



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

Human Rights Lecture at the Justice Academy of Turkey

“Judicial Independence - The Cornerstone of the Rule of Law”

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Honourable Minister,
Distinguished President of the Justice Academy,
Dear colleagues, fellow judges, ladies and gentlemen,

It is an honour for me, as President of the European Court of Human Rights, to give this lecture before such a dynamic and youthful audience of future members of the Turkish judiciary. In particular, I would like to thank warmly Mr Abdülhamit Gül, Minister of Justice, and Mr Muhittin Özdemir, President of the Justice Academy of Turkey, for the invitation to address you today. This is my first official visit to Turkey as President of the European Court of Human Rights and it is a privilege to be giving this important human rights lecture before you.

I have not come alone, as I am fortunate enough to lead a delegation composed of Ms Saadet Yüksel, Judge at the Court elected in respect of Turkey and Mr Hasan Bakirci, Deputy- Registrar of our Second Section.

I am going to begin with a very short anecdote. I was recently interviewed by a young academic at the University of Verona for a legal review. I was asked to choose one provision of the Convention or its protocols that bore a particular meaning to me. I answered the question not by referring to a particular Article of the Convention but to a principle of law, which the Court has repeatedly held is, and I quote, "*inherent in all the Articles of the Convention*" and "*inspires the whole Convention*". This principle, the rule of law, is the lodestar of the Convention system, the shining star guiding us forward. It constitutes the legal and moral foundation of our work along with the fundamental principles of democracy and human dignity. Therefore, it is perhaps not surprising that this principle should form the core of my lecture today.

The angle I propose to take is the role played by you, domestic judges, in building and preserving a democratic society governed by the rule of law.

Before I begin to analyse the relationship between an independent and robust national judiciary and the rule of law, allow me to make three more general introductory remarks.

Firstly, 2020 is a very important year for the Convention system. We are celebrating 70 years since the European Convention on Human Rights was signed in Rome on 4 November 1950. Turkey's association with the European Convention on Human Rights has been a long one. A founding member of the Council of Europe, Turkey was one of the original signatories, ratifying the Convention on 18 May 1954. I am very pleased to be able to celebrate this important anniversary here with you in Turkey. We have achieved a lot in the last 70 years, but what is absolutely clear is that the values of the Council of Europe, as enshrined in the European Convention on Human Rights, are as important and relevant as they have ever been, indeed perhaps more so.

Secondly, the European Court of Human Rights itself has also just celebrated an important anniversary. Last year marked 60 years since the inauguration of the Court which took place on 20 April 1959.

Judge Kemal Fikret Arık, a Turkish judge, was one of the first group of judges of the Court elected by the Consultative Assembly. Judge Yüksel, has joined a long line of prestigious judges, becoming the third member of the single full-time Court in respect of Turkey. I would like to thank her as a colleague and a close friend for her role in organising our visit. Throughout this sixty-year period, the Court has met the often difficult challenges resulting from amongst many other issues international and domestic conflicts, migratory flows and the threat of terrorism. Notwithstanding these difficulties, the Court has contributed to the harmonisation of European standards concerning the rights and freedoms of more than 830 million Europeans. I would like to underline this achievement. One which we should never underestimate nor forget.

Thirdly, our Court enjoys close and cordial relations with the superior courts of Europe. This interaction has gained a new momentum with the creation of the Superior Courts Network in 2015 which enables the European Court to strengthen judicial dialogue and closer cooperation with these courts, thereby enhancing shared implementation of the Convention. The network now comprises 90 courts from 40 states. The Court is proud to count the Turkish Constitutional Court, Court of Cassation and Council of State as its members.

I am very much looking forward to meeting the Presidents of these courts during my visit. It is crucial that the Strasbourg Court and the three Turkish superior courts continue to fulfil their respective roles, within the context of a shared understanding of our responsibilities, with mutual respect and in the spirit of sustained and constructive dialogue.

However, I should stress that judicial dialogue does not just take place with judges from superior courts. Every year, the Court welcomes delegations of judges from all courts across the Council of Europe legal space. Indeed, we are pleased to have welcomed very many delegations of judges and prosecutors from Turkey in recent years. In 2018 and 2019, no fewer than 274 Turkish judges and prosecutors visited the Court. I think you will agree that this is an impressive number. These are not simply courtesy visits; they are of great importance for the sustained legitimacy of the Convention system. They have often been organized within the context of Council of Europe cooperation projects on raising awareness about Court judgments. The Court provides a training programme which includes meetings with Court Judges and Registry lawyers, the possibility to attend a public hearing where possible and to see firsthand how the Court works. I encourage you to participate in one of these visits if the opportunity arises and, of course, once the current sanitary crisis so permits.

Now, ladies and gentlemen, I would like to turn to the theme of my lecture today: the relationship between an independent judiciary and the rule of law which I shall structure in four parts. Firstly, I will reflect on the ideological core of the principle of the rule of law; secondly, I will demonstrate the fusalional relationship between an independent judiciary and the principle of the rule of law; thirdly, I will look at how the principle of subsidiarity rests on an independent and well-trained national judiciary and fourthly and finally, I would like to underline the importance of the work of judicial training institutions, such as your own in forming judges of the future.

The principle of the rule of law

Let me begin by looking at the principle of the rule of law. We find a reference to the concept in Article 3 of the Statute of the Council of Europe where it is stated that every Member State must accept the principles of the rule law, human rights and democracy; these three core values are closely interlinked. In the Preamble to the European Convention on Human Rights, the rule of law is considered part of the common heritage of European countries together with political traditions and ideals. It is interesting that no further reference to the term is to be found in the body of the Convention itself.

In the same way, Article 2 of the Turkish Constitution defines the Republic of Turkey as a democratic, secular and social state governed by the rule of law within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

So, both the Convention and the Turkish Constitution embed the concept of the rule of law and respect for human rights as foundational constitutional pillars. But what do we mean by *rule of law*? While there is no abstract definition of the rule of law in the Court's case-law, the Court has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake, the principle of the possibility of a remedy before an independent and impartial court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State.

I think it is safe to assume that the drafters of the Convention were, when formulating the Preamble, inspired by the Universal Declaration of Human Rights of 1948. The Preamble to the Universal Declaration reads as follows, and I quote: "*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law*".

It is important to note the direct correlation between the idea that human rights should be protected by the rule of law and its purpose to prevent man to have to rebel against public powers because of tyrannical or oppressive governance. In other words, governing in accordance with the rule of law is a fundamental premise for any governing structure in society in order to foster sustained allegiance and trust from the polity. Tyranny is after all the antithesis of the rule of law; oppression of their peoples is the external manifestation of a society where the rule of law has been abandoned by those in power.

What does it mean to be ruled by law and why is it so important for the protection of human rights. Why is it fundamental for the progressive development of a democratic society? These are difficult questions and I do not pretend to have exhaustive answers.

I would, however, submit to you that the core moral idea behind the rule of law within a democratic society as envisaged by the Convention is the respect for the personal autonomy of human beings. In order for a person to be able to retain and nurture independence of thought, to be able to manage his or life as he or she wishes, to understand his or her communal responsibilities, to be able to strive for happiness, success and inner peace, all core elements of human existence, it must conceptually be of great importance that the society in which that person lives is governed by the force of law which is transparent, stable, foreseeable and allows for mechanisms of dispute resolution that are independent and impartial.

Moreover, sustained economic development and prosperity requires States to be governed by the rule of law. A dysfunctional judiciary in a society which does not uphold the rule of law and human rights will not attract foreign investment.

The rule of law, by requiring that governmental power be regulated by law and not the whims and caprice of men, thus demands that laws are clear, not vague and open to abuse, that laws are not applied retroactively so as to limit unduly the autonomous choices made by members of society based on existing rules, and that laws be interpreted and applied by independent and impartial institutions different from those that promulgated the laws. Those in power cannot therefore control the courts. To put it clearly, laws must not only apply to the populace, but also, and crucially to those that hold the reins of power at any given moment. Ladies and gentlemen, no man or woman is above the law.

Independence of the judiciary

As we all know, the judiciary is one of the three powers of any democratic state. An efficient, impartial and independent judiciary is the cornerstone of a functioning system of democratic checks and balances. Judges are the means by which powerful interests are restrained. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law.

The judiciary's fundamental role in a democracy is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner. Article 9 of the Turkish Constitution thus eloquently provides that judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation.

But what does judicial independence actually require and why is it a fundamental constitutional pillar of any democratic society governed by the rule of law?

Judicial independence has both *de jure* and *de facto* components. As to *de jure* independence, the law itself must provide for guarantees in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

But *de jure* independence, that is independence of the judiciary set out in legislation, does not alone guarantee nor secure judicial independence. What is also needed, and perhaps even more crucially, is *de facto* independence. Now what do I mean by that?

As the Strasbourg Court has made clear “the notion of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law”.¹ The same applies to the “importance of safeguarding the independence of the judiciary”.²

In concrete terms this means that the scope of the ‘State’s obligation to ensure a trial by an “independent and impartial tribunal” under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. This point of principle is quite simple: in a State governed by the rule of law, final and binding judgments of courts must be executed without exception. The same applies to judgments of the European Court of Human Rights by which a State is bound under international law. Thus, the State’s respecting the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices.’³

The Strasbourg Court has furthermore generated a body of case-law on this subject along with the right to a fair trial by an ‘independent and impartial tribunal established by law’. We have had applications brought by domestic judges who complain about disciplinary proceedings, dismissals and demotions under Articles 6, 8 and 10 of the Convention.⁴

We have also received applications brought by judges from Turkey who complain under Article 5 about detention after the attempted military coup on 15 July 2016.

The case-law of the Court makes it very clear that the detention of judges is strictly scrutinised by the Court. In the judgment in *Alparslan Altan*, the Court, for the first time within the context of Article 5, relied on the following three elements in its strict assessment of the legality of the detention:

Firstly, the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties;

Secondly, where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with;

Thirdly, given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention.

Allow me to add here a very important consideration because I have noticed a certain misunderstanding on this issue. It is incorrect as a matter of Convention law to claim that the assessment of whether a detention is lawful under national law, as required by the terms of Article 5, is a matter reserved to the discretion of the national authorities. In other words, as regards in

¹ *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], (2018), § 144.

² *Baka v. Hungary* [GC], (2016), § 165.

³ *Agrokompleks v. Ukraine* (2011), § 136.

⁴ See for example under Article 8 *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013 and *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018. Also under Article 10 *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016.

particular Article 5 of the Convention, the European Court, must itself, because of the nature of Article 5 guarantees, determine whether national law has been complied with.

And when it comes to the detention of judges, that scrutiny will be very strict.

Therefore, although I of course take no position on the outcome as such, some of the language adopted by the Turkish Constitutional Court in a recent judgment does not seem to fully reflect the spirit of constructive judicial dialogue which we have come to expect between our Court and the highest superior courts.

To conclude this part of my intervention ladies and gentlemen, allow me to recall what I said in a recent lecture. The principle of the rule of law is an empty vessel without independent courts embedded within a democratic structure which protects and preserves fundamental rights. In the Convention system independent and impartial courts have a fundamental role to play in guaranteeing that democratic actions retain their true character by being truly inclusive and respectful of individual rights. Without independent judges, the Convention system cannot function.

Subsidiarity

I now turn to my third part reflecting on the nature and scope of the principle of subsidiarity and its importance for the sustained legitimacy and authority of the Convention system.

I strongly believe that within the European system of human rights, it is the ensemble of national judges together with judges of the Strasbourg Court who comprise a community of human rights judges. In other words, you as future judges are in this sense also Strasbourg judges. You act as human rights guardians. You have been entrusted with the task of interpreting and applying Convention rights together with the Strasbourg Court judges.

National courts play a crucial role in safeguarding fundamental human rights by reason of their direct and continuous contact with the vital forces of their countries. For the situation domestically in Turkey it is of course of great importance that under Article 90 § 5 of the Constitution, international human rights agreements, duly put into effect, shall prevail in this regard. It is crucial for Turkish judges to continue to effectively give life to this fundamental constitutional provision.

The principle of subsidiarity is implicit in the structure of the Convention. Subsidiarity encapsulates a norm of the distribution of labour between the Court and the member States with the ultimate aim of securing to every person who finds himself or herself within the jurisdiction of a State the rights and freedom guaranteed by the Convention.

In accordance with Article 1 of the Convention, it is the national authorities which are the primary guarantors of human rights, subject to the supervision of the Court. When the member States fulfil their Convention role by applying in good faith general principles in the Court's case-law, the principle of subsidiarity implies that the Court may defer to their findings in a particular case.

However, and let me be clear about this: subsidiarity is not realistic without strong, independent and impartial domestic courts embedded within a national system that is governed by the rule of law. It flows from this that member States demonstrate with their actions whether deference is due under the principle of subsidiarity. In particular, the reasoning provided by national courts in their judgments must secure and protect their independence vis-à-vis the executive and legislative branches. Also, it is incorrect to assume that the principle of subsidiarity in any way limits the Strasbourg Court's competence to ultimately review substantive findings at the national level at the stage of the application of Convention principles embedded in the domestic legal systems.

The training of Judges

I will now turn to the fourth and final part of my lecture which concerns the importance of initial and in-service judicial training.

Of course, I am speaking to an audience at a Justice Academy so you might expect me to raise this subject. However, there is a further link between training and the independence of the judiciary. This is because training is an important element to safeguard the independence of judges as well as the quality and efficiency of the judicial system. I will turn to this shortly.

Firstly, I would like to particularly focus on the need for judicial training on human rights standards. Considering that the European Convention on Human Rights is best implemented “at home” by national authorities and national courts, as I have indicated above, university and professional training of public bodies including all sectors responsible for law enforcement and the administrative of justice is crucial.

The recent Brussels Declaration from 2015 on the implementation of the Convention at the national level called upon States Parties to improve the training of judges, prosecutors, lawyers and national officials on the Convention.

Specific mention is made in this declaration to the Council of Europe’s cooperation programmes, publications as well as the Human Rights Education for Legal Professional (HELP) programme.

I understand that the Council of Europe is working with your Justice Academy together with the Ministry of Justice on a number of cooperation activities in the criminal justice field such as the reasoning of judgments in criminal cases and alternatives to detention. I very much encourage this cooperation. The Council of Europe has an immense experience in this field and is able to support the development of relevant and specialized training courses, for example on pre-trial detention, freedom of expression, fair trial guarantees.

It becomes self-evident that you need up-to-date, accurate and engaging training materials on the Convention principles and the Court’s case-law. In this sense, the HELP programme is a very useful resource as a number of its courses may be made available in the Turkish language and can adapted to the Turkish legal system. The Court has an excellent cooperation with the HELP network. The Court’s jurisprudence provides the basis for most of the available courses. The Court also supports the HELP programme through the participation of its Registry lawyers in various working groups.

I would also encourage you regularly to follow the Court’s case-law via the HUDOC platform where you can find many translations of the Court’s judgments in Turkish.

Not every judgment can be found in Turkish, however, and in my opinion the new generation of Turkish judges needs a good knowledge of English and/or French in order to keep up to date with all European case-law.

Training is not simply necessary for young professionals who are learning the craft. We all need in-service training as we progress with our careers and that includes senior judges.

I mentioned earlier the link between judicial training and independence. There is an unfortunately growing debate proclaiming that judicial authority constitutes a threat to politics and democratic decision-making, in particular when judges enforce human rights guarantees. I am convinced that Judges who have received excellent training on Convention principles and the Court’s case-law are better prepared to react to attacks on their independence and impartiality.

Honourable Minister,
Distinguished President of the Justice Academy,
Ladies and gentlemen,

It is now time for me to close this human rights lecture.

The future of the European Convention system depends on effective action taken at the national level. That starts with excellent judicial training from academies such as this one. As I have said, we are a community of European judges who together, through lucid and brave decisions taken both at the national and European level, ensure that the Convention system thrives for the next 70 years.

Thank you for your attention.