



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Meeting with the Supreme Court and the Supreme Administrative Court

Address

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Opening remarks

President Lundius,
President Melin,

Let me begin with words of thanks to you both for organising this meeting, and for being our hosts here in Stockholm. You have set the stage for a judicial dialogue between both of this country's supreme judicial bodies and the European Court of Human Rights.

From the Strasbourg side I am joined by my colleagues Angelika Nußberger, the judge elected in respect of Germany and Vice-President of the Court's Fifth Section. And of course by Helena Jäderblom, our Swedish judge. Our Registrar, Erik Fribergh, completes the Strasbourg delegation today.

Meetings such as these are of great importance for the European Court, and are a priority for me in my mandate as Court President. Our coming together to discuss and exchange is more than an exercise in communication, important as that is in itself.

Our dialogue is an instance of the principle that underpins the whole system of the Convention, the principle of subsidiarity. This has been aptly paraphrased – in the Interlaken Declaration – as the principle of shared responsibility, between the national and European levels, for the protection of fundamental human rights.

The Convention rests primarily on the model of judicial enforcement of rights, with the national judiciary in the primary role. Strasbourg's role is a subsidiary one, intervening in the final instance as required. A dialogue, therefore, between us is both natural and necessary as we fulfil our respective roles.

It is also something that is urged upon us by the Brighton Declaration of 2012, which provides strong encouragement to the development of judicial dialogue at a high level.

Dont acte, as is said in French.

Every dialogue takes place in a given context. For Sweden, that context is, I think, a benign one. In characteristic Nordic fashion, relatively few cases reach the European Court this country. Sweden is no burden to Strasbourg.

Indeed I have used Sweden as a good example in my regular dialogue with the Committee of Ministers. I referred to the way that, in Swedish case-law and practice, remedies have been developed that allow individuals to obtain compensation from the State for infringements of their Convention rights.

Indeed, this very point was raised at the 2008 Stockholm conference on the implementation of the Convention at national level, in the speech delivered by Judge Anna Skarhed, now the Chancellor of Justice.

The situation has of course developed since then. These developments were recently reviewed by the Court. In December of last year, a Chamber of the Fifth Section decided the *Marinkovic* case. This included a detailed examination of the remedies that were available in domestic law for the applicant's complaints under the Convention. As the applicant had failed to use them, the case was rejected for non-exhaustion.

Many other European States could usefully follow Sweden's lead. Indeed, I believe that the next stage of the reform process will have as its focus the national level – the development of more effective remedies, and the full and timely implementation of the Court's judgments. That is a topic I will come back to later on today.

For now, I will bring these very short introductory remarks to a close by thanking you once again for organising this meeting.

I am very much looking forward to our exchanges during today.

Achievements and Challenges

In these remarks I will present the Court's (recent) achievements, which are in my view substantial, and then say some words about the challenges that are now before us.

I will take care not to overlap too much with what will be said by Erik Fribergh, the Court's Registrar. Erik has been a key figure in the Court's fortunes for many years, and he knows its functioning better than anyone.

I am in the happy position to say that the picture has brightened considerably at Strasbourg in the past two or three years. This is mainly due to the reforms introduced by Protocol No. 14, which entered into force in mid-2010, and whose impact is increasingly being felt.

To put it another way, the music has changed since the Interlaken conference in 2010. There was at that time a growing sense of crisis surrounding the Convention. At every level, the Court was overburdened by cases, and the same happened regarding interim measures (Rule 39) shortly afterwards. There was anxiety and even pessimism at Strasbourg, with many fearing that the whole system, and especially the Court, was seriously endangered. The situation was only growing more difficult with each passing year.

Today we can – happily – look back at those times and see very clearly the distance travelled in the space of a few years. The sense of a crisis has, in my opinion, dissipated. The challenges are still great, of course, and recent gains could prove to be temporary. But the Court has certainly strengthened and improved its functioning, and the results have been quite remarkable.

We have witnessed a continuing decrease in the number of cases pending before the Court for the third year in a row. That number dropped below 100,000 at the end of 2013, and continues to fall. As Erik will explain, the biggest factor in this has been the Single Judge system for rejecting clearly inadmissible cases. The impact of this reform has been very strong.

The other significant reform of Protocol 14 was the conferral on three-judge committees of a new power to deal with cases on the basis of well-established case-law. This is now fully operational and has significantly increased the Court's productivity.

Along with treaty reforms, the Court has been developing other solutions, based on case-law and judicial practice. I think the best example is the pilot judgment procedure, which emerged ten years ago with the case *Broniowski v. Poland*. This judge-made procedure has continued to evolve since, and has been used with great effect in relation to different types of case.

Let me quote a very recent example, which concerns Romania.

Over the years a great many applications were brought to Strasbourg arising out of the problems with restitution of private property that had been nationalised during the communist era. There were thousands of such cases. Initially the Court decided them one by one, finding violations of property rights and awarding damages under Article 41. It then took a more

strategic approach, by adopting a pilot judgment in the *Maria Atanasiu* case in 2010. Although the original 18-month timetable set out in that judgment was not followed, the Romanian authorities eventually succeeded in passing the necessary legislation. The Court examined this in a case decided last month – *Preda and Others v. Romania*. It found that the new means of redress must be exhausted by those who come within its scope. That finding makes it possible to declare inadmissible more than 2,000 pending applications against Romania, marking the eventual success of the procedure in this context.

Not every pilot procedure achieved its objective, though.

It has been used in relation to the issue of prisoner voting in the United Kingdom, but the ban remains in place, even as the European elections are about to begin.

The pilot procedure in relation to the non-implementation of judgments in Ukraine did not lead to a solution. Instead, the situation has simply deteriorated. There were about 3,000 new cases of this type last month alone. This has placed Ukraine at the top of the list in terms of number of applications at Strasbourg. There are, of course, more pressing issues facing Ukraine today. I would simply comment that what this shows is how the gains made in one area can be quickly reversed by the persistent problems in another.

The message that I have for Governments, which I convey at every opportunity, is that the European Court has respected its side of the reform “bargain”. At Interlaken, the term “shared responsibility” was used to describe the link between the role of the Court and the States. This is vital to the proper functioning of the Convention system and, as the ultimate goal, the more effective protection of human rights in Europe. The Court has, in my view, lived up to its responsibility to achieve greater efficiency, improve its performance, to allocate its resources more effectively and to concentrate increasingly upon priority cases, without abandoning any other cases.

We have not run out of ideas yet, and I look forward to more developments and innovations in future.

The second part of my message to States is that improvements at Strasbourg must be reflected by improvements at the national level, through better observance of the Convention and the existence of effective domestic remedies in case of breach. Each State must live up to its responsibility.

Also, the Committee of Ministers must act more effectively in supervising the execution of judgments – the joint and several responsibility of States under the Convention, as it were.

If that does not happen, the reform process cannot succeed. Indeed, it will be unbalanced, with all of the expectations weighing on the Court, which is under constant scrutiny and constant pressure to keep improving.

At the recent Oslo conference on the long-term future of the Court, one speaker warned against this, using the term “problematism” to describe it – the sense that there are only problems at the Court, and the implication that these are of its own making. I was pleased to hear that remark from a governmental expert. The Court still has many friends and allies around Europe.

I will say a few words about the current challenges before the Court.

The most obvious one is that posed by repetitive cases. Excluding the cases before the Single Judge, the Court has at present 70,000 cases that await judicial examination by a Chamber or a committee. Most of the cases are repetitive cases – there are some 43,000. It is not a generalised phenomenon, but one that concerns a limited number of countries. I have already mentioned cases regarding non-enforcement of judgments in Ukraine - there are about 14,000 of these. And Italy has over 11,000 cases complaining about delays in the judicial system. Coming next is Turkey with over 6,000 repetitive cases, followed by Russia, Serbia and Romania, each with more than 2,000 such applications pending.

At one level, the answer is fairly evident – the States concerned must tackle the underlying systemic problems, and/or put in place domestic remedies (prevention and cure). As indicated earlier, Romania has done so. Turkey did so as well two years ago, giving new powers to the constitutional court and creating a new mechanism for dealing with the problem of judicial delays. That is how the system is supposed to work – the European Court diagnoses the problem, but it is the domestic authorities that must administer the cure. The Convention system is hardly designed for – and was surely not intended for – dealing with endless repetitive cases (the Italian problem of length of proceedings has occupied Strasbourg for more than 30 years).

These cases weigh heavily on the Court. Even if most of them are of low priority, they cannot be disregarded – that would be counterproductive. The inevitable effect of large numbers of cases is delay in dealing with them. The waiting times before the Court for some cases are clearly unacceptable. It is usual to wait three, four, years for a judgment, even longer. Nobody can be satisfied with that.

According to one school of thought, the Convention should be amended so as to give the Court control of its docket. Under this proposal, it would not let cases accumulate as they do today, but would select cases for adjudication, and dispose of the rest fairly quickly. It is described as a constitutional court model.

It is not a vision that I subscribe to. I made the point in Oslo that while the European Court has certain similarities with constitutional courts, that is only part of the picture. Our Court also deals with cases that do not raise new issues of principle or interpretation, but are important nonetheless. They are the cases that have made the reputation of the Convention system – cases of torture and ill-treatment, cases of illegal detention, of arbitrary interferences with property rights, etc.

For me, then, maintaining the dual function of the European Court is crucial.

That is a view that is shared by many States, who are unwilling to consider any radical modification of the current system leading to any sort of “pick and choose” power for the Court.

Before finishing, allow me a few words about Protocol No. 16. I hope to see it take effect in the near future. That requires ten ratifications – already ten States have signed it, which should in principle indicate the intention to ratify in due course. I regard it as the protocol of judicial dialogue, and have been a supporter of the idea for many years. The Protocol will allow the highest courts of each ratifying country to request an advisory opinion from Strasbourg on the interpretation or application of the Convention in a given case that arises before them. Requests will be considered by a panel of five judges, and if accepted will

be dealt with by the Grand Chamber (modelled on the existing procedure for the reconsideration of Chamber judgments – Article 43 of the Convention).

By definition, advisory opinions will not be binding on the requesting court.

Or on the respective State, which has the right to participate in the procedure.

Or on the parties to the domestic proceedings – the case can still be brought to Strasbourg as an individual application.

But advisory opinions will become part of the case-law of the Convention. I look forward to that day, as I am convinced of the value of the procedure. It will create a formal channel of communication between the national judge and the European judge, which I regard as being fully in the spirit of subsidiarity.

Thank you.