

Yerevan Pan-European Conference  
The European Legal Standards and the Scope of Discretion of Powers in the Member-States  
of the Council of Europe  
3 July 2013

Your Excellencies:

- Mr President of the Republic,
- Mr President of the National Assembly,
- Mr President of the Constitutional Court,
- Minister Nalbandian

Ladies and Gentlemen,

I am very pleased indeed to take the floor this morning to address words of greeting to you in the name of the European Court of Human Rights.

I am deeply gratified that the Constitutional Court has, once again, involved the European Court in its annual conference. In Strasbourg we know from the experience of my fellow judges who have taken part in previous events – and above all Judge Alvina Gyulumyan who is of course present here today – the very high quality, in every respect, of the Yerevan International Conferences.

Long may they continue.

This year the conference takes on a special importance, being part of the programme of Armenia's first ever chairmanship of the Committee of Ministers of the Council of Europe. At Strasbourg, we look forward to a constructive and productive term under Armenian leadership. Indeed, one of the first concrete achievements was the adoption of Protocol No. 15 to the Convention, which was opened for signature in the presence of Mr Nalbandian in Strasbourg at the beginning of last week. Twenty States signed the text immediately, including Armenia. I hope that their lead will be followed quickly by all other member States.

The Protocol is an important outcome of the process of reform of the Convention system, and I welcome its appearance so soon after last year's Brighton Conference.

The Protocol will make a number of amendments to the Convention, one of which has some relevance to the theme of this conference – I will return to this point in a moment.

This is a fertile time for the European Convention, with two other texts at an advanced stage. It is my hope that Protocol No. 16 will be a second achievement of the Council of Europe during Armenia's term in the chair. This protocol aims to bring a new dimension to the work of the European Court of Human Rights, creating a new advisory procedure that will allow the highest national courts to seek guidance from Strasbourg on questions of Convention law. I am convinced that this will come to be seen as a valuable feature of the international mechanism, and I strongly support a wide ratification of the protocol by European States. A new channel of judicial dialogue will come in to being. I see the clear potential for it to aid national courts in their front-line role of protecting fundamental human rights. Our Court in Strasbourg stands ready to play this new role, which I hope will become a reality in the not too distant future.

Also in the pipeline is the agreement on the accession of the European Union to the Convention. As there is still some distance to travel before that becomes a reality, I will limit myself to observing that a truly historic development in international human rights law is now within the reach of European States.

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The theme of this year's conference is a perennial one for modern states. It raises fundamental questions of power and authority, of accountability and legitimacy.

That the exercise of public power necessarily implies a degree of discretion for the authority concerned – and notably the executive – must be accepted as true in principle. In the very next breath, however, must be mentioned the limits that necessarily apply. The concept of the separation of powers, to which all European States subscribe in their way, goes hand in hand with respect by all powers of the State for the rule of law. Discretionary powers, whether they arise out of tradition and practice, or out of positive law, must remain within the boundaries set by the relevant legal norms – domestic and international. It is with the latter – and more exactly with European legal standards – that this conference is concerned.

Speaking from the perspective of the European Convention on Human Rights, it will not surprise you if I refer here to the margin of appreciation. It is, in a nutshell, the recognition by the European Court of an area of discretion that should be allowed to national authorities in the observance and implementation of human rights. A great deal has been said and written about the margin of appreciation – it may well be the most commented-upon feature of European human rights law. While it is a judge-made doctrine, it will soon make its way into the text of the Convention itself. As I mentioned earlier that one of the elements in Protocol 15 is of special relevance to today's conference – the addition of a new sentence to the Preamble of the Convention, reading as follows:

*“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,”*

The States have themselves indicated, in the explanatory report, that their intention with this amendment is to be consistent with the case-law of the Court. The Protocol does not, therefore, set out to modify this key concept of European human rights law.

In these short introductory remarks, I will limit myself to just a few very brief observations about the margin of appreciation. I expect that the matter can be addressed in more detail during the substantive discussions later on.

I referred a moment ago to the limits that must apply to discretionary power in a State that is governed by the rule of law, a concept that also appears in the Preamble to the Convention and underpins all of its provisions. In the phrase “margin of appreciation”, one must emphasise the word margin. It denotes a relatively limited area where the national authorities have a certain freedom of action or choice. The margin, as is well known, may be narrow or broad depending on a series of factors, but even when it is wide it remains a margin – it does not extend right the way across the page. As the Court has so often observed, the margin in a given case always goes hand in hand with European supervision. In short, there is no reserved domain for State authorities under the Convention.

Looking at the recent case-law of the European Court of Human Rights involving the margin of appreciation, one can see a trend towards judicial self-restraint when it is clear that the superior national courts have, at the domestic level, examined the case in light of the relevant Convention provision and case-law principles. For example, in a case that involved a balancing exercise between competing Convention rights – press freedom and the right to respect for private life – the Court observed that it “would require strong reasons to substitute its view for that of the domestic courts” (*Von Hannover No. 2*).

One sees the same approach in relation to parliaments. Where legislators carefully weigh up the relevant human rights aspects of a piece of legislation, and seek to achieve a reasonable accommodation between individual rights and others aspects of public interest, the Court has shown itself inclined to accept the balance that has been struck (*Animal Defenders*).

What we see in both of these examples is the principle of subsidiarity in action – a principle that will also become part of the Convention text with Protocol 15.

As a final remark, it is worth recognising how attentive the authors of the Convention, working more than 60 years ago, were to the need to set strict limits to the sovereign powers enjoyed by national authorities – the requirement that there be an explicit legal basis when restricting rights, and the strict criteria of “necessity in a democratic society” that must be met if an interference with an individual’s right is to be accepted. This was very progressive for its time. And it has stood the test of time, providing solid foundations for the modern human rights regime, the great achievement of the Council of Europe, and the precious heritage of all our peoples.

Ladies and gentlemen,

Thank you for your attention, and I wish for all of you a conference both fascinating and fruitful.