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A thing of beauty is a joy forever

Speech by Dineke de Groot
President Hoge Raad der Nederlanden

"A thing of beauty is a joy for ever:
Its loveliness increases; it will never
Pass into nothingness; (...)"
John Keats, Endymion, 1818

President of the European Court of Human Rights, Members of the Court, Excellencies, Ladies and Gentlemen,

It is an honour to have been invited as President of the Supreme Court of the Netherlands –and as a citizen of European society – to attend this solemn ceremony of the European Court of Human Rights and to be given the opportunity to speak to you. I would like to share some observations about judicial dialogue, criticism, beauty and joy in relation to the protection of human rights as part of the rule of law.

The European Convention on Human Rights ("the Convention") and the case-law of the European Court of Human Rights ("ECHR") are of paramount significance for the human rights and democracy oriented rule of law in Europe. The dynamic way in which your Court cares about the interpretation and the functioning of the Convention and the Protocols thereto in the light of present-day conditions[1] inspires national judges. It guides them in securing human rights in individual cases, in the common interest of European society in peace and well-being. Citizens and companies will not get much out of human rights if these rights are granted on paper only, without being practical and effective. It is essential that human rights be complied with voluntarily within national systems and, if unexpectedly they are not, they must be enforceable. In this dual approach, stimulating compliance and requiring procedural and substantive guarantees for enforcement, the ECHR leads by example in Europe in applying the Convention as a living instrument within the rule of law. Commonly, we address this system of protection in terms of its righteousness or goodness. Today at this solemn hearing, I would like also to sing the praises of its beauty and the joy it radiates.

My personal awareness of the significance of the Convention for the development and the application of national law did not only arise during law school in the Netherlands, but also during my subsequent

[1] ECHR 25 April 1978, Tyrer/United Kingdom, nr. 5856/72, no. 31; ECHR 9 October 1979, Airey/Ireland, 6289/73, no. 26; ECHR (GC) 8 July 2004, Vo/France, 53924/00, no. 82; ECHR 20 January 2011, Haas/Switzerland, 31322/07, no. 55.

study at the law faculty of the University of Vienna, Austria, shortly before I became a trainee judge in the Netherlands. It was the year of the fall of the Berlin wall, 1989. A Viennese professor organised a weekend seminar in a somewhat dilapidated Habsburg castle. The ins and outs of the Convention were addressed, including the meaning for one's personal performance as a legal professional of Article 1 of the Convention: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". It was also meaningful for my legal education to study the Convention within a Central European jurisdiction, after becoming acquainted with it in the then rather Atlantic-oriented Dutch jurisdiction. I think it is important for the sustainable common understanding of our legal cultures in Europe that exchange programmes are available for European law students and legal professionals. At the age of 24, having grown up in the peaceful and open, high-trust society of the Netherlands, I learned that living in such a society was of a beauty which was not self-evident, for instance from the insight that, for Austria, the Staatsvertrag of 1955 had in some ways also been an escape out of a closed society behind the iron curtain. I have a strong memory of the intense joy that came over the city of Vienna in 1989 during the opening up of the borders with neighbouring countries. Free exchange across open borders between the peoples of Europe is a factor of cultural enrichment for all of us.

Since 1989, the human rights approach of the Convention as a major part of the rule of law has been spread further across the European continent. Today, more than 30 years later, the protection of human rights by national authorities is still essential in contributing to peace and tolerance across our countries. The significance of judicial dialogue for this protective role of national and international courts was extensively discussed in solemn hearing speeches in the past years, for instance by President Pérez de los Cobos Orihuel of the Constitutional Court of Spain (2015), President Lenaerts of the Court of Justice of the European Union (2018) and Justice Clarke, Chief Justice of Ireland (2020). I do fully agree with them that a constructive and mature judicial dialogue between national and international courts is a meaningful instrument in the effective protection of human rights.

I think a judicial dialogue may also support courts in dealing with criticism as to the requirements regarding the protection of human rights and freedoms within the rule of law. Criticism as to what the Convention demands from States or legal professionals in regard to this protection is all around us. In my country too.

It is my perception that the judiciary in the Kingdom of the Netherlands generally implements the Convention in good faith, in accordance with Article 26 of the Vienna Convention on the Law of Treaties. In the Netherlands, almost every judge in every case at every instance is able to apply the Convention. Under Article 93 of the Dutch Constitution, provisions of an international treaty such as the Convention that may be considered "generally binding" as to their content, are obligatory just like national law after being published. According to Article 94 of the Dutch Constitution, national law is not to be applied if this is not compatible with such generally binding provisions of an international treaty. Thus, the Dutch Constitution prescribes that national law must be interpreted in the light of the international human rights treaties and agreements entered into by the Netherlands. Following the ratification of the Convention, the acquis of your Court's case-law concerning the rights enshrined in the Convention became an essential hermeneutical canon for the Dutch legislative, executive and judicial powers. This canon has proved and is still proving fruitful for the task of Dutch courts in applying national law in accordance with human rights. It would be an enormous job for the Dutch legislator if Articles 93 and 94 of the Constitution obliged this canon to be codified in Dutch national

legislation. The approach to the Convention and to this canon by the Supreme Court of the Netherlands is aimed at an effective application of human rights in a particular court case. In the Netherlands, critical consideration of the merit of the courts' case-law is seen as a valuable addition to their daily instruments. It is part of our checks and balances to monitor whether arguments in critical comments about a judgment have been recognised in the judicial debate in the case.

Criticism as to the requirements regarding the protection of human rights and freedoms within the rule of law is sometimes related directly to the Convention or to courts.

The very essence of a human rights approach within the rule of law by courts is respect for human dignity and human freedom, just as this is the very essence of the Convention.[2] National courts have to make every possible effort to apply the Convention and to give at least as much protection as the Convention requires in the interpretation of the ECHR. If national courts act like this, they will contribute to the necessary level playing field for the ECHR to stand for procedural and substantive subsidiarity. A proper judicial dialogue between our courts is a natural part of this level playing field. Such a dialogue can take place at a general academic level, by individual case management, and through responsive legal reasoning in a judgment. The Knowledge Sharing Platform of the Superior Courts Network of the ECHR is helpful for the dialogue within case management, for instance because it facilitates national contributions to the Court's comparative-law activities. A recent example in the Netherlands of dialogue through responsive legal reasoning is a judgment about the line between freedom of expression and the offence of insulting a group, in the case of a Dutch politician. In this case, the Criminal Division of the Supreme Court of the Netherlands continued its practice of elaborately integrating the case-law of the ECHR into national law and jurisprudence.[3]

Case management and responsive legal reasoning are instruments of a constructive judicial dialogue. At the same time they are instruments for dealing with criticism as to the requirements regarding the protection of human rights and freedoms within the rule of law. National contributions to the Court's comparative-law activities during case management may for instance be used to guarantee procedural and substantive fairness, or to ensure responsive legal reasoning in a judgment, in order to facilitate the acceptance of the interpretation of the Convention by the ECHR. Sometimes, criticism can be transformed into improvement of human rights protection. As you know, a severe point of criticism some years ago was the ECHR's enormous backlog in processing cases. The ECHR has substantially increased the efficiency of its handling of the caseload in the past years, since Protocol 11 came into force. The ECHR developed its successful approach in conjunction with the relevant partners. This major achievement is all the more commendable if the budgetary difficulties of the ECHR are taken into consideration. In the context of reducing the caseload, the ECHR showed the same responsive attitude towards its relevant environment as it does in its case management and judgments in individual cases.

Critical comments on the work of the courts, and especially on judgments of the ECHR against States, will "never pass into nothingness", to paraphrase John Keats.

There will always be some criticism. It is a normal aspect of the task – common to international and national courts alike – which is to promote an effective approach to human rights protection in

[2] ECHR 29 April 2002, Pretty/United Kingdom, 2346/02, no. 65.
[3] Hoge Raad 6 July 2021, ECLI:NL:HR:2021:1036.

European society. I began this speech by quoting the first verse of John Keats' celebrated poem, "*A thing of beauty is a joy forever*". It should be noted straight away that one important difference between Keats and the European Convention is their respective ages. Keats died at the age of twenty-five. The Convention, for its part, will be celebrating its 71st anniversary in two months time – and it is in jolly good health.

Looking more closely, there are also some interesting similarities between the European Convention and Keats. For example, when it is created, a literary work often receives harsh criticism but it is also defended, particularly by those who discern its underlying philosophy (Byron and Shelley, in the case of Keats). Moreover, after a certain time has elapsed, the importance of the created work becomes more generally recognised and its influence on the national and international scene increases significantly. Keats sought to crystallise the experience of beauty in a romantic poem on the assumption that everyone would feel the joy of that experience for the rest of their days. He was criticised by those who pursued a different approach to the role of the traditional romantic concept, in literature which was increasingly inspired by nationalism.

In applying the Convention the judge is sometimes confronted with the following dilemma: how can thoughts and feelings about the concept of human dignity and liberty be transposed in practice into the law? How can human dignity and liberty be accessible and effective for the individual?

Perhaps you have in mind your own examples of Strasbourg judgments in which thoughts and feelings about human dignity and liberty are transposed into rights and obligations in the realm of human rights. Allow me to mention just one aspect: the obligation for the national authorities to encourage citizens to have genuine confidence in the upholding and maintaining of those rights and obligations.

Confidence is a good example of "a thing of beauty which is a joy forever" and, at the same time, of a thing which represents an everyday challenge in terms of securing the requisite rights and obligations. When it comes to confidence, in all our respective courts we have become familiar with the role of the judge in promoting and sustaining the confidence which the courts in a democratic society must inspire in the public, as stated in the exemplary and settled case-law of the ECHR[4]. This will require, in particular, a judge who does justice in an upright, competent, attentive, and benevolent manner, and a State which genuinely allows the judge to accomplish this task.

This role increasingly requires judges to behave as courageous and alert officers of the law, even when the result of their judicial work displeases the legislature or the executive. On the position of the judiciary among the three powers, the ECHR declared as follows in 2020, in paragraph 215 of its judgment in *Gudmundur Andri Ástrádsson v. Iceland*: "a certain interaction between the three branches of government is not only inevitable, but also necessary, to the extent that the respective powers do not unduly encroach upon one another's functions and competences"[5]. In fact, in the spirit of the separation between the three powers, the sharing of responsibilities has been the crux of the matter for centuries. The word "sharing" highlights a key point that is not often made, namely the fact that none of these powers – legislative, executive or judicial, by nature – is capable of maintaining the rule of law on its own, by its own means. All stakeholders need to accept the fact that the pursuit of justice is a shared responsibility. By the exercise of competence in the context of the three powers,

[4] See, for example, Micallef v. Malta [GC], no 17056/06, § 98, ECHR 2009.
[5] Guðmundur Andri Ástráðsson v. Iceland [GC], no 26374/18, § 215, 1 December 2020.

the responsibility for securing respect for human dignity and liberty is shared, this being a sovereign responsibility that cannot be assumed by any one power in its sole interest, without undermining its position in terms of the rule of law. If this reality is ignored, the outcome will sooner or later be one of failure, to the detriment of peace and the common good, as history has shown us, more than once.

Nowadays we are increasingly hearing about concrete threats to human rights, such as the coronavirus health crisis, climate change, cybercrime or drugs mafias. These questions are no less important for the preservation of human rights protection in today's world than for the question of the rule of law. For example, on the subject of drugs mafias, there is a quite remarkable debate under way in the Netherlands at the moment about confidence in a fair trial. One of the questions is whether a suspect can retain a full right to challenge the reliability of a principal witness by raising specific motions to secure the hearing of other witnesses and experts, when that suspect himself or herself systematically invokes the right to remain silent, even though he or she is suspected of running a criminal organisation involved in drug trafficking and killings[6]. An argument frequently made against the retention of this full right consists in saying that the search for truth and justice is being undermined by a delaying tactic. The judges of the Nuremberg trials in 1946, but also, to take a more recent example, those who sat in the trial concerning the Charlie Hebdo attack in 2020[7], clearly showed that all suspects have the right to a fair trial. In the Strasbourg case-law, Article 17 on the prohibition of abuse of rights has a negative impact and cannot be interpreted *a contrario* as depriving an individual of the right to a fair trial[8]. One must not overlook that the rules of application of the Convention must guarantee human rights to a very large number of citizens who genuinely need its protection and have no intention of abusing the system. However, the Convention and its dynamic application by the Court must allow all domestic courts the possibility of finding the right solutions in a situation where the preservation of human rights protection in the general interest must be carefully weighed up against the specific importance of individual rights and safeguards. This means that, where necessary, the judge will have to consider and explain to what extent thoughts and feelings, whether or not they are comprehensible, are compatible with the respect for human rights acknowledged and guaranteed by the Convention, and whether they can legitimately restrict those rights. And let us not forget that this task is entrusted above all to the domestic courts. The ECHR has publicly taken the direction of a more specific form of subsidiarity. In its judgments it points towards a requirement of procedural and substantive safeguards on the part of a domestic court, rather than carrying out an in-depth assessment of the court in question.

The transformation of the Convention's application in a direction which takes account of current individual needs is an ongoing trend. I would express the wish that all of you here today are all able to disseminate, in your daily lives, the beauty and joy of the Convention, and I also sincerely hope that the Convention itself will never "pass into nothingness".

Thank you for listening.

[6] Pieter van der Kruijs (*oud-strafrechtadvocaat*/former defence lawyer), Richt systeem van strafrecht in op de nieuwe werkelijkheid (Modelling the system of criminal law around a new reality), NRC Handelsblad, 10 August 2021.
[7] Emmanuel Laurentin, Antoine Mégie, Florence Sturm, François Boucq, Que nous a raconté le procès des attentats de janvier 2015 ?, France Culture, Le temps du débat d'été (from about the 27th minute).
[8] European Court of Human Rights, Guide to Article 17 of the Convention – prohibition of abuse of rights, updated 31 August 2020, § 57.