

European  
Court  
of Human  
Rights

## Dialogue between judges

Strasbourg, 2006

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*Excellencies, Presidents, colleagues, friends, may I on behalf of all my fellow judges welcome you to this seminar marking the official opening of the judicial year. This is the second time we have organised such a seminar, and I am delighted to see that so many of you have found time in your busy schedules to attend. Once again, we see it as an opportunity to make and renew acquaintance with colleagues from national superior courts, to compare notes and to share experiences relating to our common responsibility for the protection of human rights in our different jurisdictions. In that context, we are all faced with similar problems; the difficulties confronting the system of the European Convention on Human Rights will be familiar to many of you, as will the solutions which are being discussed. In that connection, you are probably aware that in May of last year the Council of Europe's Third Summit of Heads of State and*

*Government set up an eminent Group of Wise Persons, tasked with elaborating a strategy to preserve the long-term effectiveness of the Convention system. I greet President Yakovlev, former President of the Supreme Court of Arbitration of the Russian Federation, and Professor Aybay, from Turkey, who are here today and who represent the eleven Wise Persons.*

*One obvious key to the continuing effectiveness of this unique system lies with you, or at least the many Constitutional and Supreme Courts represented here this afternoon. Effective implementation at national level is after all the fundamental, underlying goal of the European Convention. I am encouraged by your presence here today because I believe it shows the increasing willingness of national courts to take on this responsibility and to engage with the Convention system; it is in that context that our dialogue between judges acquires its full meaning and importance.*

*Another crucial element in making the Convention system work is the rapid and full execution of this Court's judgments, which is the focus of our discussions this afternoon. Some, but by no means all, of the Court's caseload problems derive directly from a failure to execute effectively previous judgments and especially failure to take appropriate general measures to eliminate the causes of a violation in good time. So not only is execution essential for the Court's credibility and authority and at the same time an indispensable*

*element of the judicial process under the rule of law, it is also directly linked to the problems of case inflation facing the Court and the Convention system.*

*But I will leave it to our distinguished guest speakers to enter into the substance of this topic, and I hope that as many of you as possible will contribute your thoughts on it. You are part of the system, the system depends in part on you, so your views matter to us as I hope ours do to you.*

*Let me now give the floor to Judge Tulkens, who will introduce the seminar on behalf of the organising committee and also introduce our three guest speakers. I should like to express my gratitude to the organising committee and to the guest speakers.*

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

# FRANÇOISE TULKENS

JUDGE OF THE EUROPEAN COURT OF  
HUMAN RIGHTS

Execution and effects  
of the judgments of the  
European Court of Human Rights.  
The role of the judiciary

*Françoise Tulkens*

Mr President, Excellencies, friends and colleagues, ladies and gentlemen, allow me first of all to thank you for having turned out in such numbers for today's seminar to mark the opening of the Court's judicial year. Last year's highly enriching experience has prompted us to pursue the topic of the *dialogue between judges*, a dialogue with the national courts which the European Court of Human Rights is keen to maintain, intensify and deepen. Fundamental rights constitute our common heritage, and national and international judges, now more than ever, have a shared responsibility in that regard.

However, as we are all aware, human rights are not an ideology or a thought system: they are more a matter of *praxis* than of *logos*. To have any meaning in the lives of individuals and communities, *they must be embedded in practice*. A judgment of the European Court of Human

Rights is not an end in itself, but a promise of future change, the starting-point of a process which should enable rights and freedoms to be made effective. For our meeting with you this afternoon, therefore, we have chosen to explore our shared responsibility for the application and *implementation* of fundamental rights. Hence the title and sub-title of the seminar: “Execution and effects of the judgments of the European Court of Human Rights. The role of the judiciary”.

We felt that this choice of topic was appropriate in the present climate of determination to bolster the effectiveness of the Convention system, both upstream and downstream. You will find on the desk in front of you a short text which, without making any bold claims, explains the intentions of the group responsible for preparing the seminar, made up of Judges Elisabet Fura-Sandström, Vladimiro Zagrebelsky, Lech Garlicki and myself. The sole purpose of the document, which I will present here in outline, is to provide material for reflection. Food for thought, as the saying goes.

1. The current situation prompts *two observations*. Firstly, as regards the *execution of the Court’s judgments*, in addition to paying the sum awarded by way of just satisfaction, the State is supposed to *remedy the effects of the violation*. On closer inspection, however, the State’s obligations appear to us to be less clearly defined, as the means of achieving this and the time-frame for doing so are left to the discretion of the State, subject to monitoring by the Committee of Ministers. The respondent State must also adopt the *general measures*, whether in the legislative sphere or the sphere of administrative practice, which are required to eliminate the causes of the violation. Here again, however, the measures are not defined in the Court’s judgment but are left to the discretion of the State.

Next, as regards the *effects of the Court's judgments* (the latter being traditionally viewed as declaratory in nature), the situation would appear to be even less well defined. While it is beyond dispute that, under the rules of international law, States are obliged to implement international treaties (including the Convention) in good faith, it does not automatically follow that the interpretation of the Convention, as derived from the Court's case-law, has identical binding effect. Moreover, experience has shown that there is a lack of uniformity among the member States when it comes to recognising the authority *erga omnes* of the Court's judgments.

2. In the wake of *Protocol No. 14* which, quite rightly, reflects an awareness of the issue of the execution of the Court's judgments, the Court's recent case-law has taken *two new directions*.

First of all, the judgment of 22 June 2004 in *Broniowski v. Poland*<sup>1</sup> was described by the Court as a pilot judgment in a case which brought to light a specific problem affecting over 80,000 people. The main legal basis for this new procedure is Resolution Res(2004)3 of the Committee of Ministers of the Council of Europe of 12 May 2004 on judgments revealing an underlying systemic problem, which authorises the Court to prescribe/suggest to the respondent State the adoption of certain general measures<sup>2</sup>. Admittedly, the Court's requests are usually directed principally at the legislature. However, the question arises whether it

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1. [GC], no. 31443/96, ECHR 2004-V. See also the friendly settlement in the case (judgment of 28 September 2005, to be reported in ECHR 2005-IX).

2. On the distinction between structural and specific problems, see P.-H. Imbert, "Follow-up to the Committee of Ministers' Recommendations on the implementation of the Convention at the domestic level and the Declaration on 'Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels' ", in *Reform of the European human rights system: Proceedings of the high-level seminar, Oslo, 18 October 2004*, Directorate General of Human Rights, Council of Europe, Strasbourg, 2004, p. 40.

might not be possible to involve the domestic courts in the process, and, if so, to what extent.

Next, the Court is moving towards a practice of indicating to the State concerned specific measures aimed at remedying a violation both in a particular case and in other identical cases which are pending before it<sup>1</sup>. In some judgments, the Court, in addition to finding a violation of Article 6 § 1, has indicated that the most appropriate means of remedying the violation would be to have the case retried<sup>2</sup>. In other cases, such as *Assanidze v. Georgia*, the Court has requested the immediate release of the applicant in the operative part of its judgment<sup>3</sup>. Suggestions/requests of this kind which, in a sense, “push against the boundaries of the declaratory mode of relief”<sup>4</sup>, are often addressed, at least indirectly, to the domestic courts, as they entail the adoption by the latter of certain measures.

*Either way, the domestic courts are in a position to play an important role.* Some may be more inclined than others to follow the new approaches being adopted by the Court. It would be interesting, therefore, to hear your initial reactions on the subject.

3. Lastly, there are *two additional issues* on which an exchange of views could prove particularly useful. The first concerns the reopening of proceedings in cases where the Court has found a violation without indicating the need to hold a new trial or reopen the proceedings. While most of the Contracting States make provision for

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1. See *Tekin Yıldız v. Turkey*, no. 22913/04, §§ 91 et seq., 10 November 2005, and *Xenides-Arestis v. Turkey*, no. 46347/99, § 40 and point 5 of the operative provisions, 22 December 2005.

2. See *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV, and *Claes and Others v. Belgium*, nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, § 53 and point 5 of the operative provisions, 2 June 2005.

3. [GC], no. 71503/01, ECHR 2004-II.

4. See P. Leach, “Beyond the Bug River – A new dawn for redress before the European Court of Human Rights?”, *European Human Rights Law Review*, 2005, no. 2, p. 159.

criminal proceedings to be reopened, there appears to be no uniform practice in civil and administrative matters. Moreover, the passage of time may be significant in such cases, as the domestic courts may in some instances have to examine whether the European Court's assessment of past situations remains valid in the current circumstances of the case. Possible damage to the interests of third parties might also be a problem.

The other issue, which is undoubtedly more fundamental, concerns the overall effect (precedent-setting value) of the Court's judgments. Important judgments often lay down a general rule which determines the outcome of the case. Once the judgment has been executed in respect of the applicant, it remains to be determined whether the domestic courts in the respondent State are obliged to follow the rule laid down in the judgment in similar cases, and whether the courts in other countries can be subjected to the same obligation.

To help us analyse these questions and no doubt others, we will hear three twenty-minute speeches, followed in each case by what I trust will be an open and fruitful discussion. My thanks go to President Kūris, President Papier and Lord Justice Sedley for contributing their know-how and experience.

The working languages of the seminar will be English and French, with interpretation in both those languages and in German. I would like to thank our invaluable interpreters in advance for their assistance. Before we begin, I also wish to thank Roderick Liddell, who has played a pivotal role in organising this seminar, and Alice Bouras who, with her usual consummate professionalism, has made everything possible, even at

times the impossible. Thank you very much, my dear Alice.

I will now give the floor to Judge Zagrebelsky, who will introduce the first speaker.

**VLADIMIRO ZAGREBELSKY**

JUDGE OF THE EUROPEAN COURT  
OF HUMAN RIGHTS

*Vladimiro Zagrebelsky*

It is my pleasure to introduce Mr Egidijus Kūris, President of the Lithuanian Constitutional Court, as the first of our guests to take the floor.

Mr Kūris is a professor at the law faculty of Vilnius University, specialising in constitutional and international law.

He has studied at a number of academic institutions in the United States and in various European countries, lending his studies an international and comparatist outlook.

He played an active role in the drafting of the Lithuanian Constitution and in the negotiations leading to the restoration of the country's independence.

Since 2002 he has been President of the Constitutional Court – a court which was familiar

with the European Convention on Human Rights even before it was ratified by Lithuania, as it gave an opinion in favour of ratification in 1995, finding the text of the Convention to be compatible with the national Constitution.

We shall be listening to you with great interest, Mr Kūris.

# EGIDIJUS KŪRIS

PRESIDENT  
OF THE CONSTITUTIONAL COURT  
OF THE REPUBLIC OF LITHUANIA

The impact of the decisions  
of the European Court of Human Rights  
on the national legal system viewed from  
the standpoint of the Constitutional  
Court of Lithuania

*Egidijus Kūris*

## **1. Introduction**

The very title of my address implies my viewpoint. It is a look from the standpoint of the Constitutional Court of Lithuania, one of the States having ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, at a wide range of questions related to the execution and effects of the judgments of the European Court of Human Rights (ECHR). As a constitutionalist who (due to my primary duty as a constitutional judge) has to investigate the compatibility of laws and other legal acts of my own country with the Lithuanian Constitution, I shall examine the execution and effects of decisions of the ECHR on the Lithuanian legal system, with a special emphasis on the jurisprudence of the Constitutional Court.

As one of the new constitutions born during the era of what the Hungarian constitutional lawyer

Imre Vörös has recently called the “constitutional renaissance”<sup>1</sup>, the Lithuanian Constitution – over and above any of its particular provisions – has been inspired by the Convention. Some of its provisions were directly copied from the Convention (as well as from some other international human rights instruments). I say this knowingly, because I was one of those who drafted the first version of the relevant chapters of the Constitution – technically not a very difficult job when one has the Convention at hand. Being couched in a “Convention-friendly” manner, the provisions of the Lithuanian Constitution are based on the modern concept of human rights and include a broad catalogue of rights and freedoms. The Constitutional Court, which is entrusted with controlling the constitutionality of laws and acts of the government and the President of the Republic, also protects constitutional rights and freedoms through judicial review. In this respect, parallels between the jurisprudence of the Constitutional Court and that of the ECHR are absolutely unavoidable.

References to the case-law of the ECHR and, thus, to the Convention, were made in the jurisprudence of the Constitutional Court even before Lithuania became a party to the Convention and its Protocols upon ratification by the *Seimas* (the Lithuanian parliament; the Convention and Protocols Nos. 4, 7 and 11 were ratified on 27 April 1995, Protocol No. 1 on 7 December 1995, Protocol No. 6 on 22 June 1999, Protocol No. 13 on 16 October 2003 and Protocol No. 14 on 24 May 2005). For example, already in a ruling of 18 November 1994 (that is to say before ratification of the Convention) in which compliance with the provisions of the Code of Criminal Procedure was assessed in terms of the right of the defence as set out in

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1. See I. Vörös, “Contextuality and universality: constitutional borrowings on the global stage – The Hungarian view” in *University of Pennsylvania Journal of Constitutional Law*, 1999, vol. 1, no. 3.

the Constitution, the Constitutional Court, in setting the limits of this right, referred to *Campbell and Fell v. United Kingdom*<sup>1</sup>. Later, between 1994 and 2005, the Constitutional Court referred to the Convention in thirty cases, and to the case-law of the ECHR in fifty-four cases. (Of course, these figures cover only those rulings in which the Convention and the case-law of the ECHR have been directly addressed.) This testifies to the importance of the Convention, as well as the impact of the case-law of the ECHR, on the development of the Lithuanian legal system, including national constitutional law.

## **2. Constitutional jurisprudence: general remarks**

In Lithuania, the setting up of the Constitutional Court and the birth of constitutional justice marked the emergence of the new paradigm of constitutional law. The Constitution ceased to be perceived as being merely the original text of the constitutional document (and its subsequent amendments). One of the elements of this new paradigm of constitutional law is elevation of the acts of the Constitutional Court (and the official constitutional doctrine elaborated therein) to the rank of sources of constitutional law, on a par with the Constitution itself. The Constitutional Court is the sole official interpreter of the Constitution, and the provisions of the Constitution receive their definitive meaning in the jurisprudence of the Constitutional Court, in the same way as the provisions of the Convention receive their definitive meaning in the case-law of the ECHR.

The relationship between the national law of Lithuania and the provisions of the Convention is of a monistic nature. Under the terms of Article 138 of the Constitution, all international treaties ratified by the *Seimas* are a

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1. Judgment of 28 June 1984, Series A no. 80.

constituent part of the Lithuanian legal system. As far as the Convention is concerned, the Constitutional Court has ruled that the above-mentioned constitutional provision implies that, upon its ratification and coming into force, the Convention shall become a constituent part of the Lithuanian legal system and shall be applied in the same way as national laws (statutes). So, in terms of the sources of law, the provisions of the Convention are equated with the laws passed by Parliament. Thus, the Lithuanian legal system, being based on the supremacy of the Constitution, the Convention and its Protocols, having been granted the status of a constituent part of domestic law, cannot contradict the Constitution.

As the Convention was one of the sources of inspiration during the drafting process of the Constitution, it was somewhat unnatural to challenge the constitutionality of the Convention in the Constitutional Court. Nevertheless, Lithuania has had such a case. In 1994 the President of the Republic, before submitting the Convention to the *Seimas* for ratification, requested the Constitutional Court to investigate whether certain provisions of the Convention (Articles 4, 5, 9, 14 of the Convention, and Article 2 of the Protocol No. 4) might be in conflict with the Lithuanian Constitution. On 24 January 1995 the court delivered its opinion in which, unsurprisingly, it found no incompatibility of the provisions of the Convention in issue with the Constitution.

In its conclusion, the Constitutional Court expounded the theory that the provisions of the Convention could only be considered to conflict with the Constitution if: (1) the Constitution established a complete and definitive list of rights and freedoms and the Convention set forth some other rights and freedoms; or (2) the Constitution prohibited certain acts which the Convention defined as

one or other right or freedom; or (3) a particular provision of the Convention could not be applied in the Lithuanian legal system because it was not consistent with a provision of the Constitution. In fact, the Constitutional Court has ruled out the presence of any of these hypothetical conditions. In substantiating its position, it ruled that the interpretation of the compatibility of (relationship between) the provisions of the Constitution and the Convention must be semantic, logical, etc., and not only literal (the latter method, taken alone, not being acceptable at all for the interpretation of the nature of human rights).

In the formal sense, to recognise the Convention as a treaty which has the force of law and which does not contradict the Constitution does not, *per se*, amount to recognising its influence on national constitutional law, because, from the Kelsenian perspective (on which the whole idea of constitutional review rests), an act of lesser legal force cannot in any way affect an act of a higher legal force, and the interpretation and application of an act of lesser legal force cannot in any way exert its influence on the practice of interpretation and application of an act of higher legal force. If such an approach to the Convention were endorsed by the majority of national constitutional courts which apply the provisions of their respective constitutions, they might be led to declare the Convention and the case-law of the ECHR to be of a non-binding character.

However, such a formal approach, *inter alia* in respect of the Convention and the case-law of the ECHR, would be one-sided; it has to be supplemented by an approach which reveals the true nature of the impact of the Convention on national constitutional law. The Constitutional Court of Lithuania bases its rulings on

precisely such grounds. It has held in many of its rulings that the case-law of the ECHR, as a source of interpretation of law, is also important for the interpretation and application of Lithuanian law. Thus, although no act of lesser legal force (including international treaties) is granted the status of source of Lithuanian constitutional law, as regards the Convention (as interpreted in the case-law of the ECHR), a different formula was elaborated: the Convention, designated as “a source of interpretation of national constitutional law”, is, in fact, treated as an “indirect” source of Lithuanian constitutional law (see the rulings of 8 May 2000, 10 May 2001, 19 September 2002, 23 October 2002, 24 March 2003 and 29 September 2005). Thus, not only was the text of the Constitution drafted in a “Convention-friendly” manner, but the interpretation of the Constitution is also “Convention-friendly”, in so far as the Convention, as interpreted by the ECHR, reinforces “the minimum standard of protection of human rights” and supplements the national protection of human rights and freedoms.

Further, I shall provide examples of how the Constitutional Court draws from the case-law of the ECHR. Here, two types of reliance on the Strasbourg case-law may be distinguished. Firstly, the Constitutional Court, when it finds it necessary, interprets the Constitution along the lines already drawn in the case-law of the ECHR – it, in a sense, “imports” the case-law of the Strasbourg Court. Secondly, in some cases the Constitutional Court, in anticipation of the *forthcoming* case-law of the ECHR in cases against Lithuania, quashes certain pieces of Lithuanian legislation with, however, few references (if at all) to the existing case-law of the ECHR. However, in the first instance no less than in the second, the rulings of the Constitutional Court are *formally* based solely on reasoning stemming from the

Lithuanian Constitution, and the case-law of the ECHR only serves to provide “additional” arguments which support rather than form the basis of the “authentic” constitutionalist reasoning.

### **3. Constitutional jurisprudence: “importing” the existing case-law of the ECHR**

I shall give three examples (from three rulings) to illustrate the reasoning of the Constitutional Court which, albeit basing its ruling on the “authentic” interpretation of the Constitution, nevertheless draws heavily from the existing case-law of the ECHR. The Constitutional Court has widely referred to the case-law of the ECHR while tackling such issues as the freedom of the media and the right of journalists not to disclose their sources, the assessment of the testimony of anonymous witnesses, and the protection of social rights in relation to property rights.

*1. The right of journalists not to disclose their sources.* In its ruling of 23 October 2002, the Constitutional Court noted that where the question arises whether it is necessary to disclose a source, one must assess in each individual case whether the non-disclosure of the source will be in breach of the values upheld by the Constitution. In a democratic State governed by the rule of law, the determination of such questions lies with the court. The balance between freedom of information and other constitutional values is enshrined in the Constitution so that the legislator, in establishing the right of journalists to protect their source and not disclose their identities, may not establish such legal regulations as would

presuppose disregarding the values enshrined in the Constitution. Thus, the statutory regulation which was challenged in the case in question, to the extent that it established the right not to disclose the source even where, in a democratic State, a court had decided that it was necessary to disclose the source in order to protect vitally important interests of society or other interests of utmost importance, and to ensure that the constitutional rights and freedoms of persons are protected and justice administered, was found to be incompatible with the grounds of limitation on dissemination of information set out in the Constitution and with the constitutional imperatives of an open, just and harmonious civil society as well as with the constitutional principle of a State governed by the rule of law. In order to support (but not establish a ground for!) such an interpretation of the constitutional provisions, the Constitutional Court also made reference to the case-law of the ECHR, namely, to *Fressoz and Roire v. France*<sup>1</sup> and *Goodwin v. the United Kingdom*<sup>2</sup>: “[The ECHR], while recognising the important role of the press in a democratic society, and having regard also to the interests of a democratic society in guaranteeing and protecting the freedom of the press, has held that the restriction of the right of journalists not to disclose their sources is justifiable if one follows the requirements set out in Article 10 of the Convention: such restrictions must be necessary for the protection of the interests of a democratic society; the hindrance to the exercise of press freedom is only compatible with Article 10 of the Convention if it is justified by an overriding requirement in the public interest. ... The [ECHR] has held that, although there is a general public interest in the free flow of information to journalists, the latter must recognise that their express promise of confidentiality

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1. [GC], no. 29183/95, ECHR 1999-I.

2. Judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II.

may have to yield to a greater public interest.”

2. *Anonymous witnesses*. In its ruling of 19 September 2000, the Constitutional Court held that certain provisions of the Code of Criminal Procedure, to the extent that they did not guarantee the right of the accused to question an anonymous witness or victim, while the data establishing their identity was not available, and therefore restricted his right to participate in the examination of the evidence and infringed the rights of the defence and the right to a fair investigation of the case, were in conflict with the principle of procedural fairness enshrined in the Constitution. In its ruling, the Constitutional Court also referred to the provisions of the Convention as interpreted in the case-law of the ECHR, notably in *Lüdi v. Switzerland*<sup>1</sup>, *Doorson v. the Netherlands*<sup>2</sup> and *Van Mechelen and Others v. the Netherlands*<sup>3</sup>.

To quote the Constitutional Court: “In the case-law of [the ECHR] the possibility of granting anonymity to a witness or victim is in essence not questioned. However, the exceptional character of the evidence of anonymous witnesses or victims is emphasised, and attention is paid to the other conditions which must be met when making use of the testimony of anonymous witnesses and victims as incriminating evidence in criminal cases. This flows from the requirements of [the Convention].”

In its ruling, the Constitutional Court indicated that Article 6 § 1 of the Convention guarantees the right of individuals to a fair hearing, while Article 6 § 3 lays down the defence rights of a person charged with a criminal offence, one of which is contained in Article 6 §

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1. Judgment of 15 June 1992, Series A no. 238.

2. Judgment of 26 March 1996, *Reports* 1996-II.

3. Judgment of 23 April 1997, *Reports* 1997-III.

3 (d), and provides that the indicted person has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Again, to quote the Constitutional Court ruling: “[The ECHR] in *Lüdi v. Switzerland* ... paid attention to the fact that neither the accused nor his counsel had at any time during the proceedings an opportunity to question the undercover agent. The Court found a violation of Article 6 § 3 (d) of the Convention. In the opinion of the Court, it would have been possible for the questioning of the undercover agent to be carried out in such a way that the suspect and his counsel could have put questions to him while preserving his anonymity.”

One last quote on the matter: “In *Doorson v. the Netherlands*, [the ECHR] held that there had been no violation of the right to a fair hearing as laid down in Article 6 of the Convention in criminal proceedings in which anonymous witnesses were questioned by an investigating judge who was aware of their identity, while counsel for the defence was present and in a position to ask the witnesses questions, and where the culpability of the person accused of having committed an offence was corroborated by evidence from other sources ... The principles which ought to be observed in the course of assessment of lawfulness of the testimony given by anonymous witnesses were laid down by [the ECHR] in *Van Mechelen and Others v. the Netherlands* ... Resorting to anonymous witnesses may be justifiable when this is necessary to preserve their interests and if it does not deprive the accused of the right to a fair hearing and generally to a fair investigation of the case. The defendant must be given an opportunity to question the witnesses against him, as the anonymity of witnesses restricts the opportunities of the defence to question them, or to

submit arguments concerning their animosity or prejudice towards the accused. These restrictions must be sufficiently counterbalanced by the procedures followed by the judicial authorities. In addition, the testimony given by anonymous witnesses may not be the only or the decisive evidence supporting the conviction.” Here, the Constitutional Court drew the conclusion that “it is recognised in the case-law of [the ECHR] that in certain cases the use of anonymous witnesses does not violate the Convention”.

3. *Social security and ownership rights.* In its ruling of 4 July 2003, the Constitutional Court, while analysing social security issues, noted their relationship with ownership rights, and in particular that the constitutional protection of pension rights implied the right to request the fulfilment of obligations of a proprietary nature. The Constitutional Court noted, *inter alia*, that the right of ownership is also protected by international legal instruments, namely, by Article 1 of Protocol No. 1 which provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions, and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law, and that the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Again, to support its position and to provide it with a solid comparative and international context, the Constitutional Court stated, in the said ruling, that according to the jurisprudence of the ECHR the protection of the right of every natural or legal person to

dispose of his property as established by Article 1 of Protocol No. 1 applied not only to the objects of the right of ownership specified *expressis verbis* in the civil laws of States, but also to economic interests (*Tre Traktörer Aktiebolag v. Sweden*<sup>1</sup>), to the economic rights which reflect the relationships with clients and commercial activities of a firm (*Van Marle and Others v. the Netherlands*<sup>2</sup>), to compensation claims of a proprietary nature (*Pressos Compania Naviera S.A. and Others v. Belgium*<sup>3</sup>), to claims for the reimbursement of expenses incurred in the fulfilment of contractual obligations (*Stran Greek Refineries and Stratis Andreadis v. Greece*<sup>4</sup>), to the right to a pension resulting from work (*Gaygusuz v. Austria*<sup>5</sup>), to the right to an old-age pension (*Wessels-Bergervoet v. the Netherlands*<sup>6</sup>), etc. The Constitutional Court also followed the ECHR in noting that, under the Convention, a person's property or possessions are protected as are legal demands (claims) on the basis of which the claimant may argue that he has at least "a legitimate expectation" to dispose of the property (admissibility decision in *Malhous v. the Czech Republic*<sup>7</sup>). The Constitutional Court has also indicated that, in the case-law of the ECHR, taking into account all the circumstances of a case, the guarantees attached to the right of every natural or legal person to dispose of his property set out in Article 1 of Protocol No. 1 also apply to the protection of economic interests arising from the receipt of social benefits, as well as stocks, real property, management of land, etc. On the other hand, the Constitutional Court also mentioned that, according to the case-law of the ECHR, Article 1 of Protocol No. 1 could

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1. Judgment of 7 July 1989, Series A no. 159.

2. Judgment of 26 June 1986, Series A no. 101.

3. Judgment of 20 November 1995, Series A no. 332.

4. Judgment of 9 December 1994, Series A no. 301-B.

5. Judgment of 16 September 1996, *Reports* 1996-IV.

6. No. 34462/97, ECHR 2002-IV.

7. (dec.) [GC], no. 33071/96, ECHR 2000-XII.

not be relied on where a special privilege of a proprietary nature which had been granted on political grounds was restricted or abolished.

In the context of the case in which the Constitutional Court's ruling of 4 July 2003 was adopted and which concerned the pension reform in Lithuania (a highly sensitive issue both from the social and the political points of view), the court found it useful to refer to the admissibility decisions in *Jankovic v. Croatia*<sup>1</sup>, *Sporrong and Lönnroth v. Sweden*<sup>2</sup> and *Spadea and Scalabrino v. Italy*<sup>3</sup>. Here is what it said: "When applying Article 1 of Protocol No. 1, the case-law of [the ECHR] does not deny the possibility of reorganising pension schemes and social security. Taking concrete circumstances into account [*Jankovic*], [the ECHR] has said that the State, when regulating social policy, has sufficiently broad opportunities to change the amounts of pensions. However, it is clear from the case-law of [the ECHR] that it is necessary to follow certain rules when amending legislation in this field. For example, [the ECHR] has noted that the means employed must be proportionate to the objective sought, and that, taking account of paragraph 2 of Article 1 of Protocol No. 1, interference by the State must ensure balance between the general interest of society and the requirement to protect the individual's fundamental rights [*Sporrong and Lönnroth* and *Spadea and Scalabrino*]"

#### **4. Constitutional jurisprudence: "advance" rulings in anticipation of decisions of the ECHR**

As already mentioned, the Constitutional Court of Lithuania, in some of its rulings, and in anticipation of the

1. (dec.), no. 43440/98, ECHR 2000-X.

2. Judgment of 23 September 1982, Series A no. 52.

3. Judgment of 28 September 1995, Series A no. 315-B.

“forthcoming” case-law of the ECHR in cases against Lithuania, has done away with certain pieces of Lithuanian legislation which, in any case, would have had to be annulled or amended in the wake of the relevant final decisions of the ECHR in cases against Lithuania on analogous matters. In these cases, the Constitutional Court has resolved certain human rights issues prior to the adoption of the corresponding decisions by the ECHR. Examples of such “advance” constitutional jurisprudence are given below.

1. *Fair proceedings*. In its judgment of 28 March 2002 (*Birutis and Others v. Lithuania*<sup>1</sup>), the ECHR found a violation of Article 6 of the Convention: it held that the persons accused of having committed an offence had not been ensured a fair trial and that their defence rights had been violated because they had been convicted on the basis of testimony by anonymous witnesses whom they had had no opportunity to question or have questioned. In its judgment, the ECHR referred to previous decisions (*Kostovski v. the Netherlands*<sup>2</sup> and *Van Mechelen and Others*).

However, before the ECHR had adopted the final decision in this case against Lithuania, an analogous legal problem had been solved in Lithuania by the Constitutional Court which, in its ruling of 19 September 2000 (already mentioned), relied on the doctrine formulated in the previous decisions of the ECHR and held that the Code of Criminal Procedure, in so far as it did not guarantee the right of the accused to have questions put to an anonymous witness or victim, and as a consequence his right to participate in the examination of the evidence was restricted and his defence rights and his

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1. Nos. 47698/99 and 48115/99.

2. Judgment of 20 November 1989, Series A no. 166.

right to a fair investigation of the case were infringed, was in conflict with the Constitution. Subsequently, having taken account of the said ruling, the *Seimas*, by the Law of 23 January 2001, amended the Code of Criminal Procedure and firmly established the right of the accused to have questions put to anonymous witnesses. Furthermore, with the amendments of 14 March 2002 to the Code of Criminal procedure, the *Seimas* also corrected the rules on the questioning of an anonymous witness by the investigating judge.

2. *Payment of compensation.* On 13 May 2005 the ECHR communicated the statement of the facts in *Vėjelis v. Lithuania* (application no. 19248/02) to the Government of Lithuania, in which the petitioner complained that he had not been paid the compensation to which he was entitled by law, due to changes in the legal provisions which laid down the terms of payment of compensation in the context of restored land ownership rights.

At the time of this presentation, the case has not yet been decided. However, the Constitutional Court, in its ruling of 23 August 2005, held that when, for objective reasons, he prolongs the previously established terms under which the payment of the financial compensation must be completed or changes the previously established periodicity of payments of the financial compensation, the legislator must abide by the constitutional principles of clarity, legal certainty and protection of legitimate expectations, which implies that the legislator also has a duty to establish legal regulations which clearly indicate when the payment of financial compensation will end, what portion will be paid to persons who are entitled to receive it and when this will be done. At the time of this presentation, relevant statutory amendments are being

considered in the *Seimas*.

## **5. The courts**

It is universally acknowledged that judgments of the ECHR influence the activity of national courts in a particular way.

On the one hand, national courts, in their proceedings and decisions, use the arguments pertaining to the standards of effective protection of human rights and freedoms as set out in the case-law of the ECHR, and the tendency to use such arguments seems to be growing.

On the other hand, national law provides for the reopening of the proceedings where the ECHR has decided that the application of domestic law does not comply with the human rights and freedoms protected by the Convention.

Lithuanian law provides for the possibility of reopening criminal, civil and administrative proceedings on the basis of the decisions of the ECHR.

Under Article 456 of the Code of Criminal Procedure (“Grounds for reopening criminal proceeding following decisions of the United Nations Human Rights Committee and of the European Court of Human Rights”, wording of 8 July 2004), criminal cases decided by the Lithuanian courts may be reopened when, *inter alia*, the ECHR has held that the judgment convicting an accused is in violation of the Convention or its Protocols, if the violation, by its nature or seriousness, raises reasonable doubts as to the well-foundedness of the conviction, and this continuing violation can only be stopped by reopening the proceedings. Unfortunately, the said legal

provision does not clearly indicate whether the adoption of a judgment which is in violation of the Convention means that the law has been improperly applied (from the point of view of the Convention) or that the legal provision which served as a ground for the judgment is in conflict with the Convention. It is to be hoped that courts will interpret this provision as covering both; however, the practice is so rare (if it exists) that it is impossible to discern a clear tendency.

Paragraph 1 of Article 366 (“Reopening of proceedings”) of the Code of Civil Procedure provides that the proceedings may be reopened “where the [ECHR] has held that the judgments, decisions or rulings delivered by the courts of [Lithuania] in civil proceedings are not in conformity with the [Convention] and/or the additional Protocols to which [Lithuania] is a party.”

Similarly, subsection (2)(1) of section 153 (“Principles governing the reopening of proceedings”) of the Administrative Proceedings Act provides that the proceedings may be reopened where the ECHR has held that the corresponding judgment of a Lithuanian court is not in conformity with the Convention and/or its additional Protocols. An application to reopen the proceedings may be lodged within a period of three months from the day the applicant has learnt or should have learnt about the circumstances forming the basis of the request to reopen the proceedings (paragraph 1 of Article 156). However, no application to reopen the proceedings may be lodged if more than five years have passed since the judgment or decision came into force (paragraph 3 of Article 156).

It is to be noted that under subsection 2(11) of section 153 of the same Act, administrative proceedings

may also be reopened where the unlawful legal act on the basis of which the court decided the case is annulled. Thus, the reopening of the proceedings may also be based on a decision by the Constitutional Court that a particular legal provision is unconstitutional. (The same, *mutatis mutandis*, applies to decisions of administrative courts which review the lawfulness of ministerial and municipal acts.)

There have been no examples in Lithuania so far of a reopening of administrative proceedings on the ground that the ECHR had ruled a decision of a Lithuanian court to be in conflict with provisions of the Convention and/or its Protocols.

## **6. The legislator and the executive**

The impact of the decisions of the ECHR on the national non-judicial authorities usually concerns their “execution” and “implementation”.

I am talking about the decisions of the ECHR in which it has found that the member State has violated specific rights and freedoms under the Convention. The State authorities usually execute the decisions of the ECHR by paying to the injured party the sums awarded by the ECHR for costs and expenses and for pecuniary and/or non-pecuniary damage.

However (and given the relatively small number of cases lost by Lithuania in the Strasbourg Court), of no less importance is such impact in terms of implementation of the decisions of the ECHR, when the executive, or to an even greater extent the legislator, takes measures to correct the national legislation so as to avoid future

violations. Thus, the legislator implements judgments of the ECHR by amending the legal provision by which human rights and freedoms were violated.

*The executive.* The ECHR is not the highest judicial authority in the domestic legal order of any of the States that have ratified the Convention. It does not have the power to annul or change decisions of national institutions and courts. It does not carry out an abstract review of national legal acts, nor does it give directions either to the legislator or the courts, or to other State institutions. However, under the Convention, the ECHR may award just satisfaction to the injured party: the Court in Strasbourg may award the applicant not only an amount for costs and expenses, but also financial compensation for pecuniary and/or non-pecuniary damage. It is said that, since its creation, there has not been a single case where a member State of the Council of Europe has refused to implement or in any other way follow a decision of the ECHR.

How do the Lithuanian authorities implement judgments of the ECHR? According to the information submitted by the Ministry of Justice of the Republic of Lithuania (“Statistics of Cases against the Republic of Lithuania at the European Court of Human Rights: Report of 1 January 2006”) the supervision of the implementation of judgments of the ECHR was completed in twelve cases, and the Committee of Ministers adopted resolutions stating that Lithuania had paid all the amounts awarded by the ECHR for pecuniary and/or non-pecuniary damage and costs and expenses. Moreover, with the adoption of the new Code of Criminal Procedure and the new Criminal Code, similar violations of the rights protected by the Convention have been prevented. In 2005 the ECHR delivered three final judgments in which violations

of the Convention were found (*Jankauskas v. Lithuania*<sup>1</sup>, *Karalevičius v. Lithuania*<sup>2</sup> and *Rainys and Gasparavičius v. Lithuania*<sup>3</sup>). In 2005, all in all, 23,000 euros were paid in compensation for non-pecuniary damage, 42,500 euros in compensation for pecuniary damage, and 8,000 euros for costs and expenses.

It should also be mentioned that the Ministry of Justice is currently drafting a new Arrest Act that will replace the Pre-trial Imprisonment Act. This, it is hoped, will solve the question of censorship of correspondence of arrested persons (*Jankauskas v. Lithuania* and *Karalevičius v. Lithuania*, cited above) and reduce the possibility of future violations of this kind.

Judgments of the ECHR are not unconnected to the plan to issue, in 2006, a call for tenders for the construction of a new wing at the solitary confinement pre-trial detention centre in Šiauliai and to provide 320 additional places and improve considerably the conditions of pre-trial imprisonment. Thus, the general measures associated with the judgments delivered in 2005 are not yet fully implemented (therefore, there are no resolutions of the Committee of Ministers on the matter).

*The legislator.* On several occasions, the institution of proceedings at the ECHR has itself inspired initiation of relevant statutory amendments: the *Seimas* undertook to solve problems linked to the improvement of the protection of human rights without waiting for the judgment of the ECHR (in cases which Lithuania was expected to lose). I will give three examples.

*1. Preventive detention.* In its judgment of 31 July 2000

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1. No. 59304/00, 24 February 2005

2. No. 53254/99, 7 April 2005

3. Nos. 70665/01 and 74345/01, 7 April 2005.

in *Jėčius v. Lithuania*<sup>1</sup>, the ECHR found that the preventive detention of the applicant had been in breach of Article 5 § 1 (c) of the Convention. The *Seimas* repealed the Article of the Code of Criminal Procedure on which the detention was based prior to the hearing of the case at the ECHR. Here, the institution of proceedings itself led the legislator to entertain doubts about the legal provision in issue.

2. *Term of detention.* In its judgment of 10 October 2000 in *Graužinis v. Lithuania*<sup>2</sup>, the ECHR found that the applicant had not been given the guarantees appropriate to the kind of deprivation of liberty in question and, accordingly, that there had been a breach of Article 5 § 4 of the Convention. The *Seimas*, in the new Code of Criminal Procedure, made express provision for the detainee to be heard, if necessary, where the length of detention was extended, making the hearing of the detainee compulsory where the extension of the detention exceeded four months.

3. *Body search.* In its judgment of 24 July 2001 in *Valašinas v. Lithuania*<sup>3</sup>, the ECHR held that the body search of the applicant (according to the facts of the case the applicant was made to strip naked in the presence of a female officer) had amounted to degrading treatment within the meaning of Article 3 of the Convention. The legislator adopted a new Code of Execution of Punishments, providing that only a person of the same sex may conduct a body search of the convicted person. Previously no such provision existed in law (it was established by the Interim Prison Rules, but not by a law; incidentally, the breach was caused by improper

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1. No. 34578/97, ECHR 2000-IX.

2. No. 37975/97.

3. No. 44558/98, ECHR 2001-VIII.

application of the rule rather than by the legal provision itself).

**LECH GARLICKI**

JUDGE OF THE EUROPEAN COURT  
OF HUMAN RIGHTS

*Lech Garlicki*

Mr President, it is a great pleasure and honour to introduce our next speaker: Professor Hans-Jürgen Papier, the President of the Federal Constitutional Court of Germany.

Professor Papier has spent most of his professional life in academia, having been Professor of Law in Bielefeld from 1974 to 1991 and in Munich from 1992. His main field of research is the law of public finance. In 1970 he obtained his doctorate from the University of Berlin (on “Breach of obligation in public law”) and in 1973 his *Habilitation* degree (on “Requirements for the enactment of financial-law statutes and the Basic Law’s principle of democracy”). He is the author of numerous publications, on matters ranging from tax law to constitutional and human rights law.

From 1977 to 1987 Professor Papier was also a judge of the Administrative Court of Appeal of the *Land* of North Rhine-Westphalia. In 1998 he was appointed to the Federal Constitutional Court, first as its Vice-President and, from 2002, as its President.

Another very interesting chapter in Professor Papier’s professional life was his participation in the process of

German reunification. He was honorary chairman of the Independent Commission on the Examination of the Assets of GDR Parties and Mass Organisations from 1991 to 1998 and a member of the Commission on the Implementation of the Suspension of Supplementary Pensions Act.

Professor Papier represents a very important constitutional court, and it is not necessary to describe here the enormous contribution of that court to the development of the rule of law and of fundamental rights in Germany. The jurisprudence of the German Federal Constitutional Court plays a very important role throughout the whole of Europe and, of course, is also of particular interest for the Strasbourg Court. On a more personal note, let me also draw attention to the very close relationship between the German Federal Constitutional Court and new constitutional courts in central and eastern Europe, in particular the Polish Constitutional Court.

Professor Papier, the floor is yours.

**HANS-JÜRGEN PAPIER**

PRESIDENT OF THE  
GERMAN FEDERAL  
CONSTITUTIONAL COURT

Execution and effects  
of the judgments of the  
European Court of Human Rights  
in the German judicial system<sup>\*</sup>

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<sup>\*</sup> I thank my research assistant at the Federal Constitutional Court, Oliver Klein, for his valuable help in writing the manuscript.

## **I. Initial situation**

More than fifty years after the ratification of the European Convention on Human Rights by the Federal Republic of Germany, the question of the execution and effects of the judgments of the European Court of Human Rights (ECHR) in the German judicial system is not an easy one, and cannot be answered without provoking argument. Especially in recent years, the Federal Constitutional Court and a number of German ordinary courts, but also groups within the general public, have dealt with this intensively. Consequently, the issue is as topical as it is fundamental, and I am very grateful for being granted the opportunity of presenting to you the German position today.

The starting-point of any attempt at answering this question must be the fundamental recognition

that the Convention itself, as a treaty under international law, does not make provision for the details of its incorporation into national law but leaves them to the autonomous discretion of the Contracting States. In accordance with its traditional understanding of international law – that of moderate dualism – Germany has exercised this discretion by incorporating the Convention into the national legal order by means of the ordinary law of ratification by which Parliament expresses approval of an international agreement. This gives the Convention the status of a non-constitutional federal law within the German legal system. Thus, the Convention ranks lower than the Constitution in the national hierarchy of norms but, by virtue of Article 20 § 3 of the Basic Law (*Grundgesetz*), it nevertheless has binding effect, as applicable statute law, on all bodies of the executive and on all courts.

Thus, the Convention is on the same level as ordinary federal law within the hierarchy of norms of the German legal system. However, its legal force is further enhanced and strengthened by the principle of openness towards international law (*Völkerrechtsoffenheit* and *Völkerrechtsfreundlichkeit*) of the German legal system. The Basic Law explicitly encourages German public authorities to become involved in, and to enter into commitments under, international law, and it takes for granted, so to speak, that these commitments will be implemented on the national level. At the same time, the Basic Law makes the unspoken assumption that the Federal Republic of Germany will fulfil, and will comply with, its commitments under international law. In this way, the Convention attains a special significance, which in fact goes markedly beyond the status of a non-constitutional federal law that it has in legal theory.

## II. General effects (*erga omnes*) of the judgments of the ECHR

When referring to the Convention, I have not of course merely been referring to the text of the treaty itself. I have been referring to the Convention in its enriched form, and to the interpretation it has been given in the case-law of the European Court of Human Rights. It is true that the effect of the judgments of the European Court of Human Rights is merely *inter partes*. The ECHR's landmark judgments, however, have an effect that goes far beyond the individual case, because under Article 32 § 1 of the Convention, it is for the ECHR to interpret the Convention authoritatively and authentically, and to develop it further. Recently, the Federal Constitutional Court, in its decision in *Görgülü* of 14 October 2004<sup>1</sup>, which attracted wide notice, emphasised the “particular importance” of “the decisions of the ECHR ... because they reflect the current state of development of the Convention and its Protocols”. This expressly acknowledges the value of the judgments of the Strasbourg Court in terms of precedent and the normative and guidance function of its landmark judgments.

Taking these fundamental premises as a starting-point, the Convention and the judgments of the ECHR that clarify its provisions can, essentially, be ascribed three general effects *erga omnes*, independently of the specific effects on the individual case. Firstly, *all bodies of the executive and all ordinary courts* must abide by the Convention and orientate their actions towards it. As statute law whose application is mandatory, the Convention can be applied directly without any difficulty, and every German judge and administrative official is

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1. See decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 111, 307 (319).

bound by it. In the event that national provisions exist which are contrary to it, they must be interpreted, in accordance with the principle of the German legal system's openness towards international law, in a manner that is compatible with the Convention so that, theoretically, conflicts cannot arise. In this regard, the Convention has an anticipatory effect – in the best sense of the term – by imposing in advance respect for the rule of law.

Secondly, where in exceptional cases national provisions are contrary to the Convention and are not amenable to an interpretation which is in conformity with it, for instance because of their narrow wording, the *legislature* is called upon to take corrective action. In this respect, the Basic Law's openness towards international law and the principle of consistency of the legal system call for a clarifying intervention on the part of the German legislature, which must then ease the conflict in favour of the Convention and adapt national law accordingly. Past experience shows that the legislature is indeed willing and able to do so. For instance, in response to a judgment of the ECHR<sup>1</sup>, the rules of criminal procedure allowing foreign-speaking offenders to be charged for interpreters' fees were amended in accordance with the recommendations of the Strasbourg Court.

Finally, the Convention and the ECHR's judgments also have a *constitutional-law dimension*. Although nominally they rank below constitutional law, they have an influence on the understanding of the Basic Law too. Very early on<sup>2</sup>, the Federal Constitutional Court established that the Convention should be consulted when interpreting the Basic Law. Although the Convention as well as the Basic

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1. *Luedicke, Belkacem and Koç*, judgment of 28 November 1978, Series A no. 29.

2. See BVerfGE 74, 358 (370), with reference to BVerfGE 35, 311 (320).

Law's catalogue of fundamental rights merely constitute minimum guarantees and at any rate allow for further guarantees, an extensive harmonisation of the corresponding freedoms guaranteed by the Convention and the Basic Law has taken place in this way. Fundamental conflicts in the bipolar relation between the State and the citizen as concerns the abstract understanding of a specific guaranteed right or freedom are therefore no longer an issue.

In *Görgülü*, which I have already mentioned, the Federal Constitutional Court added to the Convention's constitutional-*law* dimension a complementary constitutional-*court* dimension, an aspect which almost went unnoticed in the initial public excitement about the decision: in spite of its status as ordinary federal law, the Federal Constitutional Court has made the Convention a standard of its review where State bodies have not taken it into account in a manner that is relevant to fundamental rights in spite of their being bound by applicable statute law. Since then, the possibility of complaining of a violation of the Convention before the Federal Constitutional Court exists – by claiming the violation of the principle of the rule of law pursuant to Article 20 § 3 of the Basic Law taken in conjunction with the fundamental right that is relevant in the particular case. In this way, the Federal Constitutional Court has created a very efficient lever which enables it itself to supervise respect for the Convention's guarantees. The result of this new line of jurisprudence will probably be that the Federal Constitutional Court will, in the future, have to deal more frequently with issues relating to the Convention, and with the ECHR's judgments. In *Görgülü*, it says quite aptly that “in this way, the Federal

Constitutional Court is indirectly promoting the enforcement of international law”<sup>1</sup>.

All in all, this results in a considerably increased effect of the Convention as compared to previous practice. I would even venture to say that in Germany, because of this, the effect of the Convention on the domestic level is greater than it is in some other States in which the Convention has the status of constitutional law or takes precedence over ordinary statute law, but where citizens do not have the possibility of lodging an individual application with the Constitutional Court.

### **III. Execution of the judgments of the ECHR in individual cases (*inter partes*)**

So much for the general effects of the Convention and of the ECHR’s case-law independently of individual cases. The execution of a specific judgment of the ECHR can be more problematic. In the following, I will first deal with the technical and procedural obstacles to execution and then consider possible implications regarding content and substance.

Under the terms of Article 46, the European Convention on Human Rights leaves to the Contracting States the choice of the means by which they will abide by the judgments of the ECHR. The Convention itself only lays down the destination; it is indifferent as to how to get there. Where the ECHR’s judgment points to the future, its execution does not pose any problems. The violation of the Convention must be ended or avoided; the action that has been objected to must not be repeated. Difficulties arise, however, if the judgment concerns an issue which has already been determined, because under

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1. See BVerfGE 111, 307 (328).

German law the ECHR's judgment does not call into question the finality of the decisions of the domestic courts, nor does it reverse them. Consequently, as things stand, the challenged decisions remain in force on the national level. Only in the field of criminal law has the legislature developed a procedure by which a case that has been concluded by a final domestic decision may be reopened after a contrary judgment by the ECHR: since 1998, the possibility of a retrial exists in criminal cases where the national decision discloses a violation of the

Convention which has been established by the ECHR<sup>1</sup>.

No comparable possibility of a retrial exists in the other fields of law, however, for instance in civil proceedings. Where a particular case has been concluded on the domestic level by a final and binding decision, it is not possible for the national authorities and courts to take into account a contrary judgment by the ECHR and reassess and amend the final domestic decisions. It is true that the analogous application of the criminal procedure provisions on retrial in these cases where violations of the Convention have occurred on specific occasions in the past is discussed in parts of the legal literature, but it has not yet gained acceptance. Under the German law of civil procedure, an applicant who is successful before the Strasbourg Court must consequently be content with the Court's finding of a violation, and, possibly, an award of compensation under Article 41 of the Convention. Admittedly, the Convention, in its Article 41, itself recognises the possibility of such "partial reparation" in national law, and, certainly, the setting up of a retrial procedure is not mandatory either under the Convention<sup>2</sup> or German constitutional law<sup>3</sup>. Nevertheless, the present situation is unsatisfactory. From a legal policy point of view, I still see a need for action by the legislature here. In my opinion, extended possibilities of retrial according to the criminal procedure model would be the most obvious solution for remedial action.

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1. Article 359 of the Code of Criminal Procedure (*Strafprozessordnung*), as amended by the Law of 9 July 1998, provides, *inter alia*: "Reopening of the proceedings concluded by a final judgment shall be admissible for the convicted person's benefit: ... (6) if the European Court of Human Rights has found that there was a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and if the judgment was based on that violation."

2. The ECHR recommends the introduction of the possibility of retrial as the most obvious option, but it does not prescribe it to the Contracting States (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

3. See Pakelli, BVerfG (Committee of Three) of 11 October 1985, *EuGRZ* 1985, p. 654.

Greater difficulties of execution would arise, however, if judgments of the ECHR establishing a violation were to go beyond Article 41 and instruct respondent States to take concrete measures<sup>1</sup>, because the continued finality of the national judgment might be an obstacle to compliance with such an instruction and would first have to be removed through fresh national proceedings. In my opinion, the ECHR would be well advised, if only out of consideration for the rules governing procedure in the Contracting States, to refrain from such concrete instructions wherever possible and not to demand too much.

So much for the technical and procedural difficulties regarding the execution of the judgments of the ECHR. Let me now, in conclusion, touch upon two problems of execution concerning substance, and which have been dealt with in the above-mentioned Federal Constitutional Court's *Görgülü* decision of 14 October 2004, and have given rise to a note of discord. First of all, the Basic Law's fundamental *reservation of sovereignty* must be mentioned. The classification of the Convention as a federal law that is subordinate to the Constitution shows clearly that the Basic Law, in spite of the existing harmonisation and in spite of its interpretation in accordance with the Convention, has, theoretically, the final say. Openness towards international law only operates within the – broad – framework of the Basic Law's democratic system under the rule of law. However, in relation to the Convention, this reservation is essentially theoretical, because an interpretation and application of the Convention that is incompatible with

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1. The instruction to release the applicant which was given by the ECHR on 8 April 2004 in *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 198 et seq. and point 14(a) of the operative provisions) is, however, an exception in so far as the national court had already given a final judgment ordering the release, but this judgment had not been complied with by the domestic authorities.

the fundamental principles of the Basic Law has not yet occurred, and I cannot see it happening.

The second substantive difficulty is less fundamental but more important in practice: it concerns the problematic execution of judgments of the ECHR in the context of national litigation which needs to strike a balance between the numerous diverging interests of the parties concerned and is characterised by *multipolar legal relations connected with fundamental rights*, as is often the case, for instance, in family law and the protection of personality rights. In our opinion, a *mechanical* execution of the ECHR's judgment in such cases is out of the question because, due to the nature of an individual application to the ECHR, which confers the capacity of party to the proceedings only to the applicant and the respondent State, such execution cannot do equal justice in every case to the conflicting interests of the various parties in the national litigation. In *Görgülü*, for instance, apart from the complainant's rights, the rights of the foster parents and of the child itself had to be taken into account as well. It is precisely where such multipolar legal relations concerning fundamental rights exist that the ordinary courts have the task of transposing a judgment of the ECHR into the differentiated and graduated system of the corresponding area of national law, and where, exceptionally, the mechanical enforcement of a judgment of the ECHR might result in a violation of the Constitution, which must be avoided.

Also in such cases of multipolar legal relations touching on fundamental rights, the *evaluation* made in the judgment of the Strasbourg Court must be fully observed; it needs, however, to be complemented by taking into account the rights of the parties who were not involved in the Strasbourg proceedings and must be fitted into a

domestic decision that performs a comprehensive balancing exercise. Basically, this restriction is a mere matter of course; in comparable cases, the Federal Constitutional Court also will not deliver a final judgment on the merits but will refer the case back to the ordinary courts for a fresh judgment that takes the Federal Constitutional Court's legal opinion into account.

What applies equally to both the ECHR and the Federal Constitutional Court is that they must, in their determination of individual cases, resist the temptation of acting too much as of a court of appeal and assuming the competences of ordinary judges. The scope of their review of the decisions of the ordinary courts, especially where multipolar private-law relations are involved, should be determined with care; in particular, the review should not bear on the correctness of the ordinary courts' decisions under the general law but, instead, on the restriction on claims of violation of specific constitutional provisions or specific human rights guarantees. Constitutional courts should only intervene where, in the interpretation and application of ordinary law by the competent courts, errors become apparent which are based on a fundamentally incorrect view of the significance of a fundamental right or of a human right and have a considerable impact on the specific legal case. This applies above all to cases involving conflicting human rights. Moreover, for the European Convention on Human Rights, Article 53 of the Convention applies. Virtually every solution to a human rights conflict that deviates from the case-law of the national constitutional court, but also from the case-law of the ordinary domestic courts, will inevitably result in the impairment, or in the restriction, of a fundamental right recognised at the domestic level. In the context of multipolar relations, a solution to such a conflict that deviates from national

case-law results in extending the human right of one person, or attaching more weight to it, while restricting the human right of another.

#### **IV. Concluding remark**

Ladies and gentlemen, I come to the end of my paper. I think that as regards the application of the European Convention on Human Rights and the execution of the ECHR's judgments, things look comparatively good in Germany. We have found ways and means of increasing the Convention's force in spite of its status as non-constitutional statute law, and the fact that the ordinary courts increasingly deal with Convention law shows that Strasbourg's long arm has reached the basis of the German court system. Nevertheless, the fine tuning of the legal systems must be further improved. We are willing to continue on this path also in the future.

**ELISABET FURA-SANDSTRÖM**

JUDGE OF THE EUROPEAN COURT  
OF HUMAN RIGHTS

*Elisabet Fura-Sandström*

A man of many talents is our next speaker.

Lord Justice Sedley is familiar to many of us here present through his legal writings, as a scholar from Cambridge University where he graduated, as a barrister for almost three decades practising in the fields of civil liberties and discrimination law, and as a person instrumental in the drafting and introduction of the Human Rights Act in the United Kingdom.

To a broader audience he is known as a contributor to the *London Review of Books*, where he writes about the law.

Currently, he serves as Judge of the Court of Appeal of England and Wales and President of the British Institute of Human Rights.

Less known is perhaps the fact that Lord Justice Sedley has worked as a translator and that he once played guitar with Bob Dylan.

Unfortunately, Bob Dylan was not able to join us for this important occasion, but I am convinced that what Lord Justice Sedley will tell us about his personal reflections on the reception and application of our Court's case-law will be just as interesting, thought-provoking and entertaining as any Bob Dylan song.

We are very pleased and grateful that you accepted our invitation, Lord Sedley. The floor is yours.

# **Sir STEPHEN SEDLEY**

LORD JUSTICE OF APPEAL,  
ENGLAND AND WALES

Personal reflections  
on the reception and application  
of the Court's case-law

*Sir Stephen Sedley*

It is a curious thing that one of the European States which played a central role in the drafting of the European Convention on Human Rights and was one of its first signatories, namely the United Kingdom, should have waited fifty years before making the Convention part of its own law. It is true that the monist States of Europe – France for example – delayed ratification for a number of years precisely because the act of ratification would automatically incorporate the Convention in their domestic law. But the United Kingdom, as a dualist State, did the reverse: it ratified the Convention but for half a century would not incorporate it. We knew, of course, that Article 1 required us to secure the Convention rights and freedoms to everyone within the United Kingdom's jurisdiction, but the conventional wisdom was that the common law, with some assistance from Parliament, already did this. After all, where had the drafters of the Convention got the idea of a fair trial and freedom of speech, if it was not from us?

But, as Sganarelle said when explaining to G ronste how it was that the heart was no longer located on the left nor the liver on the right, *nous avons chang  tout cela*. For, as you

know, in 1998 the United Kingdom Parliament finally passed the Human Rights Act, making all the substantive Convention rights justiciable in our domestic courts. And before the Act came into force in October 2000, a number of the judges of the European Court of Human Rights took part in the major series of regional seminars at which the entire judiciary of the United Kingdom were introduced to this new source of law. The effect on English judges of hearing a Strasbourg judge describe how the adjudication of human rights was, exactly like our own adjudications, a logical process of principled problem-solving was positive and dramatic.

We now have five full years' experience of implementing the Convention in our own courts. But the reception of the Convention has not been a simple process of saying "Welcome, come in, warm your feet by the fire". It has been an uneven and sometimes problematical process, but – in my opinion at least – ultimately a positive one which is irreversibly altering our legal culture. I have to say, however, that this would not have been the case if all we had done was adopt the bare words of the Convention. As Napoleon repeatedly reminded the committee that wrote the *Code Civil*, the object of a document of this kind is to say as *little* as possible. It is the function of the judges who interpret and enforce it to put flesh on the bones. It is not a mere judicial *folie des grandeurs* to say that a text without jurisprudence is a body without life.

The Human Rights Act operates in two main ways. Firstly, it requires all statute law to be interpreted as far as possible in conformity with the Convention. In doing this, it requires our courts to "take into account" the jurisprudence of this Court. In our pragmatic way, we have translated this requirement into a doctrine of precedent, on the simple ground that, since Strasbourg usually follows its

own precedents, we shall only be condemned eventually in this building if we do not also follow them.

Thus I am hopeful that, with the Court's recent guidance, we shall at last develop a proper law of privacy. But our courts reserve the right to question your jurisprudence. They have done so, for example, in relation to your decision in *Saunders v. The United Kingdom*<sup>1</sup>, which we consider goes unreasonably far in protecting suspects from self-incrimination. In a judgment I wrote late last year, I took the liberty of questioning some of the reasoning of the Grand Chamber in *Banković and Others v. Belgium and Others*<sup>2</sup>. These are not acts of indiscipline or insubordination. They are part of the opportunity which a dualist system affords for a constructive dialogue between national and supranational courts. There is nothing which prevents this Court from modifying its own jurisprudence in response to the considered judgments of national courts.

Secondly, the Human Rights Act requires all public authorities, including the courts, to act consistently with the Convention. The only public body exempted from this second requirement is Parliament: if they cannot read it down, the courts can declare its legislation to be incompatible with the Convention. But only Parliament can correct the incompatibility.

Like the proverbial effects of education, however, it is possible that the most profound effects of the Human Rights Act are invisible. They include changes in our modes of legal reasoning, so that, for example, the structured inquiry into proportionality which Strasbourg has developed is replacing simple yes-or-no decisions as to whether something is reasonable; or so that the common

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1. Judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI.

2. (dec.) [GC], no. 52207/99, ECHR 2001-XII.

law, which is not directly touched by the Human Rights Act, slowly adopts the same shape as the Convention; or that private-law rights and obligations come to conform to Convention standards, notably in the areas of family law and employment law.

One particular surprise has been the effect of section 19 of the Act, which requires ministers to certify whether their draft legislation is consistent with the Convention. This was regarded as a piece of political window-dressing, but it has had a powerful effect. It has caused the government, in order to avoid accusations of knowingly violating human rights, to introduce provisions which would not otherwise have been introduced. The sharpest recent example was the inclusion by the government, because of section 19, of a proviso that a new rule withdrawing social security benefits from asylum-seekers who do not apply for asylum on arrival must not have the effect of violating their Convention rights. It enabled my court to hold, citing Article 3 of the Convention, that the State could not lawfully leave people cold, ill and hungry on the streets while their asylum claims were being processed.

Although a dualist system gives no direct effect even to decisions in cases brought against the United Kingdom, adverse judgments of the Court are always given effect. Some eleven statutes were amended, for example, in response to *Saunders*, despite serious judicial and administrative reservations about it. In many cases compensation is paid by the State in lieu of reopening proceedings. But what is regarded as equally important is changing the rules so that the breach of the Convention is not repeated.

One thing that is quietly gratifying to us has been to see how the judgments of your Court have moved steadily

towards the British model of full – sometimes extremely full – exposition of facts and reasons. There is a value to this, just as there is a problem with the Delphic mode of the French *arrêt*. Among other things, it enables other courts to discern what is incidental and what constitutes legal principle in each decision. We note too that, despite its early insistence that yours is not a precedent-based court, the fundamental requirement that like cases should be decided alike has moved you steadily towards a system of precedent with which we, in the common-law tradition, are very comfortable. It enables us in turn to pay close regard to the jurisprudence of this Court in coming to our own decisions on human rights issues.

But we in Britain enjoy one considerable privilege in this regard. English is one of the Court's two languages, and we are able to access and read all its judgments in full. So, of course, are the many Europeans here today who speak better English than I do – but, all modesty aside, you are not wholly typical; and even in this polyglot gathering the interpreting cabins are hard at work. The same is true of the francophone member States, and of those member States which have facilities for routinely translating the Court's judgments into their own languages. But, while I do not have figures, I doubt whether these are more than a small minority. Last December I learnt from Judge Zagrebelsky that a benefactor has offered to subsidise the translation of the Court's judgments into Italian – something which so far has not been routinely done.

A team headed by our recent Lord Chief Justice, Lord Woolf, reported last month to the Council of Europe and to the President of this Court on the crisis in the Court's working methods. Among his recommendations, Lord Woolf suggests a greater use nationally of non-litigious forms of dispute resolution and a greater use by

the Court of pilot judgments, which will permit repeat cases to be disposed of summarily. These proposals reflect a move towards a principle of subsidiarity which, while the Court under President Wildhaber has been promoting it for some years now, does not have the legal primacy which it enjoys, for example, in the law of the European Union. Indeed, the requirement that domestic remedies must be exhausted has little value if national systems are unable to internalise the law that they are required to apply. Such a principle would, if it could, place the primary responsibility for judicial enforcement of human rights upon the courts and institutions of each member State. As Lord Woolf noted, the issue of implementation fell outside his remit – a fact which in itself is troubling; but in a very brief final chapter he wrote:

“If the Court’s long-term viability is to be ensured, it is essential the member States take appropriate measures to implement the Court’s judgments and prevent repeat violations. ... Both the Court and member States are adversely affected by the non-implementation of the Court’s judgments. The Court suffers from an (unnecessary) increase in its workload, whilst member States are faced with the expense and inconvenience that arises domestically from repetitive cases.”

The real question is how to stop such complaints arising.

The single step which, if I may respectfully suggest it, would begin to make subsidiarity work for Strasbourg as it does for Luxembourg would be to make the essential elements of the Court’s jurisprudence accessible in the language of every member State. By this I do not mean full-scale translations of all the Court’s judgments. I mean the translation of a summary of every significant case, together with the handful of paragraphs from the judgment

which ordinarily encapsulate the jurisprudence that is being applied: a total of perhaps three or four printed pages for each case.

There is no reason for this to be done in Strasbourg, and every reason for it to be done locally, whether in a university, a translating agency, a law court or a private house. The important thing is a guaranteed source of funding, competent translation and a good distribution network. Such a network will enable the judges, administrators and legislators of the member State to access and try to respect the Court's jurisprudence, and – every bit as important – will enable local people and their lawyers to make better-informed decisions as to whether or not they have a viable case before bombarding the Registry with new applications.

To expect the courts, the citizens, the lawyers and the institutions of member States to respect law which they cannot read in their own language is not only unrealistic: it is arguably a repetition of the injustice which the English radical John Lilburne pointed out 350 years ago when he was put on trial in a court whose written proceedings were in Latin and Norman French:

“[You] put the niceties and formalities of the law upon me, ... which are writ in such language and tongues as I cannot read, much less understand; and would you destroy me for the not knowing of that which it is impossible for me to know?”

I hope I may respectfully suggest that the Council of Europe, by spending some serious money now on the dissemination of summaries of your judgments in the language of each member State, can help to save the Court

from becoming a victim of what has so far been its own remarkable success.

# **LUZIUS WILDHABER**

PRESIDENT  
OF THE EUROPEAN COURT  
OF HUMAN RIGHTS

Speech given  
on the occasion of the opening  
of the judicial year, 20 January 2006

*Luzius Wildhaber*

Presidents, Secretary General, Excellencies, friends and colleagues, ladies and gentlemen, as always, it is a great pleasure for me to welcome you here today to our traditional ceremony to mark the opening of the judicial year. Many guests, including around fifty Presidents and other judges from Supreme and Constitutional Courts, are honouring us with their presence this afternoon. Among them, I should like to welcome in particular our distinguished guest of honour, Mrs Tülay Tuğcu, President of the Constitutional Court of Turkey, and the three rapporteurs for this afternoon's seminar, Mr Egidijus Kūris, President of the Lithuanian Constitutional Court, Mr Hans-Jürgen Papier, President of the Federal Constitutional Court of Germany, and Lord Justice Sedley, from the Court of Appeal of England and Wales, to whom I would like to express our sincere gratitude for their most stimulating contributions.

There are far too many distinguished guests here this evening to name them all, but just let me mention that we are happy to welcome the mayor of our host city, Mrs Fabienne Keller. On a personal note, I am delighted to say that my own family is represented by my daughter Anne.

I would also wish to greet two members of the Group of Wise Persons, Professor Rona Aybay and President Veniamin Yakovlev.

Since the entry into force in 1998 of Protocol No. 11, which established the fully judicial character of the European Convention machinery, the importance and relevance of the European Court of Human Rights has continually increased. As I put it in my address to the Council of Europe Summit in Warsaw in May 2005, it is more than just another European institution, it is a symbol. It harmonises law and justice and tries to secure, as impartially and as objectively as is humanly possible, fundamental rights, democracy and the rule of law so as to guarantee long-lasting international stability, peace and prosperity. It strives to establish the kind of good governance that Ambrogio Lorenzetti depicted in the town hall of Sienna some 665 years ago. The European Convention on Human Rights has brought into being the most effective international system of human rights protection ever developed. As the most successful attempt to implement the United Nations Universal Declaration of Human Rights of 1948 in a legally binding way, it is part of the heritage of international law; it constitutes a shining example in those parts of the world where human rights protection, whether national or international, remains an aspiration rather than a reality; it is both a symbol of, and a catalyst for, the

victory of democracy over totalitarian government; it is the ultimate expression of the capacity, indeed the necessity, for democracy and the rule of law to transcend frontiers.

It is a privilege for us judges to be at this Court. We may have workload problems, but the avalanche of applications that reaches us simply reflects the importance the Court has acquired in the minds and hearts of all Europeans. We may be confronted by a lack of understanding in some quarters as to what an independent court is, but since our arguments are principled, we trust that they will prevail. We may be criticised for certain judgments, but this is quite legitimate and indeed inevitable in the pluralistic democracy we describe in these very judgments and of which we ourselves are a part. All in all, our mission is a deeply enriching one.

Sometimes one feels like one is wandering in a blossoming garden, where one is constantly discovering new colours and new shades. And so we have the exciting, sometimes exhilarating and sometimes very demanding and challenging task of making human rights a reality across Europe. And since human rights come as a package, we have in essence the task of giving a tangible content to such elementary notions as the principles of democracy, the rule of law and minority rights through decisions we give on a daily basis which define the content of human rights in a modern, democratic society.

In the first years of the new Court, some critics expressed concern about what they called politically motivated double standards, reflected in a more flexible interpretation of the Convention in cases concerning the

new member States. Remember that? There have been no double standards. The Court rightly showed understanding for the transitional period of consolidation of democracy in cases such as *Rekvényi v. Hungary*<sup>1</sup> or for the need to protect the essence of democracy against subversion in cases such as *Refah Partisi (the Welfare Party) and Others v. Turkey*<sup>2</sup>. However, these cases did no more than express the need to confirm and consolidate democracy and the rule of law and to prevent them being undermined.

The leitmotiv of the Court's case-law has been continuity in the framework of an evolutive jurisprudence. Thus, the dynamic interpretation of the Convention, initiated by our predecessor institutions, has been pursued by the Court, as can be seen in cases such as *Selmouni v. France*<sup>3</sup>, *Matthews v. the United Kingdom*<sup>4</sup>, *Lustig-Prean and Beckett v. the United Kingdom*<sup>5</sup>, *Immobiliare Saffi v. Italy*<sup>6</sup>, *Thlimmenos v. Greece*<sup>7</sup>, *Rotaru v. Romania*<sup>8</sup>, *Brumărescu v. Romania*<sup>9</sup>, *Kudła v. Poland*<sup>10</sup>, *Cyprus v. Turkey*<sup>11</sup>, *Christine Goodwin v. the United Kingdom*<sup>12</sup>, *Stafford v. the United Kingdom*<sup>13</sup>, *Sovtransavto Holding v. Ukraine*<sup>14</sup>, *Kalashnikov v. Russia*<sup>15</sup>, *Öcalan v. Turkey*<sup>16</sup>, *Maestri v. Italy*<sup>17</sup>, *Assanidze v. Georgia*<sup>1</sup>, *Broniowski v. Poland*<sup>2</sup>,

1. [GC], no. 25390/94, ECHR 1999-III.

2. [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II.

3. [GC], no. 25803/94, ECHR 1999-V.

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

5. Nos. 31417/96 and 32377/96, 27 September 1999.

6. [GC], no. 22774/93, ECHR 1999-V.

7. [GC], no. 34369/97, ECHR 2000-IV.

8. [GC], no. 28341/95, ECHR 2000-V.

9. [GC], no. 28342/95, ECHR 1999-VII.

10. [GC], no. 30210/96, ECHR 2000-XI.

11. [GC], no. 25781/94, ECHR 2001-IV.

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

13. [GC], no. 46295/99, ECHR 2002-IV.

14. No. 48553/99, ECHR 2002-VII.

15. No. 47095/99, ECHR 2002-VI.

16. [GC], no. 46221/99, to be reported in ECHR 2005-IV.

17. [GC], no. 39748/98, ECHR 2004-I.

*Nachova and Others v. Bulgaria*<sup>3</sup>, *Hirst v. the United Kingdom (no. 2)*<sup>4</sup>, or *Sørensen and Rasmussen v. Denmark*<sup>5</sup>, and I could cite many more. Of course, our case-law also evolves through inadmissibility decisions and findings of no violation. As examples, I might mention, apart from the cases I have already cited of *Rekvényi and Refah Partisi (the Welfare Party) and Others*, those of *Gratzinger and Gratzingerova v. the Czech Republic*<sup>6</sup>, *Streletz, Kessler and Krenz v. Germany*<sup>7</sup> (the so-called “*Mauerschützenfälle*”), *Al-Adsani v. the United Kingdom*<sup>8</sup>, *Z and Others v. the United Kingdom*<sup>9</sup>, *Banković and Others v. Belgium and Others*<sup>10</sup>, *Şahin v. Turkey*<sup>11</sup>, or *Jahn and Others v. Germany*<sup>12</sup>, as well as *Von Maltzan and Others v. Germany*<sup>13</sup>. What I am saying is that our Court has continued to offer guidance to national courts on the development and evolution of human rights protection. Yet at the same time it has followed precedent, except where cogent reasons impelled it to adjust the interpretation of the Convention to changes in societal values or in present-day conditions. And it has followed precedent not only in respect of judgments concerning particular respondent States, but also in recognising that the same European minimal standards should be observed in all member States. It is indeed in the interests of legal certainty, of a coherent development of the Convention case-law, of equality before the law, of

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1. [GC], no. 71503/01, ECHR 2004-II.

2. [GC], no. 31443/96, ECHR 2004-V.

3. [GC], nos. 43577/98 and 43579/98, to be reported in ECHR 2005-VII.

4. [GC], no. 74025/01, to be reported in ECHR 2005-IX.

5. [GC], nos. 52562/99 and 52620/99, 11 January 2006.

6. (dec.) [GC], no. 39794/98, ECHR 2002-VII.

7. [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II.

8. [GC], no. 35763/97, ECHR 2001-XI.

9. [GC], no. 29392/95, ECHR 2001-V.

10. [GC], no. 52207/99, ECHR 2001-XII.

11. No. 31961/96, 25 September 2001.

12. [GC], nos. 46720/99, 72203/01 and 72552/01, to be reported in ECHR 2005-VI.

13. (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, to be reported in ECHR 2005-V.

the rule of law and of the separation of powers for the Court to have in principle a flexible approach to the doctrine of precedent.

Obviously in describing our tasks in this way, I espouse a certain view of what the role of a European quasi-constitutional judge should be. Our Court is to a certain extent a law-making body. How could it be otherwise? How is it possible to give shape to Convention guarantees such as the prohibition of torture, equality of arms, freedom of expression or respect for private and family life, if – like Montesquieu – you see in the judge only the mouthpiece of the law? Such guarantees are programmatic formulations, open to the future, to be unfolded and developed in the light of changing conditions. My personal philosophy of the task of judges is that they should find their way gradually, in a way experimentally, inspired by the facts of the cases that reach a court. As you will realise, I do not believe in closed theoretical systems that are presented as sacrosanct on the basis of speculative hypotheses or ideologies. Such monocausal explanations ignore the complex and often contradictory manner in which societies and international relations (and incidentally also individual human beings) evolve. Conversely, it has to be acknowledged that in developing the law it is difficult to avoid value judgments, whether on domestic or on international law. This applies especially to human rights, which, anchored as they are in the concepts of constitutionalism, democracy and the rule of law, are value judgments *par excellence*.

Let me emphasise that I do not plead for a “*gouvernement des juges*”. To give broad answers which are in no way called for by the facts of the case is to confuse a judicial mandate with that of the legislature or

of the executive, and cannot and should not be the role of courts. I agree with Jutta Limbach, the former President of the German Constitutional Court, who stated: “The tighter the Court ties the net of constitutional conditions, the more it restricts the potential of Parliament to act and the more it paralyses its political creativity.”

The courts are not instruments of power. In the famous *Federalist Papers*, Alexander Hamilton, the great theoretician of the American Constitution, wrote that the government holds the sword, the legislature holds the money box and the only thing the courts hold for themselves is their independence. It is that independence which puts us in a position to watch over fairness and justice within governments.

The *Sachsenspiegel* – the oldest written record of customary law in Germany going back, in its earliest version, to the years 1220-35 – defined what and how a judge should be as follows: “Each judge should have four virtues ... The first one is justice, the second one wisdom, the third one fortitude, the fourth one moderation.” I would venture to suggest that this is still a helpful way of looking at what a judge is and does. Judges might also be inspired by the motto of the Puritans, “Do what is fair and do not fear anyone”. I would like to add that whereas international human rights judges should indeed do what is fair and should fear no one, they should at the same time have regard for the context in which they live and for the aims they are serving. Human rights are our common responsibility. First and foremost they must be respected by the national parliaments, governments, courts and civil society at large. Only if they fail does our Court come in. The subsidiarity I describe and advocate here is more than pragmatic realism, it is also a way of paying respect to

democratic processes (always provided they are indeed democratic), and I am firmly convinced that it is the best means of translating the “human rights law in law books” not only into a “human rights law in courts”, but also into a “human rights law in action” and – hopefully – in reality in all of our member States.

I should now like to describe some of the more important cases the Court decided in 2005 which, once again, provide an illustration of what lies at the heart of our activities and reflection.

The judgment in *Leyla Şahin v. Turkey*<sup>1</sup> is one of that rare breed of pivotal judgments that can be said to develop a real theory of democratic society. The case concerned a Turkish student who was refused access to university for wearing the Islamic headscarf. On the merits, the Grand Chamber endorsed the earlier decisions of the Fourth Section and the Turkish Constitutional Court, holding that there had been no violation of her right to freedom of religion. After reiterating that pluralism and tolerance were among the fundamental principles of any democratic society, the Grand Chamber said that it also had to take into account the need for the public authorities to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which was vital to the survival of democratic society. In this case, it found that, in a context in which the values of pluralism and respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should wish to preserve the secular nature of the institutions concerned and so consider it

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1. [GC], no. 44774/98, to be reported in ECHR 2005-XI.

contrary to such values to allow religious attire, including the Islamic headscarf, to be worn.

There have been new developments on Article 14, which prohibits discrimination in the enjoyment of the Convention rights. In *Nachova and Others*, cited above, the Grand Chamber was the first formation of the Court to apply this provision in conjunction with Article 2, which protects the right to life. The case originated in a military operation in which two young deserters of Roma origin were shot and killed by members of the military police who had received orders to track them down. The applicants, who were members of the victims' families, alleged among other things that prejudice and hostile attitudes of a racist nature had played a role in their deaths. On the merits, the Court found that it had not been established that the men had been killed as a result of racism. However, it went on to find that the domestic authorities should have examined, in the course of their investigation, whether racist motives had played a role in the men's deaths and, if so, they should have brought those responsible to justice.

In addition to reiterating certain basic principles governing Articles 5 and 6, the Grand Chamber's judgment in *Öcalan v. Turkey*<sup>1</sup> offered the Court an opportunity to examine two important issues. With regard to the death penalty, it found under Article 3 that imposing a death sentence after an unfair trial wrongfully subjected the person concerned to the fear that he or she would be executed. In circumstances where there existed a real possibility that the sentence would be enforced, the fear and uncertainty as to the future the death penalty generated meant that it infringed Article 3. As to the consequences of a violation of Article 6, the Court

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1. [GC], no. 46221/99, to be reported in ECHR 2005-IV.

considered that where an individual, as in the instant case, had been convicted by a court that did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represented in principle an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent State in order to discharge its obligations had to depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case.

In *Mamatkulov and Askarov v. Turkey*<sup>1</sup>, the Court reviewed its *Cruz Varas and Others v. Sweden*<sup>2</sup> jurisprudence in the light of developments in international law concerning interim measures. Referring to recent decisions of other international tribunals such as the International Court of Justice, the Inter-American Court of Human Rights and the Human Rights Committee of the United Nations, it said that henceforth “[a] failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant’s complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention”.

Lastly, in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*<sup>3</sup>, the Court made an important and much-awaited contribution to clarification of the relationship between the Convention and Community law. It found that the protection of fundamental rights by Community law, unless manifestly deficient, could be considered “equivalent” to that of the Convention

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1. [GC], nos. 46827/99 and 46951/99, to be reported in ECHR 2005-I.

2. Judgment of 20 March 1991, Series A no. 201.

3. [GC], no. 45036/98, to be reported in ECHR 2005-VI.

system. Consequently, there was a presumption that a State would not depart from the requirements of the Convention when it was merely implementing legal obligations flowing from its membership of the European Union.

The striking-out judgment in *Broniowski v. Poland*<sup>1</sup>, marked a satisfactory conclusion to proceedings that had produced the first so-called “pilot” judgment which the Court had delivered on the merits in June 2004. It concerned the case of an applicant who had been unable to secure, through a lack of funds, the payment of a debt owed to him by the Polish State as compensation for expropriation following changes made to the international borders after the Second World War. In its judgment on the merits, the Court had found a violation of the right of property and reserved the question of just satisfaction while inviting the respondent State to take, in addition to individual measures in the applicant’s case, general measures capable of remedying the situation of the 80,000 or so potential applicants in the same situation as Mr Broniowski. I should like to pay tribute to the Polish Government for complying with the judgment so expeditiously and for their constructive attitude throughout the negotiations that led to the conclusion of a friendly settlement that enabled the Court to strike the case out of the list.

I now come to the third part of my speech, devoted to the reform of the Convention system, as part of which we must consider measures that will make it possible for the Court to continue to fulfil its crucial and unique role in the coming years and decades, in the present and future European institutional framework.

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1. (friendly settlement) [GC], no. 31443/96, to be reported in ECHR 2005-IX.

Our Court, the so-called new Court of Protocol No. 11, began its activity in 1998 with a substantial backlog of some 7,000 applications, many of which were complicated cases requiring detailed judgments on the merits. As early as mid-2000, the Court drew attention to the danger that the workload would become uncontrollable. It organised a reflection day on possible reform avenues. As part of the follow-up to the Rome Conference marking the 50th anniversary of the Convention, the Ministers' Deputies set up an Evaluation Group to consider guarantees for "the continued effectiveness of the Court, with a view, if appropriate, to making proposals for reform".

The Group's recommendations, submitted in September 2001, as well as the continuing and apparently inexorable rise in the number of cases, led to the preparation of Protocol No. 14. The Court submitted a position paper in September 2003 and proposed a separate filtering system and a new pilot-judgment procedure for repetitive cases. Neither of the proposals was adopted, but the pilot-judgment procedure found support in Resolution Res(2004)3 of the Committee of Ministers and was successfully implemented by the Court in *Broniowski*.

Protocol No. 14 brings about four main procedural changes. The single-judge formation for clearly inadmissible applications; the extended competence of the three-judge Committees instead of seven-judge Chambers for applications which are "already the subject of well-established case-law of the Court"; the joint examination of admissibility and merits of applications; and the "significant disadvantage" as a new admissibility criterion. The Court urges all member States to ratify Protocol No. 14 forthwith. It will be ready to apply the Protocol as soon as it comes into force.

Two extensive audits by the Internal Auditor and by a British external auditor carried out in 2004 gave a full picture of a good many aspects of the Court's internal workings. Briefly put, the Internal Auditor stated, and the external auditor confirmed, that the Court would need, on top of the 530 persons it currently employs, another 660 persons in order to cope with all incoming applications, leaving aside the backlog.

In addition to the two audit reports, the former Lord Chief Justice of England and Wales, Lord Woolf of Barnes, carried out a management report on the Court. Let me quote from his report:

“The Court has been extensively audited and reviewed, but despite possible ‘audit fatigue’ we found everyone we met to be open, welcoming and helpful. We were struck throughout by the dedication of the staff, and their positive and pro-active attitude in the face of an ever-growing workload which would, in many situations, lead to low morale and apathy. The lawyers and judges of the Court are all extremely committed, and are constantly looking to innovate and improve, and try out new working methods. It is, in my view, to their credit that the Court continues to function in the face of its enormous and often overwhelming workload.”

As we see it, the Court has been amply vindicated by the various reports. We now wish to concentrate on our real work, of which we have plenty. Last year, in 2005, some 45,500 applications were lodged with the Court, and at the end of 2005, 81,000 applications were pending before the Court, of which a still too high proportion constitutes backlog. We are the first to recognise how high these figures are. But the true miracle lies in the fact

that the backlog figures are not much higher. It is only thanks to the constant, tireless efforts of the Court – of the judges and the Registry, to all of whom I pay a richly deserved tribute – to streamline, reconsider, improve and simplify existing procedures and working methods that we have survived as successfully as we have.

The Court's methods have continually evolved and it has constantly reinvented itself and its procedures. The most recent result has been that it delivered 1,105 judgments in 2005, which constitutes an increase of around 54% as compared to 2004.

We will of course continue to review our working methods and procedures. In doing so, we will be responding to the recommendations made by Lord Woolf, many of which are indeed already under way or envisaged. I note with satisfaction the Secretary General's willingness to implement quickly those recommendations for which his assistance will be required. I would also wish to pay tribute to the member States of the Council of Europe, and their representatives here in Strasbourg, for the financial effort they have made in approving the Court's budget for 2006. True, the Court would have preferred to have had a three-year programme adopted with an annual increase of 75 staff. But member States have accepted an increase of 46 staff members in difficult financial circumstances. We do appreciate this special effort, which will make it possible to implement one of Lord Woolf's recommendations, based on a proposal that was already on the table, that is, to set up a secretariat with the specific task of dealing with backlog cases.

The eleven Wise Persons, appointed in the aftermath of the Warsaw Summit of May 2005, have begun their

work under the chairmanship of Gil Carlos Rodríguez Iglesias, the former long-time President of the Court of Justice of the European Communities. We await their proposals with optimism, given the high competence and the excellent qualifications of the members of the Group. We expect that full attention shall be given to their future views, and that their proposals will be implemented promptly.

Ladies and gentlemen, as you will have understood from what I said earlier, my time as President has been and continues to be an immensely rewarding one, in terms both of the colleagues that I have, and have had, the pleasure of working with and of what we feel we have accomplished over that period. However, I find it very hard to understand or accept the difficulties the Court has encountered in establishing its institutional position in accordance with the text and spirit of Protocol No. 11 as a fully independent judicial organ. These matters may also be addressed by the Wise Persons in the course of their work, as they go to the effectiveness of the Convention system, but I wish to mention them here. There are three principal problems.

1. The first point concerns the Court's budget. The fact that our budget is part of the budget of the Council of Europe is not objectionable as such. However, the Court's budget should be voted on the basis of a request and explanations that stem directly from the Court. Moreover, the Court should manage autonomously the budget that has been voted. The necessary arrangements for this could be implemented easily and rapidly, and it would also increase efficiency.

2. The second point concerns the appointment of the Court's staff. All other international courts appoint,

promote and exercise disciplinary powers over their staff, either on the basis of a specific legal rule (for example, at the International Criminal Court) or on the basis of a specific agreement with the respective Secretary General (for example, at the United Nations for the *ad hoc* international criminal courts or at the Organisation of American States for the Inter-American Court of Human Rights). The Court's Rules Committee has submitted proposals to guarantee such operational independence. Opposition to these proposals purports to rely on the Council of Europe's staff regulations, which are of course based on the Statute of the Council of Europe, which itself pre-dates the Convention. The staff regulations should have been amended long ago to bring them into conformity with the Convention, and certainly since Protocol No. 11 amended Article 25 of the Convention, which now states that "the Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court". Let me just add that it would cost nothing to do this and that, in addition to the principle of judicial independence, sound management and plain common sense suggest that the body that has authority in practice over the Registry staff should also be empowered to appoint, promote and, if necessary, discipline them.

3. The third point concerns the total lack of a scheme of pensions and social security for judges. The approach adopted to this problem by the Council of Europe last year entirely failed to address the matter of principle that lies at the heart of this question. The present situation is incompatible with the notion of an independent judiciary under the rule of law, as well as being contrary to the Council of Europe's own Social Charter. It is high time for the Council of Europe to address the matter of

principle at stake and assume the responsibilities flowing from it.

Ladies and gentlemen, let me finish by quoting the ambassador of one of the member States of the Council of Europe who recently paid me a courtesy visit. Somewhere in the course of our conversation, he said: “Mr President, this Court is the ultimate expression of justice.” And he added: “It represents justice accessible to everyone.” One could hardly better summarise the essence of the Court’s role and its two basic components: justice and accessibility. And that is probably how we would like to describe our role: being accessible to help to realise law and justice in order to contribute to building a freer and more just society.

It is time now for me to turn to our guest of honour, Mrs Tuğcu, President of the Turkish Constitutional Court. Mrs Tuğcu, let me assure you that we are very pleased to have you here today. Your court has done a lot recently for human rights in your country. We are all keen to hear more about it. Mrs Tuğcu, you have the floor.

# TÜLAY TUĞCU

PRESIDENT  
OF THE CONSTITUTIONAL COURT  
OF TURKEY

Speech given  
on the occasion of the opening  
of the judicial year, 20 January 2006

*Tülay Tuğcu*

Mr President, distinguished colleagues, ladies and gentlemen,

I am very honoured to address this distinguished audience. I wish to take this opportunity to express my sincere thanks to President Wildhaber for giving me the chance to be with you today at the opening ceremony of the new judicial year of the European Court of Human Rights.

Before I comment on the place of the European Convention on Human Rights in the Turkish legal system in general and in the case-law of the Turkish Constitutional Court in particular, let me speak briefly about our Constitutional Court.

The Constitutional Court, being one of the early examples of the European model of constitutional jurisdiction, was established by the 1961 Constitution and started working on 25 April 1962. The structure and functions of the

Constitutional Court envisaged in 1961 were, to a great extent, maintained by the 1982 Constitution.

The Constitutional Court is composed of eleven full members and four substitute members. Although nomination of the judges is by different institutions, their appointment has been exclusively vested in the President of the Republic. The plenary is composed of all eleven judges and, sitting in camera, takes decisions by absolute majority except decisions concerning the dissolution of political parties which require a three-fifths' majority.

Our court has been, first and foremost, charged with examining the constitutionality of laws and decrees having the force of law and the Rules of Procedure of the Turkish Grand National Assembly both *in abstracto* and in their application. In addition to this principal task our court, sitting as the Supreme Court, tries, *inter alia*, the President of the Republic, members of the Council of Ministers and members of higher courts for offences relating to their functions; audits the income and expenditure of political parties; decides on the dissolution of political parties; and takes decisions on objections against the loss of parliamentary immunity or membership of deputies.

The President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly have the right to apply to the Constitutional Court for actions for annulment. There is no restriction on the courts that can initiate the *a posteriori* control of legal norms. Application for the dissolution of a political party is made by the Chief Public Prosecutor of the Republic. Even though the rights recognised by human rights

treaties have quasi-constitutional rank, their infringement may not be referred by individuals directly to the Constitutional Court.

Mr President, ladies and gentlemen, the caseload of the Turkish Constitutional Court tripled after 2000 as a result of certain amendments made to the Constitution and the radical legal reforms that were largely inspired by the case-law of the Strasbourg Court and undertaken in order to align Turkish law with the *acquis*. A vast increase in the number of applications over recent years due to the evolving Turkish legislative landscape has placed an enormous strain on the capacity of the court. In addition, the court started sitting as the Supreme Court in 2004, as a result of indictments against former ministers. At present, seven ministers and a former prime minister are being tried for alleged offences they committed at the time of their office.

Due to the ever-increasing workload and backlog problems, a thorough review of the workings of the court and possibly a reform of the constitutional system are urgently required. To overcome the burden of the workload, our court has drafted a proposal for constitutional amendments with a view to its organisational and procedural restructuring. It is proposed to increase the number of judges and eliminate the distinction between full and substitute members. In order effectively to manage the increasing workload, the draft proposal splits the court into two sections, reserving jurisdiction in certain matters for the plenary court. The draft proposal also introduces an individual constitutional complaint mechanism for civil and political rights in order to reduce the number of applications against Turkey taken to the Strasbourg Court.

I believe we can benefit from the Strasbourg Court's experience of maintaining the consistency of the case-law of four independent sections, filtering out unmeritorious cases and developing measures for dealing with repetitive cases when considering how to simplify our review procedure and cope with our rapidly expanding caseload.

I hope to see the proposed amendments come into force in the near future.

Mr President, ladies and gentlemen, let me make a general observation about human rights treaties in Turkey.

Turkey ratified the European Convention on Human Rights and Protocol No. 1 six months after the Convention came into force. At that time, the ratification of the Convention did not generate much interest in Turkish public opinion and no coverage was given to it in the press. It was only after 1987, when the competence of the European Commission of Human Rights was recognised, that the Convention became popular in the media. Soon after the jurisdiction of the Strasbourg Court was accepted, the Convention became an essential part of Turkish social and political life.

In recent years the Turkish legal system has been thoroughly screened with a view to strengthening democracy, consolidating the rule of law and ensuring respect for fundamental rights and freedoms, reforming Turkish legislation with due regard to the European Convention on Human Rights and the case-law of the Strasbourg Court. So far, nine reform packages and two

substantial sets of constitutional amendments have been adopted.

Thanks to impressive progress made in recent years<sup>1</sup>, Turkey is now party to all the principal human rights conventions of the United Nations. In line with this progress, just three weeks ago, Turkey ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights. The ratification of the first Protocol is also under way.

The norms of the Council of Europe, embodied in more than 190 conventions provide a basic point of reference for us. In recent years, a number of European conventions and protocols have been ratified. Suffice it to recall that just a month ago, Turkey ratified Protocol No. 13 abolishing the death penalty in all circumstances.

Mr President, ladies and gentlemen, as far as the place of international treaties in the Turkish legal system is concerned, according to the fifth paragraph of Article 90 of the Constitution, “International treaties duly put into

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1. Major human rights treaties ratified since 2003: International Covenant on Civil and Political Rights (23 September 2003); International Covenant on Economic, Social and Cultural Rights (23 September 2003); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (18 March 2004); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (18 September 2003); Criminal Law Convention on Corruption, Civil Law Convention on Corruption, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (2 March 2004); European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights (17 April 2004); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (8 July 2004); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances (13 December 2005); and Second Optional Protocol to the International Covenant on Civil and Political Rights (27 December 2005). Human rights treaties signed since 2003: Optional Protocol to the International Covenant on Civil and Political Rights (3 February 2004); Second Optional Protocol to the International Covenant on Civil and Political Rights (6 April 2004); United Nations Convention against Corruption (10 December 2003); Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention (6 October 2004); Protocol amending the European Social Charter (6 October 2004); and European Social Charter (revised) (6 October 2004).

effect have the force of law. No appeal to the Constitutional Court can be made with regard to these treaties on the ground that they are unconstitutional”. For almost four decades, there have been acrimonious disputes over the status of international treaties *per se* and the European Convention on Human Rights in particular due to the ambiguous nature of the phrase “have the force of law”.

There have been three different approaches to the meaning of this phrase. The first kind of interpretation adopts a literal approach whereby treaties are seen as having equal standing with domestic legislation due to explicit acknowledgment. The supporters of this approach, therefore, hold the view that if the Constitution had wished to grant treaties a superior position in comparison to national legislation it would have expressed this in unequivocal terms, just as many European constitutions do.

The second kind of interpretation is based on the idea that a literal reading of the last paragraph of Article 90 is obscure and devoid of meaning. The denial of judicial review by the Constitutional Court implies that international treaties are superior to national laws. As a result, in the case of conflict between international provisions and national ones, international treaties should prevail. Therefore, under no circumstances does the *lex posterior* principle come to the fore. According to this view, the phrase “have the force of law” indicates a monist approach.

According to the third kind of interpretation, based on a teleological approach, theoretical and doctrinal debates on the meaning of “have the force of law” have often had a largely formal character and frequently no practical

significance. Since Article 2 of the Constitution defines the Republic as “a State governed by the rule of law ... respecting human rights”, treaties relating to fundamental rights and freedoms should be distinguished from other treaties and given a status superior to that of national laws.

A constitutional amendment in May 2004<sup>1</sup> added a new sentence to the last paragraph of Article 90 of the Constitution as follows:

“In the case of a conflict between international treaties in the area of fundamental rights and freedoms duly put into effect and the domestic laws, due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”

Thanks to this provision, disputes over the status of human rights treaties have come to an end. The courts of general jurisdiction are now obliged to apply the Convention provisions in their judgments. Recent judgments of the Court of Cassation and the Supreme Administrative Court disclose direct application of the provisions of the European Convention and other international treaties on human rights<sup>2</sup>.

Lower courts are not entitled to apply to the Constitutional Court claiming that a domestic law that appears to contradict the European Convention should be declared unconstitutional, and individuals are not

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1. Law no. 5170, Official Gazette no. 25469, 22 May 2004.

2. See, *inter alia*, judgment of 25 May 2005 of the Civil Plenary of the Court of Cassation (E:2005/9-320, K:2005/355); judgment of 13 July 2004 of the Ninth Criminal Division of the Court of Cassation (E:2004/3780, K:2004/3879); judgment of 24 May 2005 of the Criminal Plenary of the Court of Cassation (E:2005/7-24, K:2005/56); judgment of 8 February 2005 of the Thirteenth Division of the Supreme Administrative Court (E:2005/588, K:2005/692); and judgment of 29 September 2004 of the Fifth Division of the Supreme Administrative Court (E:2004/291, K:2004/3370).

required to appeal to the Constitutional Court claiming the unconstitutionality of a court ruling before lodging an application with the Strasbourg Court. This is because the Constitution does not empower the Constitutional Court to review the constitutionality of national laws *vis-à-vis* the European Convention. In cases of conflict between the domestic laws and the Convention, the Constitutional Court may ask the court *a quo* to apply the provisions of the Convention directly by virtue of the supremacy of international human rights treaties.

It is worth mentioning that the impact of the case-law of the Strasbourg Court on the Turkish legal system is likely to increase in the years to come, as it is exceedingly difficult for the domestic courts to determine in practice whether generally abstract provisions of the Convention are in conflict with national legislation. To be more precise, it is almost impossible for Turkish judges to apply the new wording of Article 90 without taking into account the case-law of the Strasbourg Court.

There remains one final point I would like to mention concerning the relationship between the Turkish Constitutional Court and the European Convention. In August 2002<sup>1</sup> and January 2003<sup>2</sup>, the Turkish parliament adopted a number of reforms whereby the finding of a violation of the Convention by the Strasbourg Court has been accepted among the causes for retrial in civil and criminal cases. As a result of a legislative amendment<sup>3</sup>, final judgments of the administrative courts were also brought within the scope of the retrial procedure. The retrials that have taken place so far have led to the acquittal of a number of persons.

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1. Law no. 4771, Official Gazette no. 24841, 9 August 2002.

2. Law no. 4793, Official Gazette no. 25014, 4 February 2003.

3. Law no. 4928, Official Gazette no. 25173, 19 July 2003.

As regards the dissolution of political parties and the trial of certain key statesmen, where our court applies criminal procedural law in the same way as the ordinary courts, a couple of retrial requests have been received so far. In the context of those proceedings, our court may be led to reconsider application of the provisions of the Convention and the interpretation of the Strasbourg Court to come to a conclusion. As the cases are still pending, I would like to make no further comment.

Mr President, ladies and gentlemen, let me briefly comment on the impact of the European Convention and the case-law of the Strasbourg Court on the decisions of our court.

As the Turkish Constitution provides that the State shall recognise and protect fundamental human rights in accordance with the Constitution, the primary duty of the Constitutional Court is to protect human rights in accordance with the Constitution.

Nevertheless, the Constitutional Court has, in various ways, referred to the Convention and the case-law of the Strasbourg Court. In some of our decisions, the reasons for referring to the Convention have been touched on, while in others the Convention has been briefly cited. Where the Convention is the *ratio legis* of the provisions of the Constitution, our court makes references to the preparatory work of the constitutional provisions. In cases where the Convention contains explanatory or supportive norms, our court does not hesitate to take advantage of the Convention's provisions to strengthen its arguments. In some cases, we make use of the provisions of the Convention to interpret a constitutional principle.

Since its establishment<sup>1</sup>, our court has referred to international treaties sixty-one times, and to the European Convention on thirty-seven occasions. These references are mainly related to gender equality, the right to a fair trial, the right of property and the dissolution of political parties. Despite the fact that our court is not formally bound by the judgments of the Strasbourg Court, given that the Constitution and the rule of incorporation do not create such an obligation, we assign to the rulings of the Strasbourg Court an authority of interpretation<sup>2</sup>.

Mr President, ladies and gentlemen, we are aware that harmonisation of the jurisprudence of European constitutional courts on the one hand and collaboration of national and regional courts on the other will significantly improve the implementation of fundamental rights and freedoms. We are also aware that the effectiveness of the European Convention system depends on the willingness of member States to enforce the judgments of the Strasbourg Court. Even though we are not bound by its rulings, our court and other national courts make genuine efforts to monitor the case-law of the Strasbourg Court. As the role of the Convention is enhanced in the Turkish legal system, the element of mutual trust between the Strasbourg Court and the Turkish judiciary also becomes more important.

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1. The Constitutional Court first referred to the ECHR ten months after its establishment (19 February 1963, K:1963/34). In the same year it referred to the ECHR in three decisions.

2. So far, decisions of the Strasbourg Court have been cited in four of our cases. For example, in 1999 the Constitutional Court referred to *Sporrong and Lönnroth v. Sweden* (judgment of 23 September 1982, Series A no. 52) in connection with the regulatory seizure of real estate. In 2003 the Constitutional Court declared a *de facto* expropriation unconstitutional, referring to three judgments of the Strasbourg Court, namely, *Papamichalopoulos and Others v. Greece* (judgment of 24 June 1993, Series A no. 260-B), *Carbonara and Ventura v. Italy* (no. 24638/94, ECHR 2000-VI) and *Belvedere Alberghiera S.r.l. v. Italy* (no. 31524/96, ECHR 2000-VI).

Let me conclude my remarks by stating that our court is committed to remaining in the vanguard of the struggle to defend human dignity and individual rights and to make human rights ever more fully and widely respected in Turkey and in Europe.

I hope that Protocol No. 14 will come into force as soon as possible.

I wish the Strasbourg Court a very fruitful judicial year.