Tülay Tuğcu

President of the Constitutional Court of Turkey

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[1], 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.

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 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 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[2] 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."

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).

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

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[3].

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 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[4] and January 2003[5], 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[6], 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.

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.

3 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).

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

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

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

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[7], 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[8].

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.

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.

7 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.

8 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).