



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

Speech to the Supreme Court of The Netherlands

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President Feteris,

Members of the Supreme Court,

I would like first of all to thank you for the invitation to come and meet with you during this official visit to The Netherlands.

While each part of my visit to your country is important, the significance of our meeting today is to be underlined, for it is the “judicial dialogue” part. This is an ongoing priority for me, and for my colleagues of the European Court, and I will develop the point a little more in the course of my remarks.

Let me say to President Feteris, that I appreciate your personal investment in developing relations between the high judicial authorities of The Netherlands and the European Court.

You paid a visit to Strasbourg in 2014 along with your predecessor, Geert Corstens.

And you returned to Strasbourg earlier this year as part of the delegation from the EU Network of Presidents of Supreme Courts. I regard that event as being very significant, since it was the natural extension of the classic bilateral dialogue into a broader form of interaction, one that reflects the reality of the interlocking legal orders in Europe of today (and of tomorrow too, I hope).

You stated in your intervention on that occasion that it is important to maintain and develop that wider forum of judicial dialogue. On that point, I am in full agreement with you, and it is my strong wish to continue in this direction in future.

To come to The Netherlands is to come to a country that is rightly regarded as having a highly effective model for the implementation of the Convention. The Dutch legal order is an open and highly receptive one in relation to international law, with a special place reserved for the Convention. In place of constitutional review, as practised in most other European States, here it is Convention review of legislation, which is conducted in light of the relevant Strasbourg jurisprudence. European human rights law is fully integrated in the Dutch legal order, and expertly applied by the domestic courts.

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These are the correct conditions to realise the principle of subsidiarity. President Feteris spoke on this exact subject at our Court last June. What I want to underline here is my view that subsidiarity represents a deepening, and not a dilution, of human rights protection in Europe. It lays a just emphasis on the role of the national authorities - above all the national courts - in safeguarding fundamental rights. You will perhaps be aware of the term “the age of subsidiarity”. This has become current in discussions about the future of the Convention system. There is much truth in it, when one has regard to the four international conferences about reform of the Convention that have taken place since 2010. At each of these conferences, Ministers adopted political declarations that emphasise the national pillar of the Convention system. But this is not put forward in isolation, or in such a way as to overshadow the role of the European Court. Rather, it is one important part of a general reaffirmation of the importance of Europe’s human rights system. That political support takes on an even greater importance given the political surprises that have been delivered to Europe and to the world in 2016.

As you know, subsidiarity is implicit in the structure of the Convention. It is discernible in Article 1, which lays on States the general duty to respect rights. And in Article 19 too, defining the role of the Court, to ensure the States’ observance of their engagements. It underpins the rule on the exhaustion of domestic remedies in Article 35. It is likewise implied in the right to an effective remedy before a national authority for a claimed violation of human rights, contained in Article 13. These are core elements in the architecture of the Convention system. It requires the stability and balance that two pillars, standing in the correct proportion, can bring.

Subsidiarity also has a jurisprudential basis. It is frequently stated in the case-law that the Court’s jurisdiction is a subsidiary one. I refer, for the most recent example, to the Grand Chamber case this week concerning the question of home birth – the *Dubská and Krejzová* case. The judgment [quote] “*reiterates the fundamentally subsidiary role of the Convention system and recognises that the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned.*”

In this division of labour between the national and the international, the European Court’s task is to lay down the interpretation of the Convention. The national judge is thus given a jurisprudential framework within which to perform their primary function. To be sure, the supervision of the European Court remains, but as often stated, when the assessment at national level has been made in the light of the relevant case-law principles, there would need to be strong reasons to substitute the Strasbourg view for that of the domestic courts. I am speaking here of the margin of appreciation, of course. You will be familiar with its elastic nature, determined by a series of variables. But it is clear from the case-law that where the national court has conducted its assessment or review in the required way, then a broader margin should be allowed.

The final assessment of the European Court will not be totally free of controversy. It is not uncommon for judges at Strasbourg to reach different conclusions on exactly this issue, and to use their right to issue a separate opinion in order to set out another analysis. I am thinking, for example, and because one of the authors is here today, of the joint dissenting opinion in the *Jeunesse* case. In a memorable phrase, Judge Jos Silvis considered that the margin of appreciation had “undergone a hot wash”. The opinion argued that the balancing exercise had been carried out in a full and careful manner by the domestic authorities, in keeping with the Convention case-law. The majority view was that the case featured a number of exceptional circumstances. These lead to the finding that the removal of the applicant from the country was not compatible with the right to respect for family life.

With Protocol 15, the concept of subsidiarity will move from the implicit to the explicit, and reach from the case-law into the text of the Convention itself. One may regard this amendment as the codification of existing judicial practice. Although that may be too strong a way of putting it, given that it is the Preamble that will be modified, and not the articles that concern the function or jurisdiction of the Court. It has, however, been suggested by commentators that the amendment of the Protocol could prove to be of considerable significance for the Court, as it may be specifically invoked by States, urging the Court to lessen the intensity of its review. I shall leave that question for a future date – the entry into force of the Protocol is still some way off, with 32 States having ratified so far.

Having spoken of one new Protocol, I will say something of the other.

At Strasbourg, we await patiently but also expectantly, the entry into force of Protocol 16.

It is appropriate to mention the matter here, since the idea of advisory opinions was strongly sponsored by The Netherlands and Norway. It was their power of persuasion that built up the momentum behind an idea that had been raised at different times in the past, including in 2006 when a group of wise persons put forward a set of proposals to strengthen the Convention mechanism.

By the Brighton conference in 2012, the time had finally come for the idea. I note that The Netherlands was one of the first States to sign the Protocol when it was finalised in 2013.

At the end of that year, there was a “bump in the road”, so to speak, when the Protocol was held to be one of the numerous obstacles to EU accession to the Convention in Opinion 2/13.

There was real surprise at Strasbourg to see Protocol 16 called into question in that way. Its negotiation came after the discussions on the draft accession agreement, and at no point did the concern arise that the advisory procedure might have negative implications for EU accession. One can suppose that this is an inhibiting factor for some EU States. But not for all of them. Today there are six States which have ratified the Protocol. Three of these are EU States – Finland, Lithuania and Slovenia. Political support has been offered for it by France. In a recent speech to the Parliamentary Assembly, President Hollande declared his intention to promote ratification of the Protocol. A seventh ratification is imminent, following a positive vote on the subject by the Armenian Parliament at the end of October. Other Parliaments in Europe, including that of The Netherlands, have been seized of the

matter. The number of ratifications required for the Protocol to enter into force is ten. It is not far off now.

In anticipation of this development, the Court recently adopted the rules that will govern advisory proceedings. These will be published very soon, and I hope that they will bring the necessary clarity about how the procedure will function in practice. I will comment on a couple of the points addressed in the new rules. Given that the Protocol is sometimes referred to as the “Protocol of dialogue”, the rules have been shaped with this in mind. On a very practical level, there is provision for inviting the national court to send further information so that the scope of the request is fully clarified for the European Court. But there is also a more participatory role, since the national court shall receive copies of submissions made to the European Court by the parties, and will have the opportunity to comment on such materials.

One other point clarified in the new rules is that costs of the procedure will not be subject to any ruling by the European Court, but determined according to national law and practice.

I referred earlier to interlocking legal orders, and in recent cases the European Court has dealt with the EU legal order and legal order that is founded on the Charter of the United Nations. I will concentrate on the former.

Regarding the EU, the present “pause” over accession to the Convention leaves the two European Courts centre stage in seeking to achieve a degree of co-ordination between the Convention and EU law. The case of *Avotins v. Latvia*, decided last May, is a contribution from Strasbourg.

The case arose out of a civil judgment given against the applicant by a court in Cyprus and enforced in his native Latvia under the Brussels I Regulation. It was his complaint that he had never been notified of the proceedings in Cyprus, so the proceedings against him had not respected the rights of the defence, contrary to Article 6 of the Convention. The complaint against Cyprus failed to meet the six-month time-limit. Only his complaint about the enforcement proceedings was admissible.

In those proceedings, the applicant invoked Article 34(2) of the Brussels (I) Regulation, which does not permit recognition if the judgment was given in default of appearance. But this does not apply where the defendant failed to challenge the original judgment when it was possible to do so. The Latvian Supreme Court established that the applicant had not appealed; therefore his argument about non-notification lacked relevance. It followed that the Cypriot judgment had to be enforced in Latvia without any review of its substance, this being excluded by Article 36 of the Regulation.

The Grand Chamber recalled that *“a decision to enforce a foreign judgment cannot be regarded as compatible with the requirements of Article 6 § 1 of the Convention if it was taken without the unsuccessful party having been afforded any opportunity of effectively asserting a complaint as to the unfairness of the proceedings leading to that judgment, either in the State of origin or in the State addressed”*.

And it referred to “*the general principle whereby a court examining a request for recognition and enforcement of a foreign judgment cannot grant the request without first conducting some measure of review of that judgment in the light of the guarantees of a fair hearing; the intensity of that review may vary depending on the nature of the case*”.

It was a situation for the *Bosphorus* presumption, the Court held, since the domestic court had not enjoyed any margin of manoeuvre or discretion in the matter, which is the first condition.

The second condition is that the supervisory system of the EU should be deployed to its full potential. There had been no preliminary reference to Luxembourg, but the Court avoided excessive formalism on this point – it would serve no useful purpose to make the application of *Bosphorus* depend strictly and generally on the domestic court seeking a preliminary ruling. In the circumstances of the case, where the applicant did not raise any argument about the interpretation of Article 34 of the Regulation either in Latvia or in Strasbourg, the Court considered that the second condition was satisfied.

Once the presumption is in place, the focus of review becomes whether there was a manifest deficiency in the protection of Convention rights. In answering this question, the judgment recognizes the legitimacy of the area of freedom, security and justice within the EU. Set against that is the imperative of observing the Convention, as a “constitutional instrument of European public order”. The methods of the EU must not lead to infringement of fundamental rights protected by the Convention. The tension lies in the principle, recalled in Opinion 2/13, that EU Member states cannot check compliance with fundamental rights by other Member states, save in exceptional cases. The judgment approaches the matter in a spirit of complementarity, reaching the position that the courts of EU States must give full effect to the mutual recognition mechanism where the protection of Convention rights is not manifestly deficient. If however a serious and substantiated complaint is raised of manifest deficiency, and there is no remedy for this in EU law, the national court cannot refrain from examining such a complaint solely because they are applying EU law. On the facts of the case the Court concluded that there had not been a violation of Article 6 in the enforcement of the judgment.

In my discussions with President Koen Lenaerts, he has expressed appreciation for the stance adopted in *Avotins*. Of course, the Court of Justice has also addressed the articulation of EU law and the European Convention on Human Rights. You will be familiar with the *Aranyosi and Căldăraru* decision, given in the context of the European arrest warrant and dealing with the problem posed in that context by extremely bad prison conditions in some States. I think it correct to conclude that within the two European systems there is now a *volonté* to achieve a measure of normative harmonization. It is no substitute for the political project of accession, for which the case in favour remains a very persuasive one, I believe.

Mr President, if I may I would make two further comments before I conclude.

The first concerns the Supreme Court Network, which is developing very well as it enters its second year. I am gratified that The Netherlands has joined this initiative, with your court and the Council of State participating. That means that 21 courts from 16 States are now engaged in practical co-operation with the European Court of Human Rights.

We expect this to increase in the near future, in light of further expressions of interest that have been conveyed to Strasbourg. I am convinced that this will be a very useful exercise, and so my thanks to you for coming on board.

My second remark is that at this moment in time, our Court has one empty chair. There is a gap in our ranks, as we await the next judge who will be elected in respect of The Netherlands. I want to underline that the European Court – the old and the new - has always been served with great distinction, and to a very high standard, by the Dutch member. Judge Willy Thomassen was the first Dutch member of the new Court, and she returned to join the Supreme Court after her term in Strasbourg. Judge Egbert Myjer was her successor, and he remains, as ever, an active and dynamic figure in legal circles.

And until this September, it was our good fortune to count Jos Silvis among our ranks. At his departure, I referred to him as a pillar of our Court, and I repeat my remark today. It gives much satisfaction to me to see him continue his judicial career after his time at the European Court. We are pressing the point in Strasbourg that this type of arrangement should be the norm. It can encourage more candidates from the judiciary to consider a term at Strasbourg. Moreover, the prospect of continuity is, naturally, an element that promotes judicial independence. There is still work to be done here as regards quite a few States. The Netherlands has set a fine example, and I will point to it as best practice in the ongoing discussions about the future of the Convention system in Strasbourg.

Thank you.