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# Dialogue between judges



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# Dialogue between judges

Proceedings of the Seminar  
21 January 2005

Most significant or critical issues arising out  
of the European Court of Human Rights  
and its case-law

Strasbourg, 2005

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## Luzius Wildhaber

**President  
of the European Court of Human Rights**

### OPENING WORDS

Let me first say how encouraging it is for my colleagues and myself to see so many senior judicial figures here today.

When I asked Judges Tulkens, Zagrebelsky and Fura-Sandström to organise a seminar to coincide with the ceremony for the official opening of the judicial year, it was indeed with the idea of offering a little more than we have done in the past to those of you coming from a distance for this event and thereby to attract a greater number of judges from the Council of Europe member States. Well, that seems to have worked even better than we had hoped.

We have of course been helped in this by the pulling power of three distinguished rapporteurs, to whom I am very grateful. But the most important thing for me is that it provides us with an opportunity to make or renew contact with you and to discuss with you our shared task of making the human rights protection system set up by the European Convention on Human Rights work. We are partners in that system; without you, without the commitment to the system of, particularly, the superior domestic courts, the aims of the Convention cannot be attained.

That is why you will always be welcome in Strasbourg, why we will always have important topics for discussion and why we should in fact meet regularly to dissipate the inevitable misunderstandings that arise. We need to explain our approach from time to time and you must not hesitate to tell us when there are particular difficulties seen from your perspective.

So, may I repeat that I am delighted to see you all here today.

Before giving the floor to the organisers – Françoise Tulkens, Vladimiro Zagrebelsky and Elisabet Fura-Sandström – I should just like to thank them for their efforts to make this event happen. I am confident that those efforts will be crowned with success and that we will spend a stimulating and useful afternoon.





## Françoise Tulkens

**Judge of the  
European Court of Human Rights**

Mr President, members of the judiciary, ladies and gentlemen, dear colleagues, dear friends,

A few months ago, President Wildhaber asked Elisabet Fura-Sandström, Vladimiro Zagrebelsky and me to organise this seminar to mark the start of the new judicial year. In a display of considerable confidence – although perhaps not entirely without risk – he gave us *carte blanche*. We have therefore chosen, and accept total responsibility for doing so, to take the opportunity afforded by the presence of so many of you here today to pursue, strengthen and deepen the dialogue in which the European Court of Human Rights and its President wish to engage with the national supreme courts.

It cannot be repeated often enough that, notwithstanding the vital role played by the international machinery, the effective protection of human rights begins and ends at the national level. According to an author who made one of the biggest contributions to Protocol No. 11: “[now, perhaps even more than in 1950,] the task of protecting human rights lies mainly with the national judges. However, the reality is that in the future the national courts’ role will become increasingly linked to that of the international courts”<sup>1</sup>. The national and international courts clearly share responsibility for providing human rights protection. The domestic authorities have the initial responsibility, whereas, as an independent supervisory body, the European Court of Human Rights has final responsibility. The role of the European Court of Human Rights is to reinforce human rights protection at the national level, not to replace it. This serves to demonstrate how vital a complementary relationship between the domestic legal order and the international order is to the defence of fundamental rights.

In order to give this complementary role, this interaction, some substance we thought it would be helpful for you to have an opportunity to express any preoccupations, concerns, problems or difficulties you may have with the European Convention on Human Rights – our common heritage – or with the Court, whose task it is to interpret and apply it (Article 32).

We have invited three people who are particularly well-placed to talk on the matter, one from the Court of Cassation, one from the Constitutional Court and the third from the Court of Justice of the European Communities, to act as it were as your spokesmen. We have asked each of you, President Canivet, President Onida and Advocate General Jacobs, to tell us what, from your perspective, are the most significant or critical issues arising out of the European Court of Human Rights and its case-law. I thank you, on behalf of the Court, for accepting our invitation. We wish to learn from you and to hear what you have to say. The development of European human rights law represents a major challenge for traditional legal thinking and forces us to think increasingly in terms of an integrated network, in which hierarchy is replaced by alternation, subordination by coordination, linearity by interaction, confrontation by coexistence, and opposition by otherness and reciprocity.

<sup>1</sup> [Unofficial translation from the French] Jaccot-Guillarmod (Olivier), “The new European Court of Human Rights from the viewpoint of a national judge”, *Revue suisse de droit international et européen*, 1999, p. 45.

I am sure that this afternoon we will have an open discussion, the true discussion which, as Habermas reminded us in his Discourse Ethics, is based on the following presuppositions: "Everyone must be able to problematise any affirmation whatsoever. Everyone must be able to express his views, desires and needs. No speaker may be prevented by pressure from authority, whether or not exerted during the discussion, to take advantage of his rights [to discuss matters freely]"<sup>2</sup>

In practical terms, as we indicated when outlining the programme, we will therefore have three twenty-minute talks each followed by a discussion. The working languages will be English and French with interpretation being provided by our highly professional interpreters whom I thank in advance for their invaluable assistance.

\* \* \*

President Canivet, thank you for joining us this afternoon. In addition to your work at the Court of Cassation, you are a thinker and writer who has worked untiringly to promote law and justice. From what I have read of your article of October 2004 on "The network of judges in the European Union", you are certainly no stranger to our theme of dialogue. Nor are you afraid to take up a bold position, as can be seen from an interview you gave to *La Semaine juridique* a few years ago. When asked: "What advice would you give to a young judge?", you replied: "I would stress two things. First, the need to keep an open mind. The legal system does not hold absolute truths. It only makes sense in an economic and social context. There are, however, fundamental principles that are common to all systems of justice. In order to understand this, travel, observe foreign systems, and study the case-law of the Court of Justice and European Court of Human Rights". Such advice is worth its weight in gold, even for judges who are not quite so young...

You have the floor.

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2 [Unofficial translation from the French] J. Habermas, "Discourse Ethics: Notes on a Program of Philosophical Justification", *Moral consciousness and communicative action*, MIT Press.



## Guy Canivet

President of the Court of Cassation  
France

### NATIONAL SUPREME COURTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: NEW ROLE OR RADICAL CHANGE IN THE DOMESTIC LEGAL ORDER?

Mr President, colleagues, professors, ladies and gentlemen, May I begin by saying what an honour it is for me to be invited here to take part in this debate marking the start of the new judicial year.

#### INTRODUCTION

Having been given the freedom to choose how to interpret the subject of this modest contribution to the dialogue between judges, “National supreme courts and the European Convention on Human Rights: New role or radical change in the domestic legal order?”, I thought it would be helpful to talk to you about the role played by a national supreme court, such as the Court of Cassation, as an agent for bringing about the changes to the domestic legal and court system which the application of the Convention imposes and, above all, to identify what I see as being the actual or potential consequences of that role on the relationship between the national supreme courts and the European Court of Human Rights.

I should preface my remarks by saying that the general problem posed by the application of the European Convention on Human Rights by the supreme courts of the Contracting States is particularly acute in France. The French legal system is “monistic”, in that, firstly, there is no separation between the internal and international orders – Article 55 of the Constitution provides: “Treaties or agreements that have been lawfully ratified or approved shall, upon publication, prevail over Acts of Parliament ...” – and, secondly, no appeal lies to the body responsible for reviewing the constitutionality of legislation, the *Conseil constitutionnel*, for a specific review of its Convention compliance.

In addition, under our judicial system, the absence of a direct remedy in the *Conseil constitutionnel* for a review of the conformity of domestic legislation and regulations with the European Convention on Human Rights (which ranks above legislation) means that all courts, irrespective of their level and whether ordinary or administrative, are responsible for reviewing Convention compliance and have the power to disregard domestic legislation that does not comply with the Convention. Obviously, they do so subject, in the domestic order, to supervision by the Court of Cassation or the *Conseil d’État*, and in the supranational order, by the European Court of Human Rights under the direct-application procedure.

In the French internal judicial order, therefore, the Court of Cassation is the primary body responsible for realigning domestic law with the European Convention on Human Rights. It does so in the light of the provisions of the Convention as interpreted by the European Court of Human Rights, to whose decisions it ascribes at least interpretative authority in all cases.

Under this system the French Court of Cassation has the classic role of adapting domestic law, through its case-law, to make it compliant with the Convention guarantees. However, this process has, on occasion, strained relations with other State powers (I) and, less predictably, led to a radical change in the national legal and judicial order, to the point where it has affected the methods of statutory interpretation (II).

## I. THE NEW ROLE OF THE DOMESTIC COURTS – FROM MAINTAINING TO TRANSFORMING THE LEGAL SYSTEM

The Court of Cassation's role in realigning domestic law with higher norms is a central tenet of French legal theory. It is derived from the Constitution itself. However, in a system strongly influenced by the principle of the separation of powers and the supremacy of legislation which, culturally at least, has since the Revolution allowed the courts to interpret legislation only within a strictly regulated framework, the performance of that task nevertheless gives rise to difficulties with the executive and the legislature.

Both are reluctant to accept that the courts should have any control over domestic legislation or regulations, still less that they should have the power not to apply them.

These difficulties may provoke a crisis in cases in which a court has to examine the legislative intention in the light of the general interest<sup>1</sup>, when the *Conseil constitutionnel* may have already done so. Yet that is what the courts are required to do, for instance, by the case-law of the European Court of Human Rights on "legalisation" law. One can imagine Parliament's reaction when its view of what constitute compelling general interest grounds is contradicted by the courts and the confusion caused by the differing analyses of that concept when the *Conseil constitutionnel*, administrative courts and ordinary courts each examine it in turn.

### A. INTEGRATING NEW SOURCES OF LAW AND NEW METHODS OF REASONING

The first stage in the process is, however, well rehearsed: it involves the Court of Cassation ensuring a coherent legal order by removing any contradiction between domestic laws and the Convention guarantees. However, what is unusual here is that, in performing this function, the national court adopts a new judicial method.

#### 1. EXPANDING THE SOURCES OF THE RULE OF LAW AND MAKING THEM CONSISTENT

The French legal model enables the courts to adapt the national law to the international instruments to which France is a party, in particular, the European Convention on Human Rights. The task of detecting inconsistencies and realigning the rules pending any corrective legislative intervention falls naturally upon the courts<sup>2</sup>. The Court of Cassation's case-law is therefore geared towards continually rebuilding a new coherent order based on sources of law that are intentionally and advisedly pluralistic and diverse.

1 See the decisions of the Court of Cassation, sitting as a full court, of 24 January 2003, (*Bulletin* no. 3, p. 4) and 23 January 2004 (*Bulletin* no. 2, p. 2).

2 For examples of this process of realignment with regard to the civil status of transsexuals, see the judgment of the Court of Cassation, sitting as a full court, of 11 December 1992 (*Bulletin* no. 13, p. 27), following the European Court's judgment of 25 March 1992 in *B. v. France* (Series A no. 232-C); similarly, concerning criminal proceedings, see the judgment of the Court of Cassation, sitting as a full court, of 2 March 2001, following the European Court's judgment of 23 May 2000 in *Van Pelt v. France* (no. 31070/96).

The coexistence of different European legal systems – the Community system, with the Court of Justice of the European Communities, and the Convention system, with the European Court of Human Rights – means that there are other areas of uncertainty that also have to be considered. It makes good sense for both domestic and international courts to seek to harmonise the bodies of case-law, while complying with decisions that are authoritative.

## 2. THE CHANGES IN JUDICIAL METHOD

What appears to be less usual here though is that, when performing this task of realignment, the Court of Cassation enforces the Convention guarantees by reference to the principles and the methods of interpretation established by the Strasbourg Court's case-law. Thus, for instance, it will examine whether permissible restrictions on the freedoms guaranteed by the Convention correspond to the aim pursued by the legislation and are proportionate to it. The Criminal Division of the Court of Cassation did this in a decision<sup>3</sup> in which it held that French legislation which restricted freedom of expression by prohibiting the publication of opinion polls during the latter stages of political election campaigns did not comply with Article 8 of the Convention.

This illustrates the three difficulties to which such a decision may give rise in a political system based on the separation of powers: the first is understanding that the court is applying judicial techniques to which it is not accustomed; the second is applying the test of the necessity and proportionality of its aim to legislation, which ultimately entails judicial review of its purpose; the third is the judicial destruction of statutory arrangements considered vital to the functioning of the institutions, with the result that the legislature is required to intervene when and in the circumstances the judiciary dictates.

For this reason, public and political opinion perceive the European Court of Human Rights and the Court of Cassation alike as being subversive influences on national law, especially when they intervene in issues such as political elections that are regarded as being within the sovereign preserve.

In such cases, both the European Court of Human Rights and the national supreme court share a responsibility of which it is necessary to be aware.

The fact that the exercise of bringing domestic law into conformity with the Convention is not an exact science means that the domestic courts are particularly exposed. Since it is unable to predict all the factors that may be taken into account by the European Court of Human Rights when it interprets the Convention provisions *in concreto*, the national court may be overcautious, and risk a subsequent finding of a violation, or over bold, and liable to criticism for abusing its powers of "judicial repeal". Hence, the derisive expression "human rightists" has been coined.

## B. THE CHANGE IN THE RELATIONS BETWEEN THE JUDICIARY AND THE LEGISLATURE

At all events, a new form of relationship between the judiciary and the State powers is emerging which can prove a source of considerable friction when, pursuant to the Convention, the Court of Cassation repudiates institutions and obliges the legislature and the executive to start afresh.

### 1. THE RISKS OF FRICTION

This is what happened, for instance, with the invalidity tribunals that were established to hear disputes relating to rights to invalidity benefit. Their composition and procedure were found to contravene the principle of impartiality and, consequently, following a ruling of incompatibility by the Court of Cassation<sup>4</sup>, the tribunals were no longer able to function.

3 Court of Cassation, Criminal Division, 4 September 2001, *Bulletin* no. 170, p. 562.

4 Judgment of the Court of Cassation, sitting as a full court, of 22 December 2000 (*Bulletin* no. 12, p. 21).

In such situations, a finding that a domestic procedure or institution is incompatible with the Convention will obviously be disruptive and may lead to a hostile reaction, as it entails an urgent, forced overhaul of procedures or institutions that have been established by law.

## 2. THE NEED FOR COOPERATION

These special cases in which the national supreme court repudiates – either of its own motion, or pursuant to a decision of the European Court of Human Rights – a statutory body or a procedure so that an urgent replacement has to be found make effective cooperation between the legislature and the national supreme court necessary, something that is not always easy to achieve. No framework for such cooperation exists in France. It has therefore been necessary to devise procedures, which presently take the modest and fragile form of informal warnings or suggestions of variable candour and clarity.

Thus, as a result of the European Convention on Human Rights, the role of the national courts has changed. In the national institutional order, this has seen a shift in the balance of power in relation to the other branches of State, in particular, the legislature. In addition to this factor, which must be borne in mind if one is to understand the resistance, if not outright hostility, which the application of the Convention can provoke at times, it is also necessary to acknowledge that this phenomenon alters the fundamental nature of the national supreme court and the principles on which it functions.

## II. A RADICAL CHANGE IN THE DOMESTIC LEGAL ORDER – FROM A CHANGE IN THE NATURE OF THE NATIONAL SUPREME COURT TO A REAPPRAISAL OF THE METHODS OF STATUTORY INTERPRETATION

The radical change in the sources of law produced by the Convention affects the nature of the national supreme court and may ultimately prove incompatible with the traditional method of statutory interpretation.

### A. THE CHANGE IN NATURE OF THE NATIONAL SUPREME COURT

The change here is substantial as it entails a loss of sovereignty for the national supreme court and may, in certain instances, even affect the judicial authority of its decisions within the domestic order.

#### 1. LOSS OF SOVEREIGNTY

The supreme courts of the Contracting States indisputably lose sovereignty when their decisions are, albeit indirectly, subjected to the *ex post facto* supervision of the European Court of Human Rights.

When it comes to interpreting the Convention itself, there can be no disputing the European Court of Human Rights' authority to review the decisions of the domestic courts. It is proper, sensible and desirable for the European Court's interpretation of its founding instrument to take precedence over the interpretation of the courts of a Contracting State. Giving precedence to the European Court's interpretation is essential if the Convention is to be applied uniformly. To challenge that principle would be as much a legal aberration as a political one.

The power to review is more debatable and, if the truth be told, the loss of sovereignty less readily accepted, in the not uncommon cases in which the European Court interprets the factual elements necessary for the application of concepts of pure domestic law differently from the domestic courts.

Is it, for instance, necessary and reasonable for the European Court – especially if it intends to act as a quasi-constitutional court – to contradict, as it did just a few days ago, the national court's assessment as to whether the consequences of executing a decision against which an appeal

on points of law had been made would be manifestly unreasonable<sup>5</sup>? It is true that these factual elements provide the basis for a decision to strike the case from the list which determines access to a court, but does that mean that the European Court should repeat a factual balancing exercise that has already been performed by the domestic courts?

Courts whose role is restricted to examining the lawfulness of a decision have some difficulty in understanding how the European Court of Human Rights can determine *ex post facto* issues which they consider to be within the unfettered discretion of the tribunals of fact, even if an examination of factual issues will obviously be necessary before the Convention guarantees can be enforced. In our system there is a division of roles between the tribunals of fact and the tribunals of law. This is one of the most important features of our system, of our judicial culture even.

At the risk of appearing disrespectful, I would add that the European Court's reputation is at stake should its assessment of such factual elements prove questionable. That is a risk to which it is naturally exposed, since it is not always in possession of all the evidence that was before the domestic courts.

The situation of courts, such as the French Court of Cassation, which only decide points of law is, in this regard, an unenviable one because they find themselves caught between two courts which decide both issues of fact and issues of law: the subordinate national courts below and the European Court above. It is not, therefore, uncommon for the European Court to find a violation of the Convention on the basis of factual elements taken into account by the national court which the Court of Cassation, as a tribunal of law, had no power to review. There are those who consider there to be an incompatibility here. Even if that incompatibility is more apparent than real, the result is a seemingly paradoxical situation for the so-called "courts of cassation".

The European Court's practice of reopening factual issues which have been decided by the national courts incontestably needs to be thought through, as does its occasional practice of interpreting national law.

Was it necessary and reasonable for the European Court, in deciding that there had been a violation of the right of access to a court, to reject the national court's finding that an appeal on points of law was inadmissible because the appellant had failed to raise the ground of appeal before the lower courts<sup>6</sup>? In so doing, the European Court clumsily became embroiled in a complex procedural technique with which it was clearly unfamiliar and thereby ran the risk of committing errors that undermined the authority of its decisions.

In the Convention system, the right of direct application to the European Court was not intended to be used as a standard remedy against the decisions of the supreme courts of the States. Such a practice undermines the supreme courts' authority domestically, at a time when, on the contrary, it needs to be consolidated if responsibility for applying the Convention is to be decentralised effectively.

## 2. THE EFFECT ON RES JUDICATA

The national supreme courts' loss of sovereignty may even affect the authority of their decisions. That is the position in France in criminal proceedings. Following a long conflict between the French authorities and the Council of Europe, a procedure<sup>7</sup> was set up by a law of 15 June 2000 allowing a retrial – even if domestic remedies have been exhausted – in cases in which the European Court has found a violation of the Convention whose nature or gravity is such as to entail damage that cannot be remedied by compensation.

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5 See *Carabasse v. France*, no. 59765/00, 18 January 2005.

6 See *Dulaurans v. France*, no. 34553/97, 21 March 2000.

7 Governed by Articles 626-1 to 626-7 of the Code of Criminal Procedure.

Such a procedural remedy is logical and, in truth, essential. It is not really acceptable to permit a judicial decision tainted with a violation of the Convention negating its factual or legal basis to remain effective. However, it has to be understood that this represents a fundamental change in the way the courts operate under the Convention system in that the judgments of the European Court now affect the *res judicata* of the domestic courts' decisions. The European Court is thus intervening in the domestic judicial decision-making process.

Indeed, logic dictates that this remedy should not be restricted to criminal proceedings. The consequences of decisions in civil proceedings that violate the Convention can be just as serious and harmful as those in criminal proceedings, for example when they result in a denial of filiation, civil status, or inheritance rights.

Such an extension will become all the more necessary when the procedures for making reparation for a violation of the Convention themselves become the subject of review by the European Court, entailing a new dispute arising out of the action taken on the Court's judgments.

It is possible to understand – even if one does not agree with them – the reactions which interference by a supranational court in the domestic judicial decision-making process spark off among supporters of sovereignty. The undermining of the sovereignty of the national courts is evident.

## B. THE EFFECT ON THE METHODS OF STATUTORY INTERPRETATION

The European Convention on Human Rights consequently changes the judicial system radically. It may also change the legal order when it affects methods of statutory interpretation.

In the French domestic order, case-law develops under an unusual arrangement involving a dialogue between the Court of Cassation and the tribunals of fact, with the latter initially enjoying the power to resist. When the Court of Cassation, which does not normally try cases<sup>8</sup>, overturns a judgment of a first court of appeal on a matter of statutory interpretation, it remits the case to another court of appeal. The second court of appeal is not bound to follow the reasoning of the Court of Cassation and may reach the same verdict as that which was overturned. If in such eventuality a new appeal is lodged, it is examined by the most authoritative composition of the Court of Cassation, the full court<sup>9</sup>, which may either follow the decision of the Division that heard the initial appeal or prefer instead the decision which the two courts of appeal each reached in turn. The full court includes three members from each Division: the President, the senior judge and an ordinary judge<sup>10</sup>. Obviously, it follows that these judges will or may have been members of the court that heard the initial appeal on points of law.

Indisputably, the judges who heard the initial appeal will be deciding the same issue in the same case for a second time. Is this consistent with the principle of objective impartiality? When one sees the number of applications based on the principle of impartiality, the question is bound to come before the European Court. Ultimately, it is the French procedure for establishing case-law which is fundamentally at risk because the deliberations of the full court actually consist in a dialogue between the three judges of the Division that delivered the initial decision and their sixteen colleagues who will examine afresh the point of law under consideration. The internal debate within the Court of Cassation is not purely academic, as, in more than a third of the cases, the Court of Cassation upholds the decision of the courts of appeal.

To hold in a such case that there has been a violation of the Convention would result in a clear contradiction between our legal tradition of statutory interpretation and the principle of impartiality taken to its logical extreme.

8 Article L.11-2 of the Code of Judicial Organisation provides that the Court of Cassation "shall not rule on the merits of cases".

9 Pursuant to Article L.131-2 of the Code of Judicial Organisation.

10 In accordance with Article L.121-6 of the Code of Judicial Organisation.

Does the concept of individual cases make any sense to a court that decides points of law? Is there any fundamental difference between deciding the same point of law twice in the same case and deciding it in separate cases?

Ultimately, it is the special role and even the identity of such courts that is at stake, since their role is precisely to ensure the permanence of the legal order by, in principle, deciding identical questions the same way. Legal certainty thus comes into conflict with impartiality because the judge's position is presumed to be constant. Careful reflection will therefore be necessary before any decision is taken to destroy such a unificatory system of statutory interpretation.

Indeed, the same principle of dialogue is to be found at the European Court of Human Rights itself in the procedure for referring cases to the Grand Chamber or in the participation of the same judges in the examination of both the admissibility and merits of an application. And what also of the participation by the national judge from a Contracting State in cases concerning the legislation of his or her own State?

## CONCLUSION

None of the consequences which I have just described are necessary inferences from the Convention itself. They result from the structure of the relationship between national legal and judicial orders and the legal and judicial order of the Convention.

Obviously, I have no wish to complain of this state of affairs. I would certainly not seek to criticise the European Court's case-law, which makes an essential contribution to the improvement of our judicial decision-making process. From that perspective, I can but welcome the fact that some of our judicial procedures and practices that were unacceptable and manifestly incompatible with the guarantees afforded by the Convention should have been changed.

But the structure of the relationship with the national supreme courts does not afford any system of formal cooperation between the two judicial orders or, therefore, any individual or collective means enabling the national courts to express their views to the European Court of Human Rights outside the purely procedural context. That, it seems to me, is a gap that needs to be filled if there is to be properly understood decentralisation in the application of the Convention. It seems to me that there would be merit in institutionalising dialogue between the national judges and the judges of the European Court.

It has often been said that the machinery for obtaining a preliminary ruling on the question of interpretation from the Court of Justice of the European Communities is, in this connection, far preferable. It establishes a genuine relationship of judicial cooperation. While I understand that for structural reasons the European Court of Human Rights is unable to set up a like system, it does seem to me that, one way or another, means of formal cooperation should be established.

The current situation – and this will be my second and final concluding observation – causes tensions which, at their most extreme, may result in outright opposition or calls for a breakaway by judges and political authorities alike. This is not a healthy state of affairs and must, in my view, be remedied if the States which have acceded to the Convention are to be encouraged to apply it. If the national courts, as the first "Convention courts", are to have primary responsibility for ensuring progress in human rights protection under the Convention, they must be given the means of fulfilling that task.

It is certainly not through warring between judges that the Convention guarantees will be successfully enforced, but through the calm instilled by ongoing cooperation between the European Court of Human Rights and the national supreme courts. The place and arrangements for such a dialogue have yet to be decided, but today's seminar is a useful prelude.





## Vladimiro ZAGREBELSKY

**Judge of the  
European Court of Human Rights**

It is a great pleasure for me to introduce Mr Valerio Onida, who was professor of constitutional law at Milan University for a number of years.

It is not only for his academic work that Professor Onida is one of the most highly regarded specialists of Italian constitutional law.

I should also like to pay tribute to him for his public-spirited commitment to the defence, implementation and development of constitutional values, fundamental rights and democracy. His commitment is long standing and has seen him play an active role in the debates which enthrall and on occasion inflame Italian society.

Following his election by Parliament, Professor Onida has for the past nine years been a judge of the Constitutional Court and is now its president. He sat as judge rapporteur in a number of very important cases in which he was at pains to ensure that the Constitutional Court defined the constitutional rights and freedoms in a manner consistent with the European Convention on Human Rights. Fortunately, the values enshrined in these two instruments are inspired by a common vision. The social character of the Italian Constitution sits well with the protection of individual rights and freedoms.

However, the respective positions of the Convention and the Ratification Act (1955) in the hierarchy of sources of law in the Italian legal system has yet to be determined satisfactorily. Clarification by the Constitutional Court would be welcome. There is a degree of uncertainty weighing down the judges' reasoning, which all too often fails to take into account the Convention as it is interpreted by the European Court of Human Rights. While such an approach will often not affect the outcome in practical terms, it does betray a cultural attachment to the national legal system which ought perhaps to be consigned to the past.

I am sure that you will find Mr Onida's contribution to judicial dialogue, the theme of today's discussion, most interesting.





## Valerio Onida

President of the  
Constitutional Court, Italy

### REFLECTIONS ON THE BRONIOWSKI CASE-LAW

Mr President, dear colleagues, ladies and gentlemen, I should like to thank President Wildhaber and the European Court of Human Rights for inviting me to this seminar. My nine-year term of office as a judge at the Italian Constitutional Court is due to expire in a few days' time, on 30 January, and your invitation enables me to conclude my tenure with this speech.

This occasion is a symbolic one for me. I firmly believe that the relationship between the European Court of Human Rights and domestic courts, especially the constitutional courts, must become closer by means of increased mutual understanding, through the exchange of information and opportunities for judges to meet and consider issues together, with a view to aligning and harmonising the various bodies of case-law.

The European Court, which rules only once domestic remedies have been exhausted, inevitably establishes common standards that go beyond the individual case, and the domestic legal systems and case-law of the national courts must eventually comply with those standards. It is therefore essential that the domestic courts are able to refer to the European Court's judgments.

At the same time, the case-law of the domestic, and especially the constitutional courts, in the area of fundamental rights is part of the legal heritage on which the Court draws when establishing its own case-law. There is thus a sort of interactive relationship between the European Court's case-law and that of the national courts.

In Italy, as, I believe, in other European countries, the very concept of fundamental rights and their privileged position in the legal system developed from the Constitutional Court's case-law: the Italian Constitution describes these rights as "inviolable" and the essence of these rights is protected even against constitutional amendment.

The rights guaranteed by the Constitution are ultimately the same as those guaranteed by the Convention, which in turn is an integral part of the domestic legal system.

In the Italian legal system, the task of ensuring that the rights guaranteed under the Convention are respected in specific cases falls to the ordinary and administrative courts.

There is no direct individual right of appeal to the Constitutional Court for alleged violations of fundamental rights, as is the case in neighbouring countries. The Constitutional Court's specific task is to decide whether ordinary laws are compatible with the Constitution, in situations where an ordinary court, called upon to apply the law, has expressed doubts as to its constitutionality.

Occasionally, a court which has raised a question regarding the constitutionality of a statutory provision will identify Convention provisions, as well as constitutional provisions, as being the relevant "parameter" causing concern, namely the rule they consider may have been infringed.

Granted, the Italian Constitutional Court has so far generally refused formally to acknowledge that the Convention takes precedence over ordinary laws for the purpose of supervising constitutionality. Only in one judgment (no. 10 of 1993) has it stated that the Convention occupies a sort of intermediate position between the Constitution and ordinary legislation. However, from a practical perspective, what is important is that the Constitutional Court has frequently ruled on the compatibility of national laws with Convention standards, generally noting the similarity between the Convention standards and the constitutional rules in issue.

Since the recent constitutional reform in 2001, however, the Italian Constitution clearly provides that legislative power is to be exercised subject to the obligations arising out of international treaties: this should make it easier to recognise that ordinary legislation, even if enacted subsequent to the entry into force of the European Convention, may not contradict the Convention as applied by the Strasbourg Court.

There is no doubt that the Convention is directly applicable in the Italian legal system. Where required to resolve a dispute by applying national legislation, the courts must, as far as possible, interpret and apply those laws in a manner that is compatible with the Convention. Like the Constitution, the Convention thus “permeates” the entire Italian legal system.

However, a problem remains: where a later national statute cannot be interpreted and applied in compliance with the Convention, and therefore appears definitively irreconcilable with it, who is responsible for cancelling that statute’s effects in the domestic legal system?

Since the Italian Constitution provides that the courts may not refuse to apply legislation that is in force without soliciting a judgment from the Constitutional Court – which is the only court with jurisdiction to strike down legislation – it would be unreasonable to assume that any court could refuse to apply a domestic statute in force because it believed it to be contrary to the Convention. If that were the case, every court would be responsible for supervising compliance with the Convention, while the Constitutional Court is responsible for supervising compliance with the Constitution. Since the rights guaranteed under the Convention are generally the same as those guaranteed by the Constitution, the court concerned would have the choice between referring an issue of constitutionality to the Constitutional Court or directly refusing to apply the law, for reasons which would ultimately be the same.

\* \* \*

I should now like to make some brief remarks about execution of the Strasbourg Court’s judgments in the light of those recently given in *Broniowski v. Poland* ([GC], no. 31443/96, ECHR 2004-V) and *Sejdovic v. Italy* (no. 56581/00, 10 November 2004), and the Committee of Ministers’ recommendations.

As you are aware, Article 46 of the Convention requires States to abide by the final judgment of the Court, with the Committee of Ministers being responsible for supervising execution. To “abide by” means, firstly, to put an end to the violation if it is still ongoing and, secondly, to give effect to the consequences which flow under national law from the violation of a right, where *restitutio in integrum* is not possible.

A problem arises where the case has already been concluded at national level by a final judicial decision.

Article 41 of the Convention would seem to grant States a certain margin of appreciation. The provision for just satisfaction in those instances where the internal law of the High Contracting Party “allows only partial reparation [of the violation]” would seem to imply that *restitutio in integrum* might not be an option, not only in circumstances when it is materially impossible, but also where domestic law prohibits it.

However, I believe that the approach taken by the European Court and the Committee of Ministers is perfectly justified in view of the Convention obligation to ensure the effectiveness of the rights guaranteed. Both bodies consider that, where a violation of a substantive right has been found, the offending domestic decision must be quashed or the applicant afforded an opportunity to reopen the proceedings.

In Italy, an analogy may be seen with the provision in the 1953 Constitutional Court Act which states that even final criminal convictions cease to be effective where the legislation on which they were based is declared unconstitutional.

With regard to violations of the right to a fair trial, it remains to be decided which breaches are considered so serious that they give rise to a presumption that the conviction was unjust, as provided for in the Committee of Ministers' recommendation of 19 January 2000. The draft law submitted to the Italian Parliament confines itself to providing for the reopening of the criminal proceedings, without further clarification.

However, the most serious problem arising from the European Court's recent judgments concerns the execution of those which find "systemic" violations, namely violations which result from the existence of domestic rules, settled case-law or established domestic practice incompatible with the Convention.

Following requests from the Committee of Ministers, in *Broniowski* and *Sejdovic* the Court set out the measures it considered should be taken to give effect to the rights that had been infringed.

If considered as imposing an obligation on the State concerned, and not simply as an invitation or advice, operative provisions of this type seem to go beyond the Court's role, bearing in mind that the Convention does not provide for mechanisms of this type, but only for an obligation on States to redress the violation in the individual case.

However, the basic undertaking accepted by the States that are parties to the Convention of securing "to everyone within their jurisdiction the rights and freedoms" guaranteed by the Convention, would appear to justify such operative provisions, quite apart from the practical reasons that may have persuaded the Court to adopt them.

In my opinion, however, such operative provisions must be interpreted in a manner that does not conflict with the States' margin of appreciation for determining the methods to be used to give effect to the infringed right.

When the Court identifies a structural measure to be adopted, it does not impose a specific obligation on the State concerned, but merely indicates the most direct method of achieving the desired result. This does not prevent the State from achieving the same result by other means.

For example, when paragraph 47 of *Sejdovic* states: "the respondent State must remove every legal obstacle that might prevent anyone convicted *in absentia* who, not having been effectively informed of the proceedings against him, has not unequivocally waived the right to appear at his trial from obtaining either an extension of the time allowed for appealing or a new trial", this does not prevent the Italian State from deciding to forgo the right to prosecute defendants who cannot be traced and to defer the start of the proceedings until they can be informed of the charges against them.

Equally, the Court's proposal does not impose an obligation on the State with regard to the specific kind of instrument to be used in removing the structural problem concerned, and which may take the form of a statutory amendment, a finding of unconstitutionality or changes to the courts' interpretation of the legislation.

Despite clear differences, I believe that the operative provisions in question are somewhat similar to certain operative provisions, known as "supplements", issued by the Italian Constitutional Court. These introduce in the legislation, through a declaration of unconstitutionality, an element that was previously missing and whose absence had made the law in question unconstitutional.

There is a view that, in delivering such judgments, the Constitutional Court is unduly taking the place of the legislature and making a discretionary choice that belongs to the legislature.

In reply to this objection, it may be pointed out that any “corrections” to legislation made by the Constitutional Court nonetheless leave it open to the legislature to enact other solutions it considers more appropriate, so long as such measures are equally likely to ensure that the legislation in question is compatible with constitutional principles.

One might even imagine the European Court being able to adopt operative provisions similar to the “supplements of principle” sometimes adopted by the Italian Constitutional Court. Under this system, instead of directly indicating the changes to be made in order to render the legislation compatible with the Constitution, the Constitutional Court merely identifies the principle with which the legislation must conform, and leaves to the legislature the task of drawing up the necessary texts. In the meantime, it is for the courts to find a way, within the existing system, of ensuring a solution in the specific case which will comply with the principle identified by the Constitutional Court.

For example, in judgment no. 26 of 1999, the Constitutional Court found that the prison regulations governing prisoners’ complaints were unconstitutional “in so far as they do not afford judicial protection against actions by the prison administration which infringe the rights of those who are subject to a restriction of their personal liberty”. The “right to a court” was thus affirmed as the general principle, and it was left to the legislature to decide on the procedures for implementing that right; in the meantime, the courts were charged with ensuring that the principle was observed.

However, it should not be overlooked that, where there is no legislative intervention or it is belated, such operative provisions may give rise to uncertainty if the courts do not adopt uniform solutions.

To sum up, beyond the technical choice of the instrument to be used, the most important thing is to ensure that the practical solutions adopted are capable of providing concrete protection for fundamental rights.



## Elisabet Fura-Sandström

**Judge at the  
European Court of Human Rights**

Last but not least, ladies and gentlemen, I would like to introduce to you Francis Jacobs, Advocate General at the Court of Justice of the European Communities.

He has chosen to speak on the interaction between the case-law of the European Court of Human Rights and the Court of Justice of the European Communities.

As a barrister, QC, a professor of European law and Advocate General since 1988, he has a remarkable background as a practitioner and an academic with a profound knowledge and experience of the subject matter. I can think of no one more suited to address today's topic.

It is a great pleasure and honour for me to give you the floor, Mr Jacobs.





## Francis Jacobs

Advocate General,  
Cour of Justice of the European Communities

### INTERACTION OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE: RECENT DEVELOPMENTS

#### I. INTRODUCTION

It is a great privilege to take part in this seminar on the theme “Dialogue between judges”. This theme is well illustrated by recent developments in the dialogue between the European Court of Human Rights and the European Court of Justice.

#### II. STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

By way of historical background which is familiar, but still worth recalling, at the early stages in the development of Community law, the Court of Justice of the European Communities did not accept that the competence of Community institutions was subject to the requirement to protect fundamental rights such as those guaranteed by the constitutions of the member States for fear that that might prejudice the supremacy of Community law. In the course of time, it might be said that the Court came to recognise that not to protect such fundamental rights would itself prejudice the supremacy of Community law, because it became apparent that the constitutional courts in particular, and other legal circles, were unwilling to accept any failure of Community law to protect fundamental rights. The first case in which the Court recognised, albeit incidentally, that fundamental rights form part of the Community legal order was *Stauder v. City of Ulm*<sup>1</sup> in 1969. In its seminal judgment in *Internationale Handelsgesellschaft* in 1970, the Court declared that “... respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice [and that] protection of such rights, whilst inspired by the constitutional traditions common to the member States, must be ensured within the framework of the structure and objectives of the Community”.

In *Nold*<sup>2</sup> in 1974, the Court stated that it could not uphold measures which were incompatible with fundamental rights recognised and protected by the Constitutions of the member States. It also identified as a source of human rights international treaties for the protection of human rights on which the member States had collaborated or of which they were signatories. In subsequent cases, starting with *Rutili*<sup>3</sup> in 1975 (which concerned member State action), it accepted that the European Convention on Human Rights had special significance in that respect, and the later case-law of the European Court of Justice makes frequent reference to the Convention and to the Strasbourg case-law.

1 Case 29-69, *Stauder v. City of Ulm* [1969] European Court Reports (ECR) 419.

2 Case 4-73, *Nold v. Commission* [1974] ECR 491.

3 Case 36-75, *Rutili v. Minister for the Interior* [1975] ECR 1219.

The position now is that the approach of the European Court of Justice has been given Treaty expression in the Treaty on European Union, which came into force in 1993. Article 6(2) of that Treaty provides that the Union shall respect fundamental rights, as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member States, as general principles of Community law.

One difficulty however with the present arrangement is that, although the European Union must respect the Convention, on the one hand it cannot be the object of proceedings before the European Court of Human Rights, which is plainly a lacuna in the European system of protection of human rights, while, on the other hand, it cannot defend its measures when, as increasingly happens, they are indirectly questioned before the European Court of Human Rights in proceedings brought against the European Union's member States.

A solution would be for the Union to accede to the Convention, and there seems to be increasing support for such accession. The European Court of Justice took the view in 1996 that, as Community law then stood, accession by the Community would require amendment of the Treaty<sup>4</sup>, and it is interesting to speculate as to whether that situation might change over the course of time with the development of the European Union and the evolutionary interpretation which must be accorded to the Treaty. But in any event the necessary Treaty provision will be introduced if the European Constitution comes into force. After earlier drafts in which the Union was explicitly empowered, and indeed encouraged, to accede to the Convention, the final text obliges it to do so; Article I-9(2) provides that the Union *shall* accede to the Convention.

On the level of substantive law, even in the absence of accession by the European Union to the Convention, and although the Community is not formally bound by that instrument, the situation in practice is not very different. For practical purposes, as I suggested in an opinion in 1996, the Convention can be regarded as part of Community law and can be relied on as such both in the European Court of Justice and in national courts where European Community law is in issue<sup>5</sup>.

Fundamental rights, including the Convention rights, can be relied on in order to contest the validity of Community acts (although only the European Court of Justice can declare them invalid) and to help interpret them. Community legislation, and other Community measures, are generally implemented by the member States, rather than by the Community institutions, and it has been clear, at least since *Wachauf*<sup>6</sup> in 1989, that fundamental rights must also, as a matter of Community law, be respected by member States when they implement Community measures.

That proposition has been taken over by the European Union's Charter of Fundamental Rights, which now forms Part II of the European Constitution. The relevant Article of the Charter, now Article II-111 of the Constitution, states that the provisions of the Charter are addressed to the member States only when they are implementing Union law.

It is important to note that the Charter is thus not a free-standing catalogue of fundamental rights applicable for all purposes throughout the European Union; it will be, if the Constitution comes into force, binding in the first place on the Union institutions and other Union entities; and on the member States only when they implement Union measures.

Meanwhile, European Community and European Union acts are from time to time challenged in Strasbourg: recent and well-known examples include *Matthews v. the United Kingdom*<sup>7</sup> and *Senator Lines GmbH v. fifteen member States of the European Union*<sup>8</sup>; both illustrate, in different ways, the triangular relationship between the European Union, its member States and the European Convention on Human Rights, and the variety of ways in which European Union acts are indirectly challenged

4 Opinion 2/94, [1996] ECR I-1759.

5 Case C-84/95, *Bosphorus* [1996] ECR I-3953, § 53.

6 Case 5/88, [1989] ECR 2609.

7 (dec.) [GC], no. 56672/00, ECHR 2004-IV.

8 [GC], no. 24833/94, ECHR 1999-I.

before the European Court of Human Rights. *Matthews* concerned the exclusion of residents of Gibraltar from elections to the European Parliament; *Senator Lines GmbH* raised the issue whether an action could be brought against the member States of the European Union collectively.

In *Senator Lines GmbH*, following a decision of the Court of First Instance of the European Communities, the European Court of Human Rights held that *Senator Lines GmbH* could not be regarded as a victim of a violation of the Convention, so that the issue of the answerability of the member States was not addressed. In *Matthews*, the United Kingdom had implemented the European Community provisions on elections to the European Parliament; those provisions did not provide for elections to take place in Gibraltar.

The European Court of Human Rights found a violation of the Convention and the United Kingdom sought to comply with that judgment by providing residents of Gibraltar with the right to vote in elections to the European Parliament. Thereupon, however, the Kingdom of Spain brought proceedings against the United Kingdom in the European Court of Justice<sup>9</sup>, contending that the United Kingdom had acted unlawfully under European Union law by so doing: a development which well illustrates the interaction of the Strasbourg and Luxembourg Courts.

### III. STATUS OF STRASBOURG CASE-LAW IN EUROPEAN UNION LAW AND ITS INTERACTION WITH THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE AND NATIONAL COURTS

What then is the status, in European Union law, of the case-law of the European Court of Human Rights? Clearly that case-law is not formally binding in European Union law – nor indeed is the Convention itself, as yet.

But in practice the Strasbourg case-law is followed by the European Court of Justice, as it is by national courts, even though it may not be formally binding on them under national law (see, in respect of the United Kingdom, the Human Rights Act 1998). The Strasbourg case-law is in fact frequently cited by the European Court of Justice<sup>10</sup> – a striking phenomenon, since no other body of case-law is regularly cited by it.

Both national courts and the European Court of Justice would presumably be concerned to avoid any conflict with the Strasbourg case-law, since otherwise the European Union (although not formally bound) and/or its member States might be put in breach of the Convention as interpreted in Strasbourg, thus resulting in a breach on the international plane.

It is perhaps of particular importance that the European Court of Justice should not, through its interpretation either of European Union law or of the Convention, create a conflict for European Union member States and should on the contrary seek to ensure that their obligations under European Union law are consistent with their obligations under the European Convention on Human Rights.

In any event, it is striking that the European Court of Justice has not merely followed Strasbourg case-law, but has also been willing to reconsider its own case-law in the light of later Strasbourg case-law. In other words, if the European Court of Justice goes first, and Strasbourg then goes the other way, the European Court of Justice may subsequently adapt its case-law.

This happened first in *Niemietz v. Germany*<sup>11</sup> (1992), followed by other cases, which raised the question whether the search of business premises by public authorities fell within the scope of Article 8 of the Convention. In *Hoechst*<sup>12</sup> (1989), the Court of Justice had held that the inviolability of the home did not protect business premises of undertakings against the intervention of public authorities.

9 Case C-145/04, *Spain v. the United Kingdom*.

10 See, for example, Case C-60/00, *Carpenter* [2002] ECR I-6279; Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk and Others* [2003] ECR I-4989; and the judgment of 25 March 2004 in Case C-71/02, *Karner* [2004] ECR.

11 Judgment of 16 December 1992, Series A no. 251-B.

12 Case 227-88, [1989] ECR 2859.

However in *Chappell v. the United Kingdom*<sup>13</sup> (30 March 1989) and later cases, the European Court of Human Rights held that Article 8 was broad enough to encompass both the home when used for business purposes and professional premises. (It must be noted however that that difference in approach between the two Courts was of limited practical significance, since the Court of Justice ruled in *Hoechst* that there was, in any event, a general principle recognised in Community law that any intervention in the private activities of any natural or legal person must have a legal basis, be justified on grounds laid down by law, and not be arbitrary or disproportionate in its application: criteria very similar to those applied in considering whether an interference with Article 8 rights is justified under Article 8 § 2.)

Nevertheless, when the issue came before the Court of Justice subsequently in *Roquette* (2002)<sup>14</sup>, the Court seemed to accept that Article 8 of the Convention applies to business premises.

But the traffic is not one-way only; there has also been cross-fertilisation. Thus there are, even from the earlier Strasbourg case-law, examples of conscious following by Strasbourg of European Court of Justice case-law. These examples, which I can only refer to in outline here, include decisions by the European Court of Human Rights on the temporal limitation of effects of judgments. In *Marckx v. Belgium* (1979)<sup>15</sup>, that Court was inspired by the position of the European Court of Justice in *Defrenne II* (1976)<sup>16</sup>. A further example is the definition by the European Court of Human Rights of what is to be considered as employment in the public service for the purposes of the Convention<sup>17</sup>, following the case-law of the European Court of Justice on the concept of employment in the public service in the context of the free movement of workers.

But a recent example perhaps shows the European Court of Human Rights going further, and re-considering its case-law in the light of case-law of the European Court of Justice – just as the European Court of Justice had done in response to Strasbourg, in the cases on search of business premises. The example is the case-law of the two Courts on the rights of transsexuals.

On 11 July 2002, the European Court of Human Rights delivered judgments in *Christine Goodwin v. the United Kingdom*<sup>18</sup> and *I. v. the United Kingdom*<sup>19</sup>, in which, departing from its earlier case-law, it found a violation of the Convention in that it was impossible under United Kingdom law for transsexuals to marry in their assigned gender.

In reaching those decisions, the European Court of Human Rights referred to the judgment of the European Court of Justice in Case C 13/94, *P. v. S. and Cornwall County Council*<sup>20</sup>. Even though the European Court of Human Rights did not explicitly state so, it seems plausible that the judgment of the European Court of Justice and the corresponding measures adopted by the British authorities to give effect to it had an influence on the decision of the European Court of Human Rights to “update” its stance on the issue of transsexuals’ rights under the Convention<sup>21</sup>.

Similarly, the decisions of national courts may lead the Court of Human Rights to reconsider its position. Take, for instance, the case of a national court which is required by its domestic law to apply the Convention, and which is, in principle, anxious to follow the Strasbourg case-law, but which

13 Series A no. 152-A.

14 Case C-94/00, *Roquette Frères S.A.* [2002] ECR I-9011.

15 Judgment of 13 June 1979, Series A no. 31.

16 Case 43-75, *Defrenne v. Sabena* [1976] ECR 455.

17 See *Pellegrin v. France*, no. 28541/95, ECHR 1999-VII, and *Frydlender v. France* [GC], no. 30979/96, ECHR 2000-VII.

18 [GC], no. 28957/95, ECHR 2002 VI.

19 [GC], no. 25680/94.

20 [1996] ECR I-2143: see paragraphs 43-45 and 93 of *Christine Goodwin*, and paragraphs 26-28 and 72 of *I. v. the United Kingdom*. The European Court of Justice had in turn referred to the case-law of the European Court of Human Rights in *P. v. S.*, at paragraph 16. In its judgment of 7 January 2004 in Case C-117/01, *K. B. v. National Health Service Pensions Agency and Secretary of State for Health*, not yet reported, also dealing with transsexual rights, the European Court of Justice referred on several occasions to the case-law of the European Court of Human Rights on the subject, including the *Christine Goodwin* and *I. v. the United Kingdom* decisions. Cross-fertilisation indeed.

21 Compare paragraphs 74-75 and 85 of *P. v. S.* with paragraph 93 of *Christine Goodwin*, and paragraphs 54-55 and 65 of *P. v. S.* with paragraph 72 of *I. v. the United Kingdom*.

may have difficulty in doing so: such a court may be well placed to suggest a qualification of the Strasbourg case-law, and the European Court of Human Rights has shown itself responsive to such concerns. Examples of this situation can be found in several cases decided by English courts since the coming into force of the Human Rights Act 1998, concerning the liability of public authorities<sup>22</sup>, court-martial proceedings<sup>23</sup>, and mandatory life sentences<sup>24</sup>. In all three cases the Strasbourg Court, it has been suggested, modified its case-law in response to fully reasoned decisions of the English courts.

Both the practice of following the Strasbourg case-law, and the cross-fertilisation between courts of different jurisdictions are examples of what seems to me a remarkable phenomenon in recent judicial practice, namely, that courts in different systems which are not formally coordinated, and especially supreme courts, are listening attentively to one another. There is a genuine dialogue between them, and they are tending to follow one another spontaneously, where there is no formal obligation to do so. In my view, it seems right that they should do so, since if there were conflicts between them there would be no obvious way of resolving them. Nevertheless, it seems a rather new and noteworthy development, and one may be moving towards the general proposition that, where there is no formal mechanism for resolving possible conflicts between two autonomous legal orders, it is not merely a matter of choice but constitutionally essential that courts should strive to coordinate their positions.

#### IV. SIMILARITIES OF APPROACH AND CONSCIOUS BORROWINGS

Let me now turn to the examination of how fundamental principles which are similar in both systems are treated. I refer in particular to the important principles of non-discrimination and proportionality.

It is true that such principles may in some contexts be applied more strictly in the case-law of the European Court of Justice than by the European Court of Human Rights. And, indeed, such differences are understandable since the former is concerned to promote uniform law, while the latter sets a minimum standard, although it may be a high, sometimes very high, standard.

That point alone, it seems to me, raises the question whether, as has sometimes been proposed – it was mentioned thirty years ago by Advocate General Warner<sup>25</sup> and again this afternoon by President Canivet – the introduction of a system of references to the European Court of Human Rights for preliminary rulings on the interpretation of the Convention is truly appropriate to the Convention system, since the purpose of preliminary rulings is to ensure uniformity, which is not the object of the Convention system. I would therefore be hesitant to introduce preliminary rulings in Strasbourg. Indeed, it may be best to provide exclusively for the present system of subsequent review by the European Court of Human Rights of the decisions of the national authorities, that is, a review based on a complete knowledge of the facts and on a final determination of all questions of national law.

In any event, the Convention system has properly been read as allowing for a variable standard. For example, the requirements imposed by the European Court of Human Rights may be somewhat more relaxed where it leaves a “margin of appreciation” to the Contracting States – a margin which may not be appropriate where the Convention is applied “internally”, that is, within a national legal system, or within the European Union legal system, but which is appropriate, as the Strasbourg Court has recognised, to its system of international supervision. Moreover, and this is a related point, according to the Strasbourg case-law the Convention system is based on the principle of subsidiarity which (despite being introduced with a certain pomp in the Maastricht and Amsterdam Treaties) seems still to be less firmly founded in European Union law.

22 The *Osman* case-law: *Osman v. the United Kingdom* (judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII), modified in *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V).

23 In *Cooper v. the United Kingdom* ([GC], no. 48843/99, ECHR 2003-XII), the Grand Chamber departed from the judgment of a Chamber in *Morris v. the United Kingdom* (no. 8784/97, ECHR 2002-I).

24 In *Stafford v. the United Kingdom* ([GC], no. 46295/99, ECHR 2002-IV), the Court modified its judgment in *Wynne v. the United Kingdom* (18 July 1994, Series A no. 294-A).

25 Case 130-75, *Prais v. Council* [1976] ECR 1589.

It is perhaps precisely in these areas that we can see in some recent cases that the European Court of Justice may be influenced, in a general way, by the Strasbourg approach; or at least detect some parallelism. I would take as examples the recent judgments of the European Court of Justice in *Schmidberger*<sup>26</sup> and *Omega*<sup>27</sup>.

In *Schmidberger*, decided in 2003, the European Court of Justice was faced, for the first time, with an explicit conflict between fundamental Convention-style rights and the fundamental economic freedoms of the Treaty. The case arose from a decision by the Austrian authorities to close a motorway during a certain period in order to allow a demonstration by environmental campaigners. *Schmidberger* claimed damages from the Austrian authorities for the losses caused by the closure of the motorway, which restricted the free movement of goods as guaranteed by the European Community Treaty. However, the Austrian authorities sought to justify their action in authorising the demonstration as being necessary to guarantee freedom of assembly and freedom of expression. There was thus a conflict between the freedoms of the Treaty and the fundamental rights of the demonstrators. The European Court of Justice recognised that both categories were subject to properly justified limitations and, undertaking a balancing exercise perhaps not very different from that which might have been carried out by the European Court of Human Rights, concluded in effect that the Austrian authorities had not acted unlawfully by restricting the free movement of goods in the interest of permitting the exercise by the demonstrators of their civil liberties.

In *Omega*, a judgment of 14 October 2004, the issue arose from a ban, under German law, on the operation of an installation known as a laserdrome, which involved the simulation, for entertainment purposes, of the killing of human beings – an activity referred to as “playing at killing”. The ban under German law was based on the view that the activity offended against the values enshrined in the Basic Law, notably as an affront to human dignity; but the activity was not unlawful in certain other member States, and the ban was challenged as a restriction on the free movement of goods and the freedom to provide services.

The European Court of Justice held that the ban was not unlawful under European Community law, since it was justified as protecting fundamental rights, notwithstanding that other member States did not prohibit the practice. The German court which referred the case to the European Court of Justice had expressly asked whether the power of member States to restrict the fundamental freedoms of the Treaty was subject, as some previous case-law such as *Schindler*<sup>28</sup> might suggest, to the condition that the restriction in question was common to all member States of the European Union. Such a view might indeed have been thought necessary to ensure the uniform interpretation of European Union law – a uniformity generally regarded as essential. However the European Court of Justice replied in the negative on this point, relying on case-law subsequent to *Schindler* to support that reply. It stated that the need for, and the proportionality of, the provisions adopted to protect fundamental rights are not excluded merely because one member State has chosen a system of protection different from that of other member States. The ban pursued a legitimate aim, and was not disproportionate. In both *Schmidberger* and *Omega*, the European Court of Justice speaks, it may be thought, like a human rights court. The approach, and indeed the language, are very close to those of Strasbourg. The cases perhaps show, also, a greater sensitivity than previously to national courts’ conceptions of fundamental rights.

## V. THE FUTURE

There seems likely to be increasing emphasis on human rights in European Union law, especially if the Constitution comes into force and the European Union Charter of Fundamental Rights becomes binding. But it may well be – and in my view is to be hoped – that human rights will

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26 Case C-112/00, [2003] ECR 5659.

27 Case C-36-02, [2004] ECR.

28 Case C-275/92, [1994] ECR 1039.

continue to be interpreted and understood in line with Strasbourg case-law, taking that case-law as the general standard and (as the Strasbourg Court itself recommends) applying a higher standard where the context makes that appropriate.

It is encouraging that the Charter itself envisages that the rights corresponding to the Convention rights are to be construed in line with the Convention. Article II-112 of the Constitution expressly states that the meaning and scope of those rights shall be the same as those laid down by the Convention.

Furthermore, the Strasbourg case-law is specifically mentioned in the preamble to the Charter, stating as it does that the Charter “reaffirms ... the rights as they result, in particular, from ... the case-law of the ... European Court of Human Rights”.

## **VI. STRASBOURG CASE-LAW AS A RESOURCE**

Finally, I would like to mention briefly that the Strasbourg case-law can also be seen as a resource – and sometimes as a source of inspiration – for other courts, in a variety of different ways. Firstly, it constitutes the obvious point of reference, where questions of human rights arise. Secondly, even if there is no decision directly in point, the Strasbourg case-law may indicate the line of approach. Thirdly, and even more importantly, it can play a crucial role in the development (or consolidation) of a common system of values, something particularly necessary since shared values are a basic component of the European identity. Human rights and fundamental freedoms embody the essence of the values that a society deems worthy of protection and are seen as the foundations on which political, legal and social systems are built. The European Convention on Human Rights, as the expression of the European consensus on these fundamental aspects, can and should provide a leading role for the further consolidation of the European identity in the context of the European Union.



**OPENING OF THE JUDICIAL YEAR  
OF THE EUROPEAN COURT  
OF HUMAN RIGHTS**

**21 JANUARY 2005**





## Luzius Wildhaber

President of the  
European Court of Human Rights

Presidents, Secretary General, Excellencies, dear friends and colleagues, ladies and gentlemen,

It gives me great pleasure to welcome you here today to our traditional ceremony to mark the opening of the judicial year. The numerous guests who honour us with their presence this evening include thirty-two Presidents and nineteen judges from Supreme and Constitutional Courts. In particular, I should like to welcome our distinguished guest of honour, Mr Valery Zorkin, President of the Constitutional Court of the Russian Federation, and the three rapporteurs from this afternoon's seminar, Mr Guy Canivet, President of the French Court of Cassation, Mr Valerio Onida, President of the Italian Constitutional Court, and Mr Francis Jacobs, Advocate General at the Court of Justice of the European Communities, whom I thank most warmly for their thought-provoking contributions.

Looking back, it has once again been a year rich in events of importance for the Court. Some of them have been sad events; we lost two respected and well-loved colleagues last year, Judge Gaukur Jörundsson, and Wolfgang Strasser, who was Deputy to the Registrar responsible for the Grand Chamber. Our thoughts go to their families. On a happier note, fourteen of the Court's judges were re-elected, and we welcomed our new colleagues Judges Mijović, Spielmann, Jaeger, Myjer, Jebens, David Thór Björgvinsson, Jočienė and Šikuta.

Of the moments which stand out, I would mention the opening for signature in May of Protocol No. 14 to the European Convention on Human Rights, the delivery by the Court of its first so-called "pilot" judgment and the adoption of the Constitutional Treaty by the Intergovernmental Conference of the European Union.

Aware, however, that a court's activities are primarily reflected in its case-law, I should like to begin by making some brief comments about a few of the key judgments delivered in 2004. You will realise immediately that they all concern the issue of effective execution of the Court's judgments. Indeed, this is one of the themes that dominated the Court's case-law last year. But it has also to be seen in a wider context, that of the need to restore the balance between national and international jurisdiction in implementing the Convention.

The first of those judgments was delivered in the case of *Maestri v. Italy*<sup>1</sup>. Until recently, the Court always hesitated to stipulate the measures to be taken by a State in order to redress the effects of a violation. Indeed, in line with the Convention's subsidiary character, every respondent State remains free to choose the means by which it will discharge its obligation to execute the Court's judgments, provided that such means are compatible with the conclusions set out in them.

In *Maestri*, however, the Court was more robust. The case concerned a career judge whom the Court had held to be the victim of a violation of Article 11 as a result of a disciplinary sanction imposed because he belonged to a Masonic lodge. The Grand Chamber of the Court underlined that, in ratifying the Convention, the Contracting States undertook to ensure that their domestic legislation was compatible with it. Consequently, it was for the respondent State to remove any obstacles in its

<sup>1</sup> [GC], no. 39748/98, judgment of 17 February 2004, ECHR 2004-I.

domestic legal system that might prevent the applicant's situation from being adequately redressed. It was therefore for the Italian government to take appropriate measures to redress the effects of any past or future damage to the applicant's career as a result of the disciplinary sanction against him which the Court had found to be in breach of the Convention.

A second judgment warrants mention in this context, especially since in addition it helps to clarify the concept of "jurisdiction", which defines the Convention's scope. Until now, each time the Court was required to rule on the concept of "jurisdiction", it had considered the concepts of imputability and responsibility as going together, since the State's responsibility under the Convention could only arise if the alleged violation could also be imputed to it. In *Assanidze v. Georgia*<sup>2</sup>, the problem was posed differently. The applicant, a well-known opposition politician, had been acquitted by the Georgian Supreme Court on all the charges against him, but continued nonetheless to be detained by the authorities of the Ajarian Autonomous Republic. The Georgian central authorities had taken all procedural measures possible under domestic law in order to obtain enforcement of the judgment acquitting the applicant, had also had recourse to various political means to settle the dispute, and had on numerous occasions repeated their request to the Ajarian authorities for the applicant's release, but without success. The Court concluded that, within the domestic system, the applicant's continued imprisonment was directly imputable to the Ajarian authorities. The Georgian Government considered that on this basis it could not be held responsible for the situation.

The Court, however, took a different view. It emphasised that, under the Convention, it was solely the international responsibility of the State that was in issue, irrespective of the national authority to which the breach of the Convention could be imputed at the domestic level. The Court concluded that the applicant's continued imprisonment was within the "jurisdiction" of Georgia and that the responsibility of the Georgian State alone was engaged under the Convention. Consequently, having found that the applicant was being detained arbitrarily contrary to Article 5 § 1 of the Convention, the Court held – and stated for the first time in the operative provisions of a judgment – that the respondent State had to secure the applicant's release at the earliest possible date. The very day after the judgment was delivered, the applicant was released from prison in Ajaria, which is a striking demonstration both of the effectiveness of the human rights protection afforded by the Convention and of the very practical importance of the execution of the Court's judgments.

In a joint judgment against Russia and Moldova, the Court took a similar approach, albeit in a markedly different context. Again in the operative provisions of the judgment, it urged the two respondent States to take all necessary measures to put an end to detention that the Court had described as arbitrary and to secure the immediate release of those applicants who were still imprisoned.

One last judgment must be mentioned here, namely the Court's first so-called "pilot" judgment. Delivered in the case of *Broniowski v. Poland*<sup>3</sup>, it followed on from the Committee of Ministers' resolution on judgments revealing an underlying systemic problem, adopted recently as part of the Protocol No. 14 package. Human rights violations arising from a systemic problem in the States Parties to the Convention account for a considerable proportion of the Court's workload. In all these cases, despite their similarity, the Court is obliged on each occasion to repeat the same message, something that could be avoided if the State concerned were to rectify the problem as soon as it was identified by the Court. For that reason, in its resolution the Committee of Ministers invited the Court to identify, in its judgments finding a violation of the Convention, what it considered to be an underlying systemic problem and the source of that problem, in particular when it was likely to give rise to numerous applications.

2 [GC], no. 71503/01, judgment of 8 April 2004, ECHR 2004-II.

3 [GC], no. 31433/96, judgment of 22 June 2004, to be reported in ECHR 2004-V.

This is what the Court did in *Broniowski*. The case concerned a scheme for compensation in kind for the loss sustained by property owners whose properties had had to be abandoned after the Second World War and who had thereby acquired “a right to credit” against the State. However, the latter had been unable to honour all those obligations due to a shortfall in the amount of land available. It is estimated that 80,000 people are affected.

The Court was unanimous in concluding that, by failing to honour its obligation to the applicant, the respondent State had violated Article 1 of Protocol No. 1. Above all, however, it also found, for the first time in the history of its case-law, a so-called “systemic” violation, arising from the fact that the violation in question resulted from a large-scale problem originating in the malfunctioning of Polish legislation and administrative practice which had affected, and still had the potential to affect, large numbers of people, a situation that could give rise to numerous well-founded applications.

Consequently, the Court indirectly extended the benefits of its finding to all those persons by holding that the respondent State was, through appropriate legal measures and administrative practices, to secure the implementation of the property right in question in respect of the applicants or to provide them with equivalent redress in lieu. Finally – and this is a very important element – the Court announced that, pending the implementation of such general measures, which were to be adopted within a reasonable time, it would adjourn examination of applications resulting from the same general problem.

Faced with a structural situation, the Court is in effect saying to the respondent State and to the Committee of Ministers that they too must play their role and assume their responsibilities. This is surely also in the interests of the individual applicants who may secure redress more rapidly through the general measures to be introduced by the respondent State than if the Court were to attempt to process and adjudicate each application in turn. In sharing out the burden of Convention enforcement, this approach is entirely consistent with the aim of restoring the balance in the relationship between international and domestic protection of fundamental rights; the failure of States to provide adequate remedies at national level is a significant, though not the sole, source of the current overloading of the Court’s docket.

In the eyes of many, the Court in Strasbourg has come to represent the last resort for every imaginable complaint. However, as developments over the past fifteen years have amply borne out, the Court cannot live up to this expectation. The package of resolutions and recommendations from the Committee of Ministers accompanying Protocol No. 14 contains a timely reminder to the member States of their essential contribution to the proper functioning of the system. The Convention system has always been intended to be a subsidiary one. The primary level of protection has to be the domestic one. Only where that first level of protection has failed to operate effectively does the European supervision by the Court come into play.

An encouraging development to point out is therefore all those judgments in which domestic courts – and in particular Constitutional and Supreme Courts – have demonstrated their determination to apply the Convention standards directly and to integrate the Convention case-law into their respective legal systems. By way of example, let me refer here to the British House of Lords, which on the basis of a comprehensive and penetrating analysis of the Strasbourg case-law recently declared that foreigners suspected of being terrorists could not be detained under the Anti-Terrorism, Crime and Security Act 2001 indefinitely without trial; to the Belgian Court of Cassation, which last year reaffirmed the supra-constitutional rank of the Convention in the Belgian legal system; to the critical part played by the Ukrainian Supreme Court in securing to the Ukrainian people their right to free elections; and let us not overlook the remarkable decision of the Plenary of the Russian Supreme Court of 10 October 2003, which insists that the judgments of the European Court “are binding on all authorities of the Russian Federation, including the courts”, and the important developments in the case-law of the Russian Constitutional Court to which I believe President Zorkin will draw our attention.

Let me now turn to some institutional aspects which marked the Court’s life in 2004. Indeed, the adoption of Protocol No. 14 provides an appropriate opportunity for a brief stocktaking of what has been achieved by the new Court set up in November 1998 by Protocol No. 11. This Protocol

marked a huge leap forward in terms of principle, in fully judicialising the international control machinery: it merged the former Court and the Commission and made the new Court a permanent institution, it made the right of individual petition mandatory, and it abolished the adjudicative role of the Committee of Ministers, all elements which today are considered cornerstones of the Strasbourg system, taken for granted by everybody, but which came into being only six years ago.

But Protocol No. 11 has also been a success in practice in that the single, permanent Court in Strasbourg has shown itself able to cope with a much heavier caseload than its two predecessors, while maintaining the authority and quality of the case-law in the substantial cases. I do not intend to bore you with a long list of statistics, so I will confine myself to giving you just three figures covering the last five years: in that period the number of applications lodged has increased by 99% – a frightening figure in itself – but the number of applications finally disposed of has risen by nearly five times that figure, that is by 470%, and this against a background of budgetary growth of more modest proportions, amounting to 72%.

In 2004 the Court terminated 21,100 cases, by delivering 20,348 decisions and 718 judgments, an output which represents an increase of 18% on the 2003 output and which was achieved under difficult circumstances, and with means which all in all appear quite modest when compared with those of other international courts. This output is the result of a collective and sustained effort by a highly dedicated Court assisted by an equally motivated and competent Registry, to which I would like to pay tribute here. Unfortunately, however, all productivity gains achieved over the years have been eaten up by the constant rise in the number of incoming cases. The desire of more and more European citizens to seek justice on an international level as regards their enjoyment of their basic human rights has outstripped the benefits of the structural innovations introduced by Protocol No. 11.

This brings me now to Protocol No. 14, which was opened for signature last May after several years of intensive reflection and negotiation on how to adapt the Convention's procedural framework so as to help the Court cope with an ever-increasing caseload.

The main changes which the Protocol will bring about are well-known: the single-judge formation for clearly inadmissible applications, the extended competence of the Committees of three judges instead of seven-judge Chambers for routine admissible applications, the joint examination of admissibility and merits of applications and the "significant disadvantage" as a new admissibility criterion. Besides these changes, which will definitely help to speed up the processing of applications, innovations like the judges' single term of office, the new role for the Commissioner for Human Rights, and the "infringement proceedings" for a State's failure to fulfil its obligations to execute a judgment finding a violation represent additional elements strengthening the Strasbourg system.

Another major signal sent out by Protocol No. 14 is to be found in the new provision permitting the European Union to accede to the Strasbourg system. Along with the corresponding provision of the European Union Constitutional Treaty, it puts an end to several decades of discussions and hesitations over whether such a move was desirable and whether the nature of the Strasbourg review was compatible with the very essence of Community law. Even though the details of such an accession remain to be worked out, the answer now given in parallel and almost simultaneously by the Convention and the European Union Constitutional Treaty is clear: not only is accession by the European Union desirable, it has become a necessity if action by European Union authorities is to enjoy the same degree of human rights acceptability with the citizen as action by national authorities. It can only be for the good of European unity if there is an integrated overall framework for the development and implementation of human rights standards in Europe, whatever the legal source of the measure affecting the citizen. I would therefore urge both the Council of Europe and the European Union to explore together as soon as possible the steps which could be taken as from now with a view to enabling negotiations on accession to be finalised as soon as Protocol No. 14 and the Constitutional Treaty have come into force. I hope that the Third Summit of Council of Europe member States will also send a clear signal to this effect.

In May 2003 the Committee of Ministers reaffirmed its determination “to guarantee the central role that both the Convention and the European Court of Human Rights must continue to play in the protection of human rights and fundamental freedoms on this continent”. It is my belief that Protocol No. 14 represents a major contribution towards achieving that goal, and this is why I would urge all Contracting States to ratify it as soon as possible.

The Court, for its part, will do its utmost to use to the full all the instruments contained in Protocol No. 14, just as it did with Protocol No. 11. In an effort to anticipate formal entry into force, the Court has even begun adapting some of its procedures to reflect the scheme foreseen in the Protocol. Preparations with a view to adjusting our structure and working methods in time for the entry into force of Protocol No. 14 are under way.

Yet, as I have repeatedly said, Protocol No. 14 is unlikely to be the end of the story, as it might well not be sufficient to get the caseload problem under control. For there is one thing which, despite all its potential and all our efforts, Protocol No. 14 will not do, and the Court has always been very clear about that: it will not itself reduce the volume of cases coming to Strasbourg; it will not turn off the tap; it will not even slow down the flow.

On the other hand, ceaselessly raising judicial productivity has its limits, if only physical ones; nor can it be a dictate to which the Court should continue to yield at all costs, as this would amount not only to an interference with the Court’s independence in organising its judicial work, but would also be wrong in principle. Indeed, the main aim of the Convention is not to have as many applications as possible declared inadmissible, but rather to secure effective protection of human rights in the member States. Driving up the statistics of terminated cases every year can only be achieved by concentrating on the easier, more numerous inadmissible applications, which will inevitably be at the expense of the more complex, meritorious ones.

To keep its priorities right, the Court recently decided, in line with the objectives pursued by Protocol No. 14, to devote more attention to adjudicating on the meritorious cases, the ones where the applicant will often have a serious claim of being the victim of a human rights violation. This may well result in the future in what could at first sight appear as a stagnating or even lower overall productivity. In reality, however, the figures, if compared category by category, should then indicate that the Court is progressively reverting to its core business, to the substantial cases, cases which actually contribute to enhancing the protection of human rights throughout the Council of Europe member States and even beyond.

Ladies and gentlemen, it is time for me to conclude. My personal philosophy concerning judges and courts is that they should only speak in public of their own role, their judgments and their contributions to society with, if I may put it that way, a sort of British understatement and/or perhaps Swiss sobriety. However, abandoning for once both understatement and sobriety, I would like to emphasise that the independent international protection machinery of the European Convention on Human Rights, embodied since 1998 in the single European Court of Human Rights, has proved to be an incredibly successful institution, known and respected across the whole world. The Council of Europe, which created and nurtured it, can be proud of this Court and its achievements and should be seeking not only to preserve, but also to strengthen it. Undoubtedly the Council of Europe’s Third Summit of Heads of State in Poland in May will constitute a precious opportunity to do this. It is no secret that I often feel obliged to call attention to workload and even backlog problems, but let me insist that the Court is overburdened because it has become so widely known over the years and such high expectations are placed on it by more and more European citizens, not because it has failed in its mission or in adapting its working methods. This Court is, without a shadow of doubt, the most productive of all international tribunals.

Most importantly, however, let us not forget that the European Court of Human Rights corresponds to a necessity for the democratic life of our European countries. The fact that the European Union Constitutional Treaty provides not only for a Charter of Fundamental Rights, but also for the accession of the European Union to the Strasbourg Convention system powerfully demonstrates how important it has become today for the credibility of action by public authorities to allow external

judicial control over their compliance with human rights standards. In other words, there is simply no alternative to preserving the efficiency of the Strasbourg control machinery, while of course adapting it to the changes in modern European society. So, as we begin the preparations for making Protocol No. 14 a success, we should in parallel keep thinking about the long-term future of this unique institution. The European Convention on Human Rights is an essential part of our common heritage, an outstanding testimony to European ethical and legal culture, and we have every reason to be proud of it.

Before I pass the floor to our guest of honour for tonight, we would like to express our gratitude to the new Secretary General of the Council of Europe, who has had what you might call a baptism of fire in his first budget negotiations. He stood firm in his support for the Court and we are grateful to him for that. We also thank all those ambassadors who reaffirmed their commitment to preserving the effectiveness of the Convention system in the course of those discussions. As I have said on many other occasions, additional resources cannot and should not be the only answer to the caseload problems facing the Court, but to exclude all budgetary growth for a system which is itself growing in every sense is not an option.

Let me now turn to our guest of honour, Mr Valery Zorkin, President of the Russian Constitutional Court. Dear President, it is a privilege and honour to have you here tonight. You have an enormously important role in modern Russia and modern Europe. So please tell us all about it.



## Valéry D. Zorkine

**President  
of the Constitutional Court of the  
Russian Federation**

The Constitutional Court of the Russian Federation is a national judicial body for the protection of human and citizens' rights and freedoms by means of constitutional proceedings in accordance with the generally recognised principles and norms of international law and in conformity with the Constitution.

The founding in 1991 of the Constitutional Court of Russia, a specific judicial institution of constitutional control, was one of the particular events marking adherence of the new Russia to the values of European law. It did not come into being easily. The range of opinions in the heated parliamentary, scientific and public debates on the status of the constitutional control body and the adoption of legislation regarding it was broad: proposals included establishing a subsidiary advisory body attached to Parliament; assigning a constitutional and control function to courts of general jurisdiction; or setting up a system of judicial control of constitutionality on the American model. Ultimately, the European model of constitutional jurisdiction and proceedings was chosen, in view of the affinity between the developing legal system of Russia and the Continental (Roman-Germanic) law family.

The powers of the Constitutional Court, as a judicial body of constitutional control exercising its judicial power independently by means of constitutional proceedings as defined in the current Law on the Constitutional Court of the Russian Federation of 1994, are aimed at guaranteeing the legal superiority and direct application of the Constitution on the entire territory of the Russian Federation and protecting the foundations of the constitutional regime and fundamental human and citizens' rights and freedoms.

In the exercise of its powers, the Constitutional Court of the Russian Federation is governed solely by the Constitution; when taking up office, judges of the Constitutional Court take an oath to obey only the Constitution. According to its Article 15 § 1, it is the Constitution that has supreme legal force; laws and other normative acts adopted in the Federation may not contravene the Constitution. At the same time, Article 17 § 1 recognises and guarantees human and citizens' rights and freedoms in the Russian Federation according to the generally recognised principles and norms of international law and in conformity with the Constitution. These principles and norms, as well as the international treaties of the Russian Federation, form an integral part of its legal order, and an international treaty shall prevail over domestic law in case of conflict (Article 15 § 4).

Accordingly, the provisions of the Constitution that envisage specific human and citizens' rights and freedoms must be interpreted by the Constitutional Court in terms of the generally recognised principles and norms of international law.

The Russian Constitution provides for machinery allowing the introduction of new principles and norms, as well as international treaties, as they arise, into the domestic legal order, and the adaptation of existing ones as they develop.

Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force in respect of Russia on 5 May 1998, is now incorporated into the Russian legal order.

It was stated in the declaration made at the time of ratification of the Convention that Russia “recognises ipso facto and without a special agreement that the jurisdiction of the European Court of Human Rights is obligatory regarding the questions of interpretation and application of the Convention and its Protocols in cases of an alleged violation of these treaties’ provisions by the Russian Federation, when an alleged violation is committed after entry into force of these treaties with respect to the Russian Federation”. Being one of the High Contracting Parties to the Convention, Russia is bound to execute final judgments of the European Court in any case to which it is a party.

Similarly, Russia adheres to self-imposed restrictions, and abides by human rights and the principles of the rule of law and democracy.

Therefore, rights and freedoms provided for in the European Convention on Human Rights, since it is an international treaty, and the judgments and decisions of the European Court of Human Rights, in so far as they express generally recognised principles and norms of international law, form an integral part of the Russian legal order.

The regulation of human rights and freedoms in Russia is governed first of all by the Constitution, and by laws proceeding from the Constitution. However, such regulation must not contravene the Convention. The task of Russian courts, including the Constitutional Court, is to guarantee human rights, whether freedom of the press, the right of property, personal integrity, human rights in the field of criminal procedure or any other right. The Constitutional Court protects the fundamental rights guaranteed by the Constitution, which are essentially the same as those listed in the Convention, the observance of which is overseen by the European Court of Human Rights.

Both the Constitution and the Convention proceed from the fact that generally recognised fundamental human rights and freedoms in a modern State governed by the rule of law are inalienable and belong to everyone from birth.

Hence the Convention occupies a particular place in relation to traditional rules of international law and international treaties. It is defined as “a constitutional instrument of the European legal order” both by the European Court and prevailing legal doctrine. The Convention is uniquely positioned on the Russian legal scene. Under Article 15 § 4 of the Constitution, the Convention as an international treaty is incorporated into the Russian legal order and prevails over federal laws. At the same time, it is fair to say that under Articles 15 and 17 of the Constitution the Convention functions as a constitutional instrument of recognition and protection of human and citizens’ rights and freedoms.

The list of rights guaranteed by the Constitution corresponds to those in the Convention for the Protection of Human Rights and Fundamental Freedoms, and seems to be considerably broader as regards social and economic rights. The exception is the prohibition of slavery, which is provided for in Article 4 § 1 of the Convention but not in the Constitution. Furthermore, under Article 20 § 2 of the Constitution “capital punishment pending its abolition may be established by the federal law as an exceptional punishment for especially serious crimes against life and the accused should be granted the right to have his case considered by a court of jury”.

Russia has signed but not ratified Protocol No. 6 to the Convention and has not signed Protocol No. 13, and has thus not undertaken to prohibit the death penalty in all circumstances. However, under a decision of the Constitutional Court the death penalty may not be imposed at present.

It should be underlined that the two reservations made by Russia at the time of ratification of the Convention regarding temporary application of extrajudicial arrest, detention and holding in custody under the Code of Criminal Procedure in force at the time and under the Disciplinary Regulations of the Armed Forces have been de facto withdrawn by a judgment of the Constitutional Court. The legislator was obliged to follow that move by introducing amendments to the two relevant acts.

## THE ROLE OF THE CONSTITUTIONAL COURT IN ENSURING INTERCONNECTION BETWEEN DOMESTIC AND INTERNATIONAL LAW

The practice of the Constitutional Court shows a tendency, predetermined by the Constitution, towards the increased role of judicial power in reinforcing interaction between the domestic and international legal systems, ensuring a more active integration of Russia into the international legal field, including the European legal landscape.

First and foremost, it is the power of the Constitutional Court to review the constitutionality of international treaties not yet in force in the Russian Federation that serves the purpose of reconciling domestic and international law (Article 125 § 2 (d) of the Constitution). Finding such a treaty to be constitutional clears the way for completion of the procedure of its entry into force as regards the Russian Federation through Parliament and for its incorporation into the Russian legal system as an integral part thereof. Otherwise, the international treaty or its particular provisions may not to be implemented or applied. This is to avoid conflicts between domestic law and the international obligations of Russia. Another power of the Constitutional Court is to settle disputes between State organs of the Russian Federation and its constituent entities as to competence in connection with the conclusion of international treaties of the Federation.

However, the role of the Constitutional Court in ensuring interconnection between the domestic and international legal systems is not confined to its participation in the introduction of international legal norms into the domestic legal order by means of parliamentary procedure.

The international legal element emerges in a variety of other cases examined by the Constitutional Court where international treaties themselves do not constitute the subject matter. When finding that a particular law or other normative act or their specific provisions are consistent or inconsistent with the Constitution, the Constitutional Court often states that the provisions in issue are in conformity with or, on the contrary, are in contravention of, the generally recognised principles and norms of international law as they are expressed in the European Convention.

From the very outset, the Constitutional Court has leaned heavily on the generally recognised principles and norms of international law, applying them as a standard for the exercise of the human and citizens' rights and freedoms enshrined in the Constitution on the domestic level. The Constitutional Court does not call upon international legal argumentation merely to reinforce its own legal positions, but uses it to interpret the meaning of the constitutional text and to reveal the constitutional sense of the legal provisions under review.

By using international legal arguments to frame legal positions of a general nature which are binding on courts and other State bodies and officials, the Constitutional Court establishes in practice a constitutional rule to the effect that international legal principles and norms belong to the Russian legal order. References to international law add value to the decisions of the Constitutional Court, which at the same time demonstrates that it considers international law to be an essential criterion to which legislation and the courts' practice must correspond. Decisions of the Constitutional Court containing a legal position and interpretation of the constitutional meaning of a law will often provide directions for the proper application of international law, by the legislator when improving legislation, the courts when trying cases and citizens when asserting their rights.

Thus in December 2003 confiscation, which until then had served as an additional measure of punishment, was struck out of criminal legislation by the federal legislator. That measure significantly restricted the ability of the Russian Federation to fulfil its international obligations under a number of conventions to which it was already a party (the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; the United Nations Convention against Transnational Organised Crime of

15 November 2000) or which were being proposed for ratification (the Criminal Law Convention on Corruption adopted within the Council of Europe on 27 January 1999 and the United Nations Convention against Corruption of 9 December 2003).

In its decision no. 251-O of 8 July 2004, the Constitutional Court noted that at present the confiscation of property in the field of criminal justice is governed by a provision enshrined in Article 81 (3.1) of the Code of Criminal Procedure of the Russian Federation (confiscation of property admitted as material evidence in a criminal case). Being inherently a provision of criminal procedure – an independent branch of Russian law – it has its own legal purpose, namely the regulation of material evidence in criminal proceedings. Ensuring the fulfilment of international legal obligations undertaken by the Russian Federation in the field of criminal procedure, it does not and must not take the place of criminal-law provisions which and only which impose confiscation as a criminal sanction and, correspondingly, does not impede the settlement of confiscation matters in the field of criminal legislation having regard to the provisions of the above-mentioned conventions.

Proceeding from this stated legal position, the settlement of confiscation matters in the field of criminal legislation calls not merely for the reinstatement of Article 52 of the Criminal Code, but for the introduction of a new version of penal confiscation that would correspond to the requirements of the above-mentioned conventions.

Here is a further example. When reviewing Article 1070 of the Civil Code of the Russian Federation, under which damage caused in the course of court proceedings shall be compensated only if the fault of the judge is established by a court sentence that has acquired legal force, the Constitutional Court ruled that this provision did not contravene the Constitution since, according to this provision in its constitutional sense, the State is sued for damage caused in the course of civil proceedings as a result of unlawful acts when deciding a case on the merits. In its constitutional sense and combined with Articles 6 and 41 of the Convention, this provision may not serve as an excuse for the State not to compensate damage caused in the course of civil proceedings in other circumstances (that is, when the case is not decided on the merits) as a result of illegal acts or omissions of a court (judge), including violation of the reasonable time requirement, if the guilt of the judge is established not by a court sentence, but by another applicable court decision.

It is noteworthy that the reference to the Convention is made not only in the reasoning part of this decision but in the operative part as well.

## **SIGNIFICANCE OF THE JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS FOR THE PRACTICE OF THE CONSTITUTIONAL COURT OF RUSSIA**

Under Article 32 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights is entitled to decide all matters concerning the interpretation and application of the provisions of the Convention and its Protocols. Therefore, the Russian Federation considers itself bound by the legal positions of the European Court as stated in its judgments and decisions when interpreting the provisions of the Convention and its Protocols and the case-law of the European Court.

The growing implementation of the European Court's case-law may serve as proof of the integration of the Russian legal system into the international judicial community.

Russia having officially recognised the jurisdiction of the European Court as regards the interpretation and application of the Convention and its Protocols to be binding, it follows that in their activities Russian courts must take its case-law into account.

While basing its findings on the provisions of the Constitution, the Constitutional Court of the Russian Federation refers at the same time to the European Convention in search of additional arguments to support its legal positions. Using the provisions of the Convention itself and subsequently judgments and decisions of the European Court of Human Rights in its reasoning was regular practice

for the Constitutional Court even before Russia became a party to the Convention. Applying legal positions of the European Court as reasons in support of its own decisions, the Constitutional Court tends to coordinate its position with that of the European Court by rendering decisions which do not simply correspond to, but are guided by, European Court practice. So far, there has been no instance of criticism by the European Court in its judgments and decisions of the practice of the Constitutional Court of the Russian Federation.

Reference by the Constitutional Court to the provisions of the Convention can in some cases result in confirmation of such interpretation of its text as leads to a better protection of a right or a freedom.

While it confirms the constitutionality of a legal provision, removes an outdated one or reveals the constitutional meaning of a norm on the basis of the interpretation of the corresponding Articles of the Constitution, the Constitutional Court refers at the same time to the provisions of the Convention and their interpretation by the European Court as additional reasons. Thereby, the Constitutional Court directs the normative process towards achieving harmony with the modern interpretation of the rights and freedoms enshrined in the Convention and its Protocols.

During the last nine years the Constitutional Court has referred in ninety decisions to the Convention and judgments and decisions of the European Court of Human Rights, which it considers to be a source of law. In particular, it has referred to the positions of the European Court regarding the right of an accused to be given legal assistance as applying to the pre-judicial inquiry and regarding criteria determining the limits of freedom of expression and information during election campaigns. The Constitutional Court has also used the findings of the European Court in its judgment of 7 May 2001 in *Burdov v. Russia*. Examining the constitutionality of legislative provisions on the social protection of citizens who had been exposed to radioactive emissions as a result of the Chernobyl disaster and on compensation of injury to health caused as a result of this disaster, the Constitutional Court referred to the provision of the aforementioned judgment of the European Court according to which the State cannot cite lack of funds as an excuse for not honouring a judgment debt.

In its decisions, the Constitutional Court has repeatedly underlined the significance of the constitutional right, in accordance with the international treaties of Russia, to appeal to international bodies of human rights protection, where all existing domestic remedies have been exhausted. The Constitutional Court would note that constitutional proceedings do not belong to those domestic remedies the exhaustion of which is required before appealing to such bodies. Citing the practice of the European Court, the Constitutional Court considers that the existence of an appellate judgment constitutes sufficient evidence that all domestic remedies have been exhausted. It is the Constitutional Court's opinion, based on the practice of the European Court, that supervisory review is not an obligatory requirement for exercising the right to appeal to these international bodies.

As is well known, under the Convention decisions of the European Court involve an undertaking by Contracting States to take "effective measures to prevent new violations of the Convention similar to those found by the Court's decisions".

In judgment no. 4-P of 2 February 1996, delivered before Russia ratified the Convention, the Constitutional Court stated that decisions of international bodies could lead to a re-examination of specific cases by the superior courts of the Russian Federation. This clears the way for superior courts to use their second-trial power with a view to revising judgments and decisions rendered previously, including those given by superior domestic courts. This legal position has been incorporated into the current Russian legislation on criminal procedure and arbitration proceedings.

Where rights and freedoms protected by the Convention have been violated by the law applied in a particular case, that is if the matter concerns a flaw in the law, then the legislator or the Constitutional Court, acting within the bounds of its jurisdiction, may decide its fate.

Thus, the Constitutional Court relies on the Convention and its interpretation by the European Court of Human Rights as it renders decisions and develops legal positions when reviewing laws and other normative acts.

The European Court of Human Rights' jurisdiction is subsidiary in nature, and mutual relations between the European Court and superior courts of European States are not to be considered as a one-way road. That is why the Constitutional Court of the Russian Federation turns to the European Court's case-law, as well as to the lessons drawn from the ongoing legal dialogue between the European Court and other European Constitutional Courts and the experiences of the latter. As a national judicial body of constitutional control, the Constitutional Court of the Russian Federation may prompt the development of the Russian legal system, its law-making and its law-enforcement practice towards conformity with a modern interpretation of the rights and freedoms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. In this way, the Constitutional Court plays an important role in the making and strengthening of Russian law as an integral part of the common European law landscape based on the Convention.

**PHOTO**





## DIALOGUE BETWEEN JUDGES

- Dialogue between judges - 2016
- Dialogue between judges - 2015
- Dialogue between judges - 2014
- Dialogue between judges - 2013
- Dialogue between judges - 2012
- Dialogue between judges - 2011
- Dialogue between judges - 2010
- Dialogue between judges - 2009
- Dialogue between judges - 2008
- Dialogue between judges - 2007
- Dialogue between judges - 2006