allowed*	*Dismissed*	*In another way (rejected)*	
General Administrative Chamber	136	99	4	50	45	37
Commercial Chamber	3	2	–	2	–	1
Financial Chamber	13	3	–	–	3	10

Movement of cases PP in 2004

	Received	Handled				To be handled
		In aggregate	*Allowed*	*Dismissed*	*In another way (rejected)*	
Total	**152**	**104**	**4**	**52**	**48**	**48**

Movement of cases PP in 2005 (1 January-20 April 2005)

	Left to be handled in 2004	**Received in 2005**	**Received in aggregate** *(columns 2 plus 3)*	**Handled**					**To be handled**
				In aggregate	*Allowed*	*Dismissed*	*Rejected*	*In another way (discontinued)*	
1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
General Administrative Chamber	37	162	199	178	47	48	80	3	21
Commercial Chamber	1	–	1	–	–	1	–	–	–
Financial Chamber	10	12	22	21	1	3	17	–	1
Total	**48**	**174**	**222**	**199**	**48**	**52**	**97**	**3**	**22**

THE SLOVAK EXPERIENCE

Ms Marica Pirošíková, Co-Agent of the Slovak Republic at the European Court of Human Rights

DISCUSSION PAPER

Like Italy, the Slovak Republic reacted swiftly to the *Kudła v. Poland* judgment. Constitutional Law No. 90/2001 Z.z. created an effective internal remedy, namely the constitutional complaint (Article 127 of the Constitution of the Slovak Republic, in force since 1 January 2002), allowing natural and legal persons to complain of a violation of their rights. If the violation of fundamental rights or freedoms has been caused by a failure to act, the Constitutional Court may order the authority which has violated the rights or freedoms in question to take the necessary action. In its decision on a complaint, the Constitutional Court can also grant appropriate financial compensation to the person whose rights have been violated.

The European Court of Human Rights (hereafter "the Court") first considered the effectiveness of this remedy in its *Andrášik and Others v. Slovakia* judgment (decision of 22 October 2002 relating to Applications Nos. 57984/00, 60237/00, 60242/00, 60679/00, 60680/00, 68563/01 and 60226/00), to which Mr Michael O'Boyle also referred in his address. It was in that decision that the Court found for the first time that the constitutional complaint was an effective remedy with regard to unreasonable length of proceedings. Mr O'Boyle also said that in 2004 the Slovak Republic had been notified of a number of applications concerning cases in which the Constitutional Court, ruling on constitutional complaints under Article 127 of the Slovak Constitution, had, as reparation for violation of the "reasonable time" provision, granted just satisfaction that was significantly lower than that awarded by the Court, or else none at all, arguing that by their conduct the applicants had substantially contributed to the origin and the length of the proceedings.

As regards the earlier Slovak legislation, I should like to point out that, under Article 130 § 3 of the Constitution, as in force until 30 June 2001, an appeal (*podnet*) could be lodged with the Constitutional Court by any natural or legal person asserting a violation of their rights. According to its case-law based on the former Article 130 § 3 of the Constitution, the Constitutional Court lacked jurisdiction to draw legal inferences from a violation of the rights set out in Article 48 § 2 of the Constitution, which provides, inter alia, that everyone has the right to a hearing without undue delay. Nor could the Constitutional Court award compensation to the person concerned or impose a penalty on the public authority responsible for the violation. In the Constitutional Court's view, it was therefore incumbent on the

authority concerned to provide redress to the person whose rights had been violated.

With effect from 1 January 2002 the Constitution was amended so as to allow individuals and legal persons to complain of a violation of their fundamental rights and freedoms under Article 127, the relevant part of which provides:

1. The Constitutional Court shall decide on complaints lodged by natural or legal persons alleging a violation of their fundamental rights or freedoms or of human rights and fundamental freedoms enshrined in international treaties ratified by the Slovak Republic … unless the protection of such rights and freedoms falls within the jurisdiction of a different court.

2. When the Constitutional Court finds that a complaint is justified, it shall deliver a decision stating that a person's rights or freedoms set out in paragraph 1 were violated as a result of a final decision, by a particular measure or by means of other interference. It shall quash such a decision, measure or other interference. When the violation found is the result of a failure to act, the Constitutional Court may order [the authority] which violated the rights or freedoms in question to take the necessary action. At the same time the Constitutional Court may return the case to the authority concerned for further proceedings, order the authority concerned to abstain from violating fundamental rights and freedoms … or, where appropriate, order those who violated the rights or freedoms set out in paragraph 1 to restore the situation existing prior to the violation.

3. In its decision on a complaint the Constitutional Court may grant adequate financial satisfaction to the person whose rights under paragraph 1 were violated.

In its decision in *Andrášik and Others v. Slovakia*, the European Court of Human Rights considered that this was an effective remedy, capable both of preventing the continuation of the alleged rights violation, in that the authority concerned could be ordered to take the necessary action without undue delay, and of providing adequate redress for any violation that had already occurred. It referred to Constitutional Court decisions III ÚS 17/02 and I ÚS 15/02, whereby persons who had complained of the length of proceedings before the ordinary courts obtained relief of both a compensatory and a preventive nature. I quote from the Court's judgment:

3. The Constitutional Court's practice

... On 30 May 2002 the Constitutional Court delivered decision No. III. ÚS 17/02-35 in which it found, upon a complaint under Article 127 of the Constitution, a violation of Article 48 § 2 of the Constitution and of Article 6 § 1 of the Convention as a result of undue delays in proceedings

concerning the plaintiff's action for recovery of property filed with the general court on 24 February 1999.

The Constitutional Court's decision stated that the first-instance court dealing with the case had remained inactive for a total period of fourteen months and that the property claimed by the plaintiff was necessary for the everyday life of the latter and of her children.

The plaintiff had claimed 25 000 Slovakian korunas (SKK) in compensation for non-pecuniary damage resulting from the length of the proceedings. The Constitutional Court decided, with reference to the particular circumstances of the case and to the practice of the European Court of Human Rights under Article 41 of the Convention, to award **SKK 5 000**, noting that that the district court in question was obliged to pay that sum within two months after the Constitutional Court's decision had become binding. Finally, the Constitutional Court ordered the district court concerned to proceed with the case without delays.

In its decision of 10 July 2002 in a case registered as No. I. ÚS 15/02 the Constitutional Court found a violation of the plaintiffs' rights under Article 48 § 2 of the Constitution. At the moment of the delivery of the Constitutional Court's decision the civil proceedings complained of had been pending for more than six years at first instance. The Constitutional Court examined their length in the light of the criteria established by its case-law, namely the complexity of the matter and the conduct of the parties. It established delays in the proceedings imputable to the court dealing with the case, the total length of which amounted to twenty-two months.

In view of this finding, the Constitutional Court ordered the general court concerned to proceed with the case without further delays. The Constitutional Court granted in full the plaintiffs' claim for **SKK 20 000** each in compensation for non-pecuniary damage, and pointed out that the general court in question was obliged to pay those sums within two months after the Constitutional Court's decision had become final. The decision expressly stated that, when deciding on the above claim, the Constitutional Court had also considered the relevant case-law of the European Court of Human Rights. Reference was made to the Court's judgment in the case of *Zander v. Sweden* (25 November 1993, Series A no. 279-B).

The Constitutional Court has subsequently delivered several other decisions to the same effect …

... the Court is satisfied that the complaint under Article 127 of the Constitution is an effective remedy in the sense that it is capable of both pre-

> venting the continuation of the alleged violation of the right to a hearing without undue delays and of providing adequate redress for any violation that has already occurred. The recent Constitutional Court decisions referred to above, by which persons complaining about the length of proceedings before general courts obtained relief of both a compensatory and a preventive nature show that the remedy in question is effective not only in law, but also in practice. Accordingly, this remedy is consistent with the presumption that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights.

Regarding the decision in *Andrášik and Others v. Slovakia*, I wonder what message the Court was seeking to convey to the Constitutional Court of the Slovak Republic concerning the amount of just satisfaction to be awarded as redress for violation of the "reasonable time" provision. On the basis of the Court's finding that the remedy was effective in practice, based on Constitutional Court Decisions Nos. III ÚS 17/02 and I ÚS 15/02, could the Constitutional Court not have concluded that the Court held amounts of this order to be sufficient? Yet, two years after that judgment, the Slovak Republic found itself in a situation comparable to that of Italy in the *Scordino* case, for in 2004 the Court notified the Government of the Slovak Republic of a number of applications concerning violation of the right to a hearing within a reasonable time further to decisions of the Slovak Constitutional Court delivered pursuant to Article 127 of the Constitution and asked it the following question:

> Can the applicant continue to qualify as a victim within the meaning of Article 34 (see *mutatis mutandis Scordino and others v. Italy* (decision), No. 36813)?

In the light of the above context, amongst other things, the Slovak Republic requested permission from the President of the Court to submit observations on the Scordino v. Italy case. If the Court does not lay down clear criteria constituting adequate guidance for national authorities ruling on the amount of compensation for non-pecuniary damage caused by unreasonable length of proceedings, it is likely to be faced with other applications similar to that in the Scordino case despite the existence of effective internal remedies. In the long run such a situation will again bring with it the risk, mentioned by the Court in the Kudła v. Poland judgment, of the Convention's system of human rights protection becoming less effective at both the national and international levels.

In the second part of my paper I should like to present a new remedy against unreasonable length of proceedings in the Slovak Republic, which entered into force on 1 July 2004. This is Law No. 514 of 28 October 2003 on liability for damage arising out of the exercise of public authority. I shall quote certain provisions of this law which might become a model for other countries:

Section 1

Scope

The present law shall cover:

a. State liability for damage caused by public authorities in the exercise of public authority;

b. Liability of local and regional authorities for damage caused by the said authorities in the exercise of decentralised authority;

c. Friendly petitions for damages and state action to reclaim compensation from public officials who have committed a fault for which the state is liable.

…

Section 9

Incorrect official procedure

1. The state shall be liable for damage arising out of incorrect official procedure. Incorrect official procedure shall also be deemed to cover failure of a public body to comply with the obligation to perform an action or deliver a decision within the statutory time-limit, the failure of a public authority to act during the exercise of public authority, unnecessary delays in proceedings and any other unlawful infringement of the rights or interests of natural or legal persons protected by law.

2. Any person to whom damage has been caused by incorrect official procedure shall be entitled to compensation for such damage.

…

Section 15

Friendly petition

1. The right to compensation for damage arising out of an unlawful decision, an unlawful arrest, unlawful custody or any other deprivation of personal liberty, a sentence, a security measure or a decision regarding pre-trial detention, and the right to compensation for damage arising out of incorrect official procedure, shall first be argued on the basis of a friendly petition (hereinafter "petition") lodged in writing by the injured party with the competent body according to sections 4 and 11.

2. If the petition is lodged with a body lacking jurisdiction, that body shall refer the matter to the competent body and notify the injured party. The effects of lodging the petition shall remain unaffected.

Section 16

1. If the competent body does not allow the friendly petition for compensation for damage, in whole or in part, within six months of the date of its receipt, the injured person may claim the compensation covered by the petition, in full or for the part not satisfied, through legal proceedings.
2. A person shall be required, at the request of the competent body, acting on behalf of the state, to communicate without undue delay all facts of importance to the friendly petition.

Section 17

Type and amount of compensation for damage

1. Compensation shall be provided for losses and loss of earnings.
2. If the simple finding of violation does not constitute sufficient reparation in the light of the damage arising out of an unlawful decision or incorrect official procedure, monetary compensation shall be awarded for the non-pecuniary damage where there is no other alternative.

…

Section 22

…

2. When the state has paid compensation for damage caused by a judge through unnecessary delay in proceedings or an arbitrary decision which obviously had no basis in the legal system and if the judge's fault has been established by a disciplinary decision, it shall require the judge to reimburse in full the amount paid.

The aim of passing the above law was, *inter alia*, to reduce the number of complaints brought before the Constitutional Court for unreasonable length of proceedings. However, in order to avoid congestion in the ordinary courts, friendly petitions were introduced to allow persons injured by unreasonably lengthy judicial proceedings to obtain compensation directly from the Ministry of Justice.

Section 22.2 of this law has created a sort of American model, referred to by Mr Michael O'Boyle, in the Slovak legal system. A judge is required to reimburse in full the damage caused by unreasonably long proceedings, provided that judge is found to be at fault in disciplinary proceedings. However, most judges are acquitted in disciplinary proceedings brought against them for unreasonable length of proceedings on the strength of objective causes such as the courts' excessive caseload. The mere

possibility of a state action for compensation, as described above, does not suffice to eliminate these problems; wide-ranging reforms are required in terms of legislation, organisation, technical support and additional court staff. The Slovak Republic has implemented reforms in this area, but without any substantial improvement in the situation – which all goes to confirm that the problem is an extremely complex one.

THE BRITISH EXPERIENCE

Mrs Alec Brown, Lawyer, Department for Constitutional Affairs, Her Majesty's Government[25]

The Department for Constitutional Affairs has responsibility for the civil and criminal justice systems in England and Wales (aspects of which are shared with other Government Departments). As a lawyer within the Department for Constitutional Affairs, I have followed the discussions today with particular interest. It is a privilege to be able to contribute some short comments on the British experience to this most helpful and timely initiative of the Polish authorities, especially following on from the distinguished speakers that have already addressed us.

Before turning to consider the reasonable time requirement under Article 6 in particular, I would like to make some brief observations about the general protection for Convention rights in the United Kingdom. In 1998, the United Kingdom Parliament enacted the Human Rights Act, which has now been in force for almost five years. The Human Rights Act for the first time provided a vehicle for the transmission of most Convention rights directly into the domestic law of the United Kingdom. The Act requires the domestic courts to take into account the jurisprudence of the European Court of Human Rights in respect of any issue arising under the Convention with which they are seized (section 2). The Act provides a scheme of remedies for the better protection of Convention rights in domestic law. For example, all those who apply and interpret legislation are required to do so in a way that is compatible with Convention rights where it is possible to do so (section 3).

The keystone of the Human Rights Act is, however, the duty it places on public authorities, by providing that they act unlawfully if they act incompatibly with Convention rights (section 6). This duty is enforceable by way of a cause of action under the Act in the domestic courts. The courts may then grant a wide range of remedies, including injunctions, declarations, orders quashing the decisions of public authorities and orders requiring public authorities to act or to refrain from acting in a particular way. In a wide range of cases, the courts may also award damages for the violation of Convention rights, where such an award would be appropriate (the court is expressly directed to take into account the principles applied by the Strasbourg Court in awarding compensation under Article 41 of the Convention: section 9 (4)).

25. N.B. This is the slightly expanded text of a floor speech made in the Workshop on 28 April 2005. It is not intended to be a comprehensive account of the policies of Her Majesty's Government in the fields considered.

The thinking behind the Act was twofold. It was intended to allow the British judiciary to contribute, together with the judiciaries of other Contracting Parties, to the rich debate as to the values of the Convention that should guide the evolution of its jurisprudence. But it was also to provide an effective forum for the resolution of cases domestically, without the necessity of an application to Strasbourg. Some would say that this was long overdue.

In particular, it was our hope and has been our experience that this will repatriate the repetitive cases that President Wildhaber noted this morning could prove so diverting of the Strasbourg Court's own limited resources. By way of illustration, the Court decided in the 1990s two important cases of precedent, *Benham v. the United Kingdom* (1996) 22 E.H.R.R. 293 and *Perks v. the United Kingdom*, App. No. 25277/94 and others, judgment, 12 October 1999. These cases established the circumstances in which imprisonment would be unlawful under Article 5 (1) (b) of the Convention in cases of judicial error in the United Kingdom. Over a hundred clone applications followed in the wake of these judgments, many relating to judicial acts occurring over a decade ago. The last of these groups of clones was determined in Strasbourg at the beginning of March this year. That such cases had to be brought before the Strasbourg Court at all, to consider a question under the Convention which is essentially referential to domestic law, was hardly the best use of the Court's precious time. It is with some relief that I can say that all cases such as these can now be appropriately addressed under the Human Rights Act. Applicants need only come to Strasbourg if they remain dissatisfied with the outcome of the domestic proceedings.

Turning to the Human Rights Act in the context of the unreasonable length of proceedings, the first point to make is that courts and tribunals are expressly defined to be public authorities under that Act. The duty under section 6 of the Act accordingly applies to the courts and tribunals of the United Kingdom and this means that they cannot countenance delay, as it is understood under Article 6 of the Convention, in their own proceedings.

The practical effect of this is to some extent limited, because the expeditious resolution of proceedings has already, and independently of the obligations of the Convention and the Human Rights Act, been placed at the heart of civil and criminal procedure in England and Wales. However, Article 6 can be relied on in judicial proceedings in a number of different ways. In civil cases, for example, the reasonable time requirement could be used to press an argument to compel a court to act in a way so as properly to progress the case. Reliance could also be placed upon it in order to have sanctions imposed on a dilatory party where appropriate (for example, denying such a party a proportion of his costs). In criminal cases, a defendant may recover damages if delay occurs in the proper investigation and prosecution of a case. Noting the example given by the Chairman, Mr. Drzewicki, earlier today, it could also be argued that a sentence should be reduced to acknowledge and remedy

unreasonable delay. A criminal prosecution may also be stayed on the grounds that it would be an abuse of process as a result of delay, but this will be ordered in England and Wales only where the resolution the trial has been compromised as a result (for example, through the decay of evidence over time).

What may not be claimed under the Human Rights Act are damages for a violation of Article 6 resulting from a judicial act done in good faith. However, complaints concerning delay (along with others) may be submitted to Her Majesty's Court Service. If upheld, compensation will be paid in appropriate cases under administrative arrangements.

The Chairman, Mr Drzewicki, made a comment this morning which I found particularly striking. He distinguished between taking steps to cure the causes of delay and merely providing remedies that addressed the symptoms of delay. It is with this distinction in mind that I would like to draw the attention of the Committee to the reforms that have been made to the civil justice system over the last decade and which are presently being undertaken to the criminal justice system.

The reasonable time requirement of Article 6 naturally gives rise to particular issues in a country with an adversarial tradition, such as the United Kingdom. This is especially pronounced in civil litigation, where, save in cases to which the Government is a party, the only involvement by the state will be in the form of the judge.

If one were to look at the civil justice system of England and Wales 10 to 15 years ago, one would have found an adversarial system with a largely passive judiciary, that often simply reacted to the steps taken by the parties. This was widely seen as producing impediments to justice. Procedure could be tactically abused by litigants, who were free to engage in trench warfare, trying to wear each other down before ever the substance of the matter was heard. It also gave rise to delays which whilst not manifestly excessive in Convention terms, were seen domestically to be unacceptable in the generality of cases. For example, in 1994 the period between the issue of proceedings and the setting down for trial was, in the High Court in London, on average 163 weeks and in the county courts, on average 80 weeks.

Delay had long been recognised in the United Kingdom as an enemy of justice. Conscious of this and conscious of the clear jurisprudence of the European Court that a system of civil procedure that depends on the parties to take the initiative with regard to the progress of the proceedings does not relieve a Contracting Party of its obligations under the reasonable time requirement (see, e.g., *Scopellitti v. Italy*, judgment, 27 October 1993, §25), the then Lord Chancellor, Lord Mackey of Clashfern, commissioned a comprehensive analysis of the difficulties which beset the civil justice system. This work was led by Lord Woolf of Barnes, then a Lord of Appeal in Ordinary and now our most senior judge, the Lord Chief Justice.

In his first report, Lord Woolf stated (*Access to Justice – Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, June 1995, §4):

> Without effective judicial control … the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment where the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable.

In his final report, Lord Woolf proposed a radical prescription for the systemic failures he had identified in the institutions and culture of civil litigation in England and Wales. It was a prescription to address the causes, not to mask the symptoms. That prescription was adopted in a consolidated code of civil procedure made in 1998, called the Civil Procedure Rules, which came into force in 1999.

The first departure in the Civil Procedure Rules is an attempt to distil the fundamental values that should underpin civil litigation into a single overarching statement of principle. This is called the overriding objective, is found at the beginning of the Rules and is the compass by which the courts should exercise all their procedural powers. Although essentially a statement of the obvious, the practical and symbolic importance of the overriding objective should not be underestimated. Rule 1.1 of the Civil Procedure Rules provides (emphasis added):

The overriding objective

1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable—

a. ensuring that the parties are on an equal footing;

b. saving expense;

c. dealing with the case in ways which are proportionate—

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

d. ensuring that it is dealt with *expeditiously and fairly*; and

e. allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Rules 1.2 and 1.3 also state a fundamental value of the new procedural code. On the one hand they require the court to give effect to the overriding objective in all instances where it exercises its procedural powers or interprets the code and on the

other hand they require the parties to litigation to help the court further the overriding objective. In other words, civil litigation is required to be a partnership between judges and litigants.

Lofty statements of principle are fine in so far as they go, but are as nothing if in practice they are ignored or if the practical tools necessary to give effect to them are lacking. Fortunately, this has not been the experience under the Civil Procedure Rules. Central to the transformation of the institutions and culture of civil litigation was not only the imposition of a duty on judges to manage cases actively, in contrast to the reactive culture of the past, but also the provision to them of the means so to do.

Although this thinking permeates throughout the whole approach of the Civil Procedure Rules, perhaps I can seek to illustrate it with three examples.

First, there are the general duty and the general powers to manage cases in accordance with the overriding objective (see in particular rule 1.4 and Part 3). The court is required to do a number of things in actively managing a case, for example to identify the issues at an early stage, to fix timetables and control the progress of the case, to decide how the issues might most efficiently be resolved and to make appropriate use of new technology. Similarly the court may extend or shorten the time for complying with procedural requirements, summon the parties and their representatives to court, strike out parts of a litigant's case (for example, if there are no reasonable grounds for raising it) and make orders imposing sanctions on parties unless they comply promptly with the directions of the court. Importantly, these powers need not await an application by a litigant, but may be raised by the court on its own motion.

Secondly, the new procedural code contains important rules applying to the pre-action stage (i.e. before the issue of proceedings), called the Pre-Action Protocols. The failure to comply with the Protocols may result in the imposition of sanctions in any subsequent litigation. Their purpose is to promote settlement without recourse to litigation and to ensure that where litigation does later issue, the case is better prepared, and the key issues are identified, from the outset.

Thirdly, a system of tracks has been instituted in most civil litigation. After proceedings have issued, the parties are permitted a relatively short period of time to plead out the case (setting out the basis of the claim and the defence in extremely skeletal written form). After this process has concluded, the case will be allocated to one of three tracks, depending on its value and complexity. The tracks are the small claims track (for the most straightforward litigation), the fast track (for litigation of middling complexity and value) and the multi-track (for complex litigation). The procedural code is then tailored around the track in question, for example an expedited and simplified procedure applies to the small claims track. A suggested timetable with short deadlines is provided for the fast track, which aims to progress the case

from allocation to hearing within 30 weeks. A suggested timetable is not provided for the multi-track, as the nature of such litigation can vary tremendously (from a question as to whether a contract worth GBP 25 000 is enforceable to group litigation concerning the solvency of a reinsurance pool where GBP 100 million is at stake). However, in multi-track cases, the importance of expedition is not ignored. The court and the parties are required to agree a bespoke timetable for the resolution of the case and to ensure that the litigation is appropriately managed through case management conferences.

Although the reforms proposed by Lord Woolf were met with a measure of trepidation in certain quarters when first proposed, they have generally been well-received by judges, practitioners and litigants. The general consensus is that they have operated to simplify and render more efficacious civil procedure, at the same time as reducing delay. For example, in the last quarter of 2004, the period between allocation to a track and trial was less than 15 weeks in 84 per cent of small track cases, less that 30 weeks in 80 per cent of fast track cases and less than 50 weeks in 75 per cent of multi-track cases.

But the attitude of those with responsibilities for the civil justice system is far from one of complacency or self-congratulation. Rather the process of reforming civil justice is very much regarded as an ongoing one, both to introduce further improvements to the system and to ensure that the existing rules are kept in a good state of repair. The stewardship of the code rests with a standing committee of senior judges, lawyers and representatives from relevant consumer and voluntary sector organisations. Following appropriate consultation, it is this committee that approves changes to the code. A policy division of the Department for Constitutional Affairs keeps civil procedure policy under constant review and both responds to and initiates new policy proposals. Ideas for new ways of improving civil procedure are collected from a wide range of sources–from practitioners, from organisations with an interest in civil justice, from the judiciary, from within my Department and indeed from helpful colloquia such as this.

I wish to turn to consider much more briefly the position of the criminal justice system in England and Wales. The adversarial tradition has not produced the same difficulties in criminal proceedings, because prosecutions are almost always brought by the Crown. However, until comparatively recently, the approach of the judiciary was essentially as passive and reactive as it was in civil proceedings. The efficacy of criminal procedure was also diminished because it was scattered and diffuse, to be pieced together from numerous Acts of Parliament, from secondary legislation, from different sets of rules applying in different types of criminal courts and from common law practice.

However, the work undertaken to modernise civil procedure has been replicated for the criminal justice system mutatis mutandis over recent years. This resulted in the publication of a consolidated code of criminal procedure, which came into force in

April of this year. Perhaps unsurprisingly, this is called the Criminal Procedure Rules. This code contains an overriding objective and confers on the criminal courts the same aggressive powers of case management as those enjoyed by their civil counterparts. Two particularly pertinent requirements of the overriding objective of the Criminal Procedure Rules are (as provided in rule 1.1 (2)):

> Dealing with a criminal case justly includes—
>
> …
>
> c. recognising the rights of a defendant, especially those under Article 6 of the European Convention on Human Rights;
>
> …
>
> e. dealing with the case efficiently and expeditiously ….

Greater case management had been introduced gradualistically into criminal proceedings since the late 1990s. However, Lord Woolf, as Lord Chief Justice not only the most senior judge but the judge with particular responsibility for the criminal courts, has commented that the code is seen as essential to promoting a culture change in criminal case management.

Time prevents me from commenting on the numerous other initiatives that are being brought forward to modernise and improve the criminal justice system. However, one noteworthy feature has been the need to ensure effective cross-Government co-ordination on criminal justice policy, which is spread between a number of Government Departments, in particular the Department for Constitutional Affairs, the Home Office and the Crown Prosecution Service. To that end a cross-Government office, the Office for Criminal Justice Reform, has been established.

A wide range of initiatives are also being brought forward which involve soft law or administrative arrangements, for example ensuring the more effective management of the criminal courts at the administrative level and by seeking to reduce the number of cases that abort at the door of the court (perhaps due to a late change in plea). We have also sought to ensure that the criminal courts are more accommodating of the needs of witnesses, as the non-attendance of witnesses has an obvious capacity to disrupt and delay trials (for example, witnesses can now arrange to visit the courts in advance of giving evidence to familiarise themselves with the court environment).

The Chairman, Mr Drzewicki, commented kindly on the British system earlier today. In commenting on the Italian experience, Mr Crisafulli suggested that the culture in litigation was different in Italy from that in my country. Let me conclude by saying that we have not always got things right and there have been times where our system has been found wanting in Strasbourg on this issue. However, it is probably fair to say that delay in judicial proceedings is fortunately exceptional in the United Kingdom. But there is no magic in the British courts or the British culture on this

issue and it was not always so. Rather can I suggest that such progress as we have been able to achieve has resulted from rigorously seeking to address the causes, rather than the symptoms, of delay, through fundamental and continuing reform.

With an eye very much to the ongoing nature of this work, I have found today's discussions both interesting and innovating, and I thank the Committee for your time.

FURTHER INFORMATION

Further information about the issues raised in this talk can be found at the following Web sites:

- Generally: http://www.dca.gov.uk/thelegalsystem.htm
- On the criminal justice system: http://www.cjsonline.gov.uk/
- The Civil Procedure Rules: http://www.dca.gov.uk/civil/procrules_fin/
- The Criminal Procedure Rules: http://www.dca.gov.uk/criminal/procrules_fin/
- Lord Woolf's Interim Report: http://www.dca.gov.uk/civil/interfr.htm
- Lord Woolf's Final Report: http://www.dca.gov.uk/civil/final/contents.htm;
- Assessment of the operation of the Civil Procedure Rules: http://www.dca.gov.uk/civil/reform/ffreform.htm
- The Human Rights Division of the Department for Constitutional Affairs: http://www.dca.gov.uk/hract/hramenu.htm
- The Human Rights Act 1998: http://www.hmso.gov.uk/acts/acts1998/19980042.htm