APPLYING AND SUPERVISING THE ECHR

The role of Supreme Courts in the domestic implementation of the European Convention on Human Rights

Proceedings of the Regional Conference
Belgrade, 20-21 September 2007

Serbian Chairmanship
Committee of Ministers
COUNCIL OF EUROPE
May > November 2007

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

LHRCBD (2008) 1

The role of Supreme Courts in the domestic implementation of the European Convention on Human Rights

Regional conference organised
by the Directorate General of Human Rights and Legal Affairs and the Supreme Court of Serbia
in the framework of Serbia's Chairmanship
of the Committee of Ministers of the Council of Europe

Belgrade, 20-21 September 2007

Proceedings

Directorate General of Human Rights and Legal Affairs
Council of Europe
August 2008

Édition française: *Le rôle des Cours suprêmes dans la mise en œuvre de la Convention européenne des Droits de l'Homme au niveau interne. Conférence régionale organisée par la Direction générale des droits de l'Homme et des affaires juridiques et la Cour suprême de Serbie, dans le cadre de la Présidence de la Serbie du Comité des Ministres du Conseil de l'Europe, Belgrade, 20-21 septembre 2007*

Directorate General of Human Rights and Legal Affairs
Council of Europe
F-67075 Strasbourg Cedex

http://www.coe.int/justice/

Printed at the Council of Europe

Contents

Introduction

The initiative to hold a regional conference to discuss the role of Supreme Courts in the domestic implementation of the European Convention on Human Rights, was taken by the Serbian Chairmanship of the Committee of Ministers of the Council of Europe.

The conference, organised by the Directorate General of Human Rights and Legal Affairs, in co-operation with the Supreme Court of Serbia, the Serbian Ministry for Foreign Affairs and the Council of Europe office in Belgrade, gave rise to an in-depth exchange of views on national experiences, the progress made and the challenges still to be faced with regard to an effective implementation of European human rights standards within Council of Europe member states.

The role of the case-law of the European Court of Human Rights as a guiding tool for Supreme Courts and national judicial systems was highlighted.

The subsidiary character of the European Convention on Human Rights was emphasised during the conference, along with the role of national judges in making the protection of human rights a reality at national level. Finally, the participants also stressed the need for an independent and qualified judiciary.

Opening of the Conference

Vida Petrović-Škero

President of the Supreme Court of Serbia

Esteemed judges, ladies and gentlemen, dear guests, good day and welcome.

The Supreme Court of Serbia is honoured to have organised this conference, together with the Council of Europe, as part of Serbia's activities relating to its chairmanship of the Committee of Ministers of the Council of Europe. We expect this meeting to contribute to the development and improvement of co-operation between the countries and Supreme Courts of the region and to the achievement of European goals: respect for human rights, the establishment of the rule of law and the development of democracy. By organising a meeting of this significance, the judiciary of our country has proved its commitment to the fundamental values, standards and norms of the Council of Europe and confirmed its willingness to contribute to their full observance at the national, regional and international levels.

Member states are striving to define the frameworks, methods and contents of their mutual co-operation and European integration within the framework of the Council of Europe and on the basis of equality and mutual respect. We expect that during the conference the participants will exchange experiences and views on certain legal topics, problems and their possible solutions and that they will make arrangements for their further co-operation.

The Republic of Serbia, as a signatory to the Convention on Human Rights, has pledged to ensure respect for the rights and freedoms laid down in the Convention. These values form the basis of democracy in any society and constitute the foundations of justice and peace in the world. A greater unity among the members of the Council of Europe and better co-operation at the regional level will ensure greater efficiency in the implementation of the provisions of the Convention. In each individual country as well as at the regional and European levels, the judiciary plays the most important role in promoting the implementation of

the Convention on Human Rights. The Supreme Court of every country has the role to encourage other courts to reach an adequate level of human rights protection and provide them with guidelines for the implementation of the provisions of the Convention. In order for the judiciary to be able to carry out this task, it is necessary for the state to ensure conditions for continuing education, for raising the level of skills and expertise of judges for the implementation of the Convention and the case-law of the European Court of Human Rights.

Countries in transition are faced with a serious task with regard to harmonising their domestic practices with international and European standards in all areas, including the improvement of human rights protection. If all three branches of government do everything they can within their purview to ensure conditions for the implementation of a mechanism for the effective protection of the rights of citizens in judicial proceedings, the results and progress will be assured. A good assessment of obstacles to the effective implementation of the European Convention on Human Rights and correctly selected mechanisms for overcoming those obstacles will also improve the quality of the protection of the rights of citizens and the trust they place in the courts.

Continuing co-operation with European institutions, notably the Council of Europe, will help us too to overcome the difficulties we are facing at the moment and to fulfil our obligation to adopt and implement European standards as best we can.

The Supreme Court of Serbia and the judiciary of our country are ready to increase the effectiveness of implementation of the Convention on the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. At the same time, we will try to ensure the greatest possible efficiency of domestic courts and to provide citizens with effective protection of their rights at the national level.

The responsibility assumed by the Supreme Court of Serbia in respect of the organisation of this conference is great, and that is why I hope that its participants will confirm the importance and usefulness of an exchange of experiences, co-operation and joint debate about topics concerning the implementation of European standards in human rights protection.

I would like to thank the participants in the conference for accepting the invitation of the Supreme Court of Serbia and the Council of Europe and I wish you all success in your work.

Philippe Boillat

Director General of Human Rights and Legal Affairs, Council of Europe

Madam President, Minister, Your Excellencies, ladies and gentlemen,

It is an honour and a real pleasure for me to be opening this regional conference, and I should like to welcome you warmly. I am most grateful to the Supreme Court of Serbia for taking the initiative of holding such a conference under the Serbian Chairmanship of the Council of Europe Committee of Ministers. My profound thanks also go to the Serbian Ministry of Foreign Affairs and all those involved in organising this important event for their excellent preparatory work.

I am particularly pleased that the Serbian authorities, the Supreme Courts of thirteen of our member states and the Council of Europe are so broadly represented, and at such a high level. The Council of Europe is represented, in particular, by the President of the European Court of Human Rights, Mr Jean-Paul Costa, whom I should like to welcome and warmly thank for consenting to share the views of the European Court of Human Rights with us. His presence, and that of Mr Popović, the judge elected to the Court in respect of Serbia, bear witness to the importance the Court attaches to the issue we are going to discuss today and tomorrow.

The main purpose of this event, indeed its very *raison d'être*, is to enable Supreme Courts to share their experience of the implementation of the European Convention on Human Rights and discuss the role that they play in their domestic judicial systems in ensuring that the Convention is effectively implemented.

I would remind you that, under Article 1 of the European Convention on Human Rights, it is primarily the responsibility of the national authorities, and hence the domestic courts, to safeguard the rights and freedoms set out in the Convention. This is essential if the fundamental principle underlying the Convention's entire supervision machinery, the principle of subsidiarity, is to be fully respected. The European Court of Human Rights should be called on to intervene only secondarily.

All the States Parties to the Convention have incorporated the Convention into their domestic legal systems, and it is therefore directly enforceable in the 47 States Parties. This does not, however, mean that in practice the Convention is applied in the same way as a source of domestic law. Some states are, if you will forgive the expression, "dragging their feet" and, as a result, thousands of appli-

cations are pending in Strasbourg, even though the Court has well-established precedents in respect of the issues in dispute. In actual fact, over half the applications to Strasbourg would not have been lodged if the domestic courts had applied the Court's case-law. A solution could – and should – therefore have been found at national level.

Supreme Courts should therefore set an example to lower courts in this respect. It is up to them, in the first instance, to lead the way in applying the Convention and the Court's case-law direct. Moreover, every Supreme Court judge can, and indeed should, by virtue of his or her status, knowledge and experience, make a significant contribution to the protection of the human rights of his or her fellow citizens.

In a presentation I shall give later this morning, I shall point out that the basis of any genuine democracy and of the rule of law is an independent judiciary. Without an independent judiciary, not only can there be no effective protection for human rights, but democracy and the rule of law are in serious jeopardy.

The purpose of this conference is therefore to discuss, together, effective means of enabling your domestic courts to take account of the case-law of the European Court of Human Rights in their decisions, to remedy situations where proceedings are excessively long, and to ensure that judges have the knowledge and expertise needed to implement the European Convention on Human Rights in their daily work. I particularly welcome those of you who are going to describe the situation in your respective countries in these respects and with regard to the issues raised during the conference, and I should like to thank you here and now.

A comparative approach strikes me as essential if we are to discuss problems that are common to several of your courts and try to come up with solutions. The experience of states that have already introduced reforms in order to forestall the submission of applications to the Court is vitally important. They will tell us what domestic procedural means they use to examine complaints in the light of the Convention and, if necessary, ascertain that there has been a violation and remedy the situation. I am delighted that you will be sharing this experience not only with your colleagues from other countries but also with representatives of the Court and the Council of Europe. In particular, we shall have the pleasure of hearing Mr Paul Lemmens, member of the Belgian *Conseil d'Etat*, and Mr Jeremy McBride, Barrister and Visiting Professor at the Central European University, who will share their experience with us.

Madam President, Your Excellencies, ladies and gentlemen,

It is primarily your Supreme Courts that have the privilege of protecting the fundamental rights of over 800 million Europeans. I am therefore convinced that our discussions will have beneficial results that will be of interest to the Supreme Courts in all the States Parties to the Convention. I wish you all an excellent conference.

Welcome message on behalf of Serbian Foreign Minister Vuk Jeremić

Radojko Bogojević

State Secretary of the Ministry of Foreign Affairs of the Republic of Serbia

Mr Minister of Justice, Madam President of the Supreme Court of Serbia, Mr President of the European Court of Human Rights, Honourable Judge Petrović, Esteemed guests, ladies and gentlemen,

I would like to welcome you on behalf of the Serbian Foreign Minister, Vuk Jeremić, chair of the Committee of Ministers of the Council of Europe, who, unfortunately, is unable to address you here today due to prior commitments. Please allow me to read you his message:

"Dear Europeans – dear friends,

It is an honour and a pleasure for me that the Regional Conference on the Role of Supreme Courts in the Domestic Implementation of the European Convention on Human Rights is being held in Belgrade as part of Serbia's chairmanship of the Committee of Ministers of the Council of Europe, and I regret not being able to address you personally.

The importance of this event is also highlighted by the presence of our distinguished guests – Jean-Paul Costa, President of the European Court of Human Rights, and Dr Dragoljub Popović, judge of the European Court of Human Rights for Serbia.

The European Court of Human Rights is a particularly important institution within the Council of Europe system. Its significance with regard to the protection of human rights and the rule of law is invaluable for Europe as a whole. The

European Convention on Human Rights and the European Court of Human Rights therefore occupy a prominent place in the priorities of Serbia's chairmanship of the Committee of Ministers of the Council of Europe.

As you know, Serbia is chairing the Committee of Ministers of the Council of Europe from May until November this year, only four years after becoming a member of the Council of Europe. The foremost priority of our chairmanship, which we presented at the 117th Ministerial Session of the Committee of Ministers of the Council of Europe on 11 May this year, is to continue to foster the fundamental values of the Council of Europe, that is human rights, the rule of law, and democracy. Within the framework of this priority, Serbia advocates a further strengthening of the mechanism for implementing, and monitoring the implementation, of the Convention. In accordance with the decisions of the Third Summit of the Council of Europe, we will focus on promoting efficiency in the implementation of the Convention on the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights, as the true pillars of the European system of protection of human rights and fundamental freedoms.

Furthermore, Serbia, as the country currently holding the chairmanship, attaches a special importance to the activities aimed at increasing efficiency in the implementation of the Convention at national and European levels.

As you know, a conference on the role of government agents before the European Court of Human Rights was held in Belgrade in June this year, and today Belgrade is the host of representatives of supreme courts of the countries of the region.

At this point, allow me to make a slight digression and mention another priority of our chairmanship. I am referring to the regional component of our chairmanship: Serbia, as chair of the Committee of Ministers of the Council of Europe, endeavours to contribute to the improvement of the European prospects by strengthening good-neighbourhood relations and reaching the standards and goals of the Council of Europe in South-East Europe.

We are also trying to help the Council of Europe make its presence more strongly felt in the region, which will help promote democracy, the rule of law and human rights protection in this part of Europe, which – I am certain you will share my opinion – is particularly important in the light of our efforts towards European integration and for overcoming the difficult legacy of the recent past.

The entering into force of Protocol No. 14 to this Convention is of essential importance for enhancing the efficiency of the system of the European Convention on Human Rights. At the same time, it is necessary to improve and strengthen the national mechanism for its implementation. Hence the special significance of today's meeting.

Topics such as the acquisition of essential knowledge and skills by judges for the implementation of the Convention, the assessment of obstacles to its effective implementation by national courts, and the provision of legal remedies in cases of lengthy judicial proceedings, as well as current problems and possible solutions with regard to the independence of the judiciary, make for a substantial and constructive debate. I am convinced that such topics, in their own right, require more than a single two-day conference, but I am also convinced that you will use the time available for an invaluable exchange of experiences and practices.

Finally, I would particularly like to say how pleased I am that that in addition to this distinguished meeting, the European Heritage Days and European Flag Day celebrations are being held in Belgrade right now. Under this flag, Serbia, as a Council of Europe member state, is striving to make a full contribution to the strengthening of the role of our organisation and multilateral dialogue between states and nations, a dialogue whose purpose is to build a joint Europe without dividing lines. This endeavour is underlined by the motto of Serbia's chairmanship – ONE EUROPE, OUR EUROPE.

I am convinced that our joint beliefs and goals and our concerted activities aimed at safeguarding human rights, democracy and the rule of law are important for every individual European and that each European can wholeheartedly say: 'One Europe, my Europe'.

I wish you success in your work, and, once again, I regret being unable to attend this important meeting in person."

The authority of the jurisprudence of the European Court of Human Rights

Jean-Paul Costa

President of the European Court of Human Rights

Madam President of the Supreme Court, Mr Minister of Justice, Mr Director-General, ladies and gentlemen, first of all my very sincere thanks to the authorities of the Republic of Serbia for the warmth and generosity of their welcome, which is in keeping with their age-old reputation for hospitality.

It is a particular pleasure to be back in Belgrade because I made a lengthy tour of your country on completing my university studies, which, as you will realise, was not exactly yesterday!

Serbia has for four months held the chairmanship of the Council of Europe Committee of Ministers. This regional conference on the role of Supreme Courts in implementation of the European Convention on Human Rights is one of the highlights of the Serbian chairmanship, and congratulations are due to the Council of Europe Directorate-General of Human Rights and Legal Affairs and the Supreme Court of Serbia for organising it.

On 2 July I also had the honour of welcoming to the European Court the President of Serbia, Boris Tadić, whose visit demonstrated his commitment to the Strasbourg human rights protection machinery.

The priorities of the Serbian chairmanship, as presented at its outset, are ample evidence of Serbia's desire to focus its action on protection of human rights. As President of the Court, which is the keystone of the European system, I am very pleased about that.

This conference seeks to bring out how the Strasbourg Court and Supreme Courts interact in applying the Convention and I am pleased to see representatives among you of the highest courts of many of our member states.

How is the authority of the European Court of Human Rights exercised? That is the question which I shall attempt to answer today, and in doing so I shall draw a distinction between the authority of the Court's judgments, which is secured by a series of mechanisms, and the authority of the case-law, which to my mind must be construed more widely. But the word authority (*auctoritas* in Latin) should not mislead you. Authority does not mean authoritarianism, still less does it mean arbitrariness. Authority is indissociably linked with reason, credibility and ultimately the power to convince, rather than with the right to impose anything.

The European Convention on Human Rights, as a multilateral treaty between states, is an integral part of international law, whose primacy over domestic law was asserted as far back the nineteenth century, and has since been confirmed on many occasions, notably in an important opinion delivered by the International Court of Justice in 1988.

The Court's case-law is clear in that regard: it states that "[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part".

At the same time the Court has often emphasised "the special character of the Convention as a treaty for the collective enforcement of human rights", the fact that it is an "instrument of European public order (*ordre public*) for the protection of individual human beings", which means that the Court has responsibility for ensuring effectiveness of the Convention by interpreting it accordingly.

The Convention, which is binding on the forty-seven states that have ratified it, contains a number of provisions which reinforce its authority and the Court's.

First of all, Article 1 provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention". That essential provision confers on each individual the right to invoke the Convention before the domestic courts. It is therefore a provision which is as important for the European Court as for the domestic courts.

Article 1 is supplemented by Article 19, which establishes the Court in order that it may "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". The Strasbourg court thus plays a distinctive role and has special authority.

Last, Article 46 states that the High Contracting Parties "undertake to abide by the final judgment of the Court in any case to which they are parties". Hence what is known as authority of judgments, authority which, under the second paragraph of Article 46, is exercised under the supervision of the Council of Europe Committee of Ministers.

As I have said, authority of judgments must be distinguished from authority of case-law, and I shall deal with those two aspects of the matter in turn, though before doing so I should like to make three brief observations:

First of all, the Court's case-law does not form a uniform whole. It is made up not only of judgments finding either a violation or a non-violation of the Convention, but also of inadmissibility decisions, which are sometimes as important as a judgment. In a moment I shall refer to the inadmissibility decision delivered by the Grand Chamber of the Court in the case of *von Maltzan and others v. Germany*, which although not a judgment is none the less very important.

My second preliminary observation is that the Court's case-law is not laid down once and for all. In many areas it has evolved and indeed is constantly evolving (an example of this is the United Kingdom cases concerning transsexuals). In other words, while observing the force of precedents, our Court applies the "*stare decisis*" rule flexibly; since its earliest judgments, moreover, it has treated the Convention as a living instrument which must be interpreted in the light of present-day conditions.

Last, the Court is clearly not infallible. In addition, some of its judgments and decisions are not adopted unanimously, hence the value of the separate opinions of minority judges provided for in Article 45. They indicate the variety of possible approaches and unquestionably have an important role in informing legal opinion, even though, naturally, *res judicata* attaches to what was decided by the majority.

I turn to the authority of the judgments. That authority has the consequence that a state which is found to have violated the Convention must execute the decision of the Court. Where the Court so decides, that state will have to pay a sum of money to the applicant. This is what is known, in Convention terminology, as "just satisfaction". In certain cases execution of the judgment means *restitutio in integrum*, where that is possible, and sometimes that may also entail a change in domestic law or domestic case-law. It is quite common for a state to be required to amend its domestic legal system in order to comply with a judgment of the Court and avoid repeating the human-rights violation found by the Court.

However, the authority of the judgments has limits: the Court's judgments are binding only on the parties and not generally binding. Thus, in law at least, only states found to have violated the Convention are bound by the Court's decision.

Sometimes, however, the law of other states is similar to the law which gave rise to the finding against the state concerned. In the absence of generally binding effect, states not directly concerned by judgments are under no obligation to comply with them, and one possible consequence of this is that after the Court has found against a state and that state has amended its system, among states parties to the Convention there will be those which change their law on that basis and those which continue to apply provisions of a system which the Court has held to be contrary to the Convention.

I shall give a few examples, if I may.

France might have learnt the lesson of the *Malone v. the United Kingdom* judgment and enacted necessary laws on telephone tapping which it then lacked, instead of which it waited to be itself found in breach of the Convention in the *Kruslin* and *Huvig* cases before enacting telephone-tapping legislation that was compatible with the Convention.

On the subject of my own country, which has not always been the best of pupils in this area, I might also mention inheritance law which discriminated against children born out of wedlock. France might have known that it risked a violation finding, given judgments concerning other countries, in particular *Marckx v. Belgium* and *Inze v. Austria*. It would certainly have done well to take the initiative, like the Netherlands, whose law on the subject, inherited from the *Code Napoléon*, was the same as France's. In the event it was more than ten years after the *Markx v. Belgium* case that the violation finding against France in the *Mazurek* case prompted the French legislature to tackle the matter.

I should add that countries increasingly seek to forestall never-welcome Strasbourg violation findings, with the result that, at least *de facto*, the Court's judgments carry some force even with countries which are not parties to the particular dispute.

That authority is reinforced, moreover, by the role which the Committee of Ministers plays in ensuring the execution of judgments. It is the Committee of Ministers, not the Court, which the Convention has always entrusted with that task, a task which, although the number of judgments delivered by the Court has very significantly increased, the Committee of Ministers has discharged very well, to its great credit.

I should also like to mention the new directions or orders the Court gives, which reinforce the authority of its judgments. An example is *Assanidze v. Georgia*, where the Court, after concluding that the applicant had been detained arbitrarily in breach of Article 5(1) of the Convention, held for the first time in the actual judgment that the respondent state must ensure that the applicant was released without delay, as was done the very next day in a signal confirmation of the Court's authority.

Pilot judgments, as used in a number of Polish cases, are another example and in my view have helped lend reinforced authority to the Court's judgments, but I leave it to my colleague and friend Judge Popović to speak about this in greater detail tomorrow. Where the Court finds that there has been what is known as a structural violation, it may, in a pilot judgment, request the respondent state to make good the injury to all potential applicants by adopting general measures, rather than itself ruling on each individual case.

Use of pilot judgments was in fact welcomed and encouraged by the Wise Men in their report and the Court is therefore keen to develop it.

What about the authority of the case-law, which is my second topic and which, to my mind, is further-reaching than the authority of the judgments? It is real and extends beyond the specific case.

I have mentioned the Netherlands in connection with children conceived outside marriage. Horizontal application of the Court's judgments is increasing: there is a tendency for states not been found to have violated the Commission to align themselves nevertheless on the Court's case-law. The situation has therefore changed for the better and it is really possible to speak of the case-law as having authority.

In France, for instance, in matters of respect for private and family life (Article 8 of the Convention), the courts and parliament have taken into account the Court's case-law on the law relating to aliens, with the Council of State basing its position on Court case-law which protects the rights of aliens forcibly removed from national territory. (In the light of the 1988 *Moustaquim v. Belgium* judgment, the French Council of State amended its case-law on the deportation of aliens in 1991.)

This horizontal application of the Court's case-law means that states have to pay close attention to the case-law in order to see how it might apply to them.

However, there is an important time dimension to the Court's case-law as well.

The courts of the member states, and here I give all due credit to the Supreme Courts, are now anticipating developments in the Strasbourg case-law, even in matters on which the Court has yet to deliver a ruling. Again, the domestic courts, proceeding by analogy, are taking pointers from the Court's general case-law in developing their own case-law. Examples of this are broad construction of what constitutes assets to take in enforceable claims and even legitimate expectation of possessing an asset, or recognition that the principle of freedom of expression prevails over the exceptions provided for in paragraph 2 of Article 10, or the understanding of judicial impartiality and procedural fairness.

This close interest in the case-law is natural, as the domestic courts have the right and the duty to ensure primacy of the Convention.

In most member states the Convention is daily invoked before the Supreme Courts (and indeed the ordinary ones) and applied by them irrespective of whether there is established Strasbourg case-law in the relevant area.

To take an example, in the United Kingdom, where the Convention has been directly applicable only since 2000, the year the Human Rights Act was passed, the House of Lords anticipates the Court's case-law in the context of anti-terrorist measures.

The corollary of the domestic courts' readiness to accommodate the Court's case-law is the fact that the Court itself sometimes draws on domestic decisions.

The *Von Maltzan and others v. Germany* decision, to which I have already referred, concerned compensation for persons whose property had been expropriated either between 1945 and 1949 in the Soviet Occupied Zone in Germany following the agrarian reform or after 1949 in the German Democratic Republic (GDR). In that case the Court clearly and expressly relied on the case-law of the Karlsruhe Constitutional Court, which placed emphasis on the wide discretion enjoyed by Parliament for purposes of arriving at comprehensive solutions to consequences of German reunification.

The Court in Strasbourg has no hesitation in following to the letter, where appropriate, the reasoning applied by a national court, as in *Thivet v. France*, a case which is of legal and historical interest because it had to do with the Russian bonds issued by the Tsarist regime which were not repaid after the 1917 revolution. In declaring that application inadmissible, the Court reproduced the decision of the French Constitutional Council approving the compensation arrangements. So while a large number of national courts rely on the Court's case-law, the Court also refers to theirs; thus we often speak the same language.

I shall conclude this series of examples by citing, again, the recent *Russian Conservative Party of Entrepreneurs v. Russia* judgment, which concerned the right of a party to stand for election. The Court held that there had been a violation of Article 3 of Protocol No. 1 and ruled that disqualification of the applicant party and a candidate in the elections for the reasons stated by the authorities was disproportionate to the legitimate aims pursued. The Court made it clear in the grounds of the judgment that the Constitutional Court of the Russian Federation shared that view.

The authority of the case-law is therefore an established fact. How can it be reinforced?

That unquestionably depends on the member states and domestic courts being better informed. Here, the Court's HUDOC information system, which is constantly being improved, plays a major part. So do the Court's internet broadcasts of hearings, which began in July 2007. The opportunity this gives everyone, wherever they are, of following a hearing of the Court virtually live should bring the Convention machinery closer to the public and to national judges.

Case-law authority is assisted by the judicial dialogue which results from judges' many visits to the Strasbourg Court. It is a great pleasure to receive delegations from national courts and arrange for them to attend our hearings and meet judges and staff of the registry. In 2006 the Court had visits from more than ninety delegations of judges from all the member states, and the figure increases annually by 15%.

Another means of ensuring dialogue is bilateral and multilateral colloquiums like this one, which are extremely constructive. The Council of Europe performs

a vital role in organising them, and the Director General, my friend Mr Philippe Boillat, knows that he can rely on the Court to take part.

Every day, in the domestic courts of our member states, the European Convention on Human Rights is invoked by lawyers and cited and applied by the judges. That, in my view, is the most significant advance of these forty five-years' case-law: law which not long ago was regarded as external has penetrated judicial thinking to such an extent as now to have a key bearing on courts' decisions.

A genuine dialogue between national judge and European judge has come about. That dialogue is indispensable, and the international judges are often former national judges, of course. It is the national courts that are primarily responsible for interpreting and applying a treaty such as the European Convention on Human Rights: it must not be forgotten that the Court in Strasbourg is careful to observe the principle of subsidiarity, which, as Philippe Boillat pointed out, is crucial to the system of human-rights protection.

However, it does ultimately fall to the Court to perform European-level review. That role firstly operates with regard to the domestic courts. Although we must not set ourselves up as a fourth instance rehearing what has already been heard in the domestic courts, we do have a duty to oversee the requirements of fair trial as guaranteed by Article 6 of the Convention. In that context I cannot overstate the need for independence and impartiality of the national courts. Without competent judges, without independent judges, there cannot be any respect for procedural fairness or, ultimately, proper respect for human rights. My distinguished predecessor, René Cassin, was fond of saying that Article 6 occupied a central place in the Convention as the absence of fair trial rendered domestic protection of human rights illusory. The Court also has a review function *vis-à-vis* national legislatures, and that role is essential if we are to maintain and develop a Europe based on human rights. The Convention and the protocols to it as applied and interpreted by the Court should be regarded by states as establishing minimum standards. It is worth pointing out that, in the light of Article 53 of the Convention, there is clearly nothing to prevent member states from exceeding those standards and providing even greater protection for Convention rights.

I am quite sure that the fruitful discussions which we are going to have will make our meeting in Belgrade a contribution to reinforcing inter-court dialogue and thus the authority of the Court's case-law.

Thank you.

The role of the Supreme Court of Albania in the domestic implementation of the European Convention on Human Rights

Perikli Zaharia

Judge of the Supreme Court of Albania

National report

The Supreme Court of Albania is the highest instance of the Judiciary for the interpretation and the implementation of laws (statutes) through its judgments.

There is also a Constitutional Court, which is not included in the Judiciary and has as specific task to examine the constitutionality of laws and their conformity with international obligations. It cannot be considered as a superior instance, as to the general review of the decisions of the Supreme and ordinary courts, but as a specialised court.

The Supreme Court is composed of 17 justices.

The Supreme Court is organised in two Divisions, Civil and Criminal Division. There are five justices on the panel during hearing a case. The unified interpretation of laws are finalised by Joint Panels. The Supreme Court aims specifically to provide a dynamic and unifying interpretation of law, having regard in particular the requirements of the European Convention on Human Rights.

Exercising judicial control on a national level, the Supreme Court ensures the direct application of the above-mentioned Convention and the interpretation of laws in the light of that one, in order to guarantee the individuals' rights and freedoms which is the self-evident role of the Judiciary in a state governed by the rule of law.

Article 5 of the Constitution of Albania provides that: The Republic of Albania applies international law that is binding upon it.

The Treaty Law is part of domestic law in Albania; the primacy of Treaty Law over ordinary legislation is insured in the Constitution.

Article 116 of the Constitution of Albania provides that:

Normative acts that are effective in the entire territory of the Republic of Albania are:

a. the Constitution;

b. ratified international agreements;

c. the laws;

d. normative acts of the Council of Ministers.

The relationship between international and domestic law is regulated in a monistic way by the Constitution of Albania.

Article 122 of the Constitution of Albania provides that:

1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.

Article 131 of the Constitution of Albania provides that:

The Constitution Court decides on:

a. the compatibility of a law with the Constitution or the international agreements as provided in Article 122;

b. the compatibility of international agreements with the Constitution, prior to their ratification;

As to the European Convention on Human Rights (the Convention), it possesses the status of constitution law in Albania and enjoys a superior rank in the Albanian hierarchy of law in particular in relation to Albanian ordinary legislation and international treaties. The Convention is directly applicable in the legal system of Albania and takes priority of importance over incompatible legislation.

The case-law of the European Court of Human Rights is considered practically an integral part of the Convention. On the other hand, Albanian constitutional provisions on human rights evoke the Convention wherever restrictions by law on those rights are mentioned.

Under Article 17 of the Constitution of Albania, limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.

These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

If the European Court of Human Rights holds that certain provisions of Albanian legislation violate the Convention, the courts of Albania are not permitted to apply those provisions.

The Supreme Court of Albania evokes a relevant judgment of the European Court of Human Rights during considering a case, wherever restrictions by law on individuals' rights and freedoms are claimed for.

So, considering *Cuni v. Shkodra Regional Police Directorate* case (No. 31, 14 April 2003) as for dismissal from employment, the Supreme Court of Albania decided in Joint Panels based on the *Pellegrin v. France* (28541/95, 8 December 1999) (Article 6/1 of the ECHR) judgment issued from the European Court of Human Rights.

The Supreme Court (Civil Division) affirmed Mirdita District Court Judgment on *Beleshi v. Prisons General Directorate* (No. 928, 19 December 2006), (as for redress because of degrading treatment), that was based on *Kalashnikov v. Russia* (No. 47095/99, 15 July 2002) and *Peers v. Greece* (No. 28524/95, 19 April 2001) (Article 3 of ECHR) judgments of European Court of Human Rights.

In the same way, the Supreme Court (Civil Division) affirmed Tirana Court of Appeal Judgment on *Daka v. Kore* (No. 443, 17 April 2007), that was based on *Mikulic v. Croatia* (No. 53176/99, 07.02.2002 (Articles 6 and 8 of the ECHR) judgment of the European Court of Human Rights.

The Supreme Court of Albania takes into consideration that Albanian judges have the relevant skills and knowledge to apply the Convention and the case-law of European Court of Human Rights.

The initial training schemes run for judges on the European Convention on Human Rights and the case-law of the European Court of Human Rights. Judges are provided with initial training in such areas during the academic year.

The academic program on "Human Rights" contains an important part of the initial training of judges. The instruments to achieve the objectives of this program are mainly: theoretical lectures; organisation of work-shops, which include the presentation and interpretation of cases by judges; eventual visits to the European Court of Human Rights.

Subjects on Human Rights dealt with over the previous years focus mainly on the basic principles of the international law on Human Rights, the European system on the protection of Human Rights and fundamental freedoms, and interpretation techniques of the Convention by the European Court of Human Rights.

Apart from the execution of European Court of Human Rights judgments by the government, Albanian courts have the authority to prescribe their own measures implementing the European Court of Human Rights decision, wherever there is a claim based on the relevant obligations derived from it.

Nevertheless, there is not yet such a case to be considered by the courts of Albania.

Where legislation violating provisions of the Convention has been applied in legal proceedings concluded by a final, non-appealable decision, a direct application for reopening of the proceedings and lodging of a claim for compensation are available in Albania, before a possible application to the Court in Strasbourg. Under Article 131/f of the Constitution of Albania, the Constitution Court decides on the final adjudication of the complaints of individuals for the violation of their constitutional rights to due process of law, after all legal remedies for the protection of those rights have been exhausted.

Since the Convention possesses the status of constitutional law in Albania, the judgments of the European Court of Human Rights are given the same authority as "self-executing" provisions of the Convention.

If an Albanian judge were to ignore established case-law of the Strasbourg Court – and bearing in mind that the Convention has been incorporated into domestic law, its judgment might be annulled on the basis that the law had been applied in a "manifestly wrong manner", contrary to the Convention.

Judges work on the presumption that, when there appears to exist a blank space or a missing part in domestic law, the clarification of an uncertainty is needed, or when faced with a doubtful or controversial point of law, they will interpret legislation in such a manner as to avoid conflict with international obligations.

Judges periodically receive information on legislation and case-law at European level.

The only document which is sent directly to each judge by the national authorities in Albania is the official gazette, which can include recent legislation at the European and international levels and judgments of the European Court of Human Rights on cases where the legal action is brought against Albania. Such information is available on paper and will be provided soon in electronic form (CD-ROM).

On the other hand, all judges periodically receive information on case-law of the European Court of Human Rights through a legal bulletin in Albanian language called "Human Rights in Europe". This bulletin is funded by the European Commission and the Council of Europe and is produced by the AIRE Centre in London and European Centre in Tirana. So it is still necessary for them to perform their own research in these matters.

There is no information in Albanian on recent case-law of the European Court of Human Rights provided in electronic form.

A principal question might be: is there the possibility of introducing review proceeding at national level following a finding of a Convention violation?

So, a Strasbourg Court judgment might considered as a new circumstance *vis-à-vis* the *res judicata* rule.

Although domestic courts in Albania have not so far had any occasions to determine their case-law on this question, there appears to be no provisions in Albanian domestic law which would allow a victim of a violation of the Convention to request revision of a final domestic court decision on the sole ground that the Court of Strasbourg has found such a violation.

Though there is no a case yet addressed to the Supreme Court of Albania, it is possible, however, that the review of a court decision could be requested by the person concerned, when the European Court of Human Rights has found a violation of the Convention and review of proceedings are the only means of providing reparation.

Although there is no specific provisions in Albania concerning review proceedings [aimed at re-opening (revision) of a domestic court decision, which has been concluded by a court judgment that is final and has binding effect], following a judgment of the European Court, it is possible to include among the recognized grounds for review, a decision given by Court of Strasbourg. It is accepted that the judgments of the European Court are given direct legal force within domestic legal orders of Albania.

Albanian domestic law does not offer apparently the possibility of having a case reviewed in the event of a finding of a violation of the Convention, but we think that it is not impossible for the person concerned to request review, based on the interpretation of the Constitution.

So, since the reasoning behind the rule is to ensure compliance with international obligations, it might also be argued that such a decision could likewise be a valid ground for review.

The independence of the judiciary: current problems and possible solutions

Philippe Boillat

Director General of Human Rights and Legal Affairs, Council of Europe

Introduction

Madam President of the Supreme Court, Your Excellencies, ladies and gentlemen,

The Council of Europe is our common European home, based on the three pillars of human rights, the rule of law and pluralist democracy. It is therefore the Council's quite natural duty to stay in the forefront of the defence and promotion of independent and impartial justice. In my opening address for the Conference this morning I mentioned the need for all democratic states respecting human rights and the rule of law to have an independent judiciary. Such independence must go hand-in-hand with an efficient and transparent judicial organisation.

In today's Europe judicial independence must be primarily understood as a right pertaining to the citizens; this is a highly topical area for debate in Europe. The independence and impartiality of the courts take on their full meaning where they are conceived and put into practice as a component of public policy: justice serving the community.

The European Convention on Human Rights and particularly Articles 5 and 6 form the prescriptive foundation upon which Europe has built up and consolidated the basic principle of an independent judiciary, under the uncompromising supervision of the European Court of Human Rights, which has developed clear, consistent case-law in this field over several decades.

Other organs and bodies of the Council of Europe, viz the Committee of Ministers, the Parliamentary Assembly, the Commissioner for Human Rights and

the Enlarged Agreement for the Development of Democracy through Law, better known as the Venice Commission, have also made judicial independence one of the cornerstones of their work on developing a European body of legal standards, supporting institutional and legislative reforms in the member states and, last but not least, monitoring compliance with the commitments entered into by these states on joining the family of European democracies.

As I say, one of the major features of a country that respects the rule of law and human rights is efficient and transparent judicial organisation. The proper functioning of the courts and their capacity for administering justice are currently being sorely tested: courts must efficiently settle disputes between citizens and guarantee the suppression of crimes and offences, and they are often also called upon to verify the lawfulness of government action.

Furthermore, the courts must guarantee high-quality work despite any political fluctuations which, as we know, depend on both the outcome of elections and the increasing demands of the general public.

European judges today are up against many major challenges. If they are to meet these challenges courts must have a solid legal framework to fall back on. They must also have sufficient human and other resources. I would remind you here that the European Court of Human Rights is constantly repeating that lack of resources is no excuse for a state to flout the provisions of the Convention, particularly Article 6[1]. This means that the competent authorities must take the requisite steps to ensure that courts operate efficiently.

The independence of the judiciary, a subject into which I will now go in greater depth, is one of the key elements in the requisite legal framework for judge and their work in order to guarantee their authority.

The independence of judges goes hand-in-hand with jurisdiction. Only an independent, proficient judge can discharge his or her duties with the requisite equanimity. This requires excellent initial training and further training throughout the judicial career. This vital issue is one of the themes we will be discussing this afternoon.

Judicial independence must also be affirmed *vis-à-vis* the legislature, the executive and the parties to proceedings. It necessitates genuine decision-making powers on the part of the court[2]. The Court has noted in the past that in individual cases independence is often confused with impartiality[3].

According to European Court case-law, in order to ascertain whether a court can be described as "independent" for the purposes of Article 6 paragraph 1,

1. Cases of Immobiliare Saffi v. Italy, 28 July 1999, and Sîrbu and others v. Moldova, 15 June 2004.
2. Benthem v. the Netherlands, 23 October 1985.
3. Incal v. Turkey, 9 June 1998.

regard must be had to the mode of appointment and terms of office of its members, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence[4].

On this latter point, the Court notes that public trust largely depends on the judiciary being organised in such a way as to avert any suspicion of lack of judicial independence or impartiality. This gives maximum weight to the Court's famous maxim, "Justice must not only be done but must also be seen to be done".

Judicial terms of office

One of the fundamental aspects of independence concerns the method of appointing judges. In many countries judges are appointed by government or parliament. The Court holds that governmental or parliamentary political influence over the judicial appointment process is problematical unless there are other safeguards to ensure the independence of judges.

In order to guarantee independence, many countries have established High Judicial Councils responsible for appointments and discipline. Independence in this context should be seen in the light of the powers and make-up of these High Judicial Councils. Obviously, real judicial independence requires proper representation of the judiciary on such Councils.

The length of judicial terms of office is not decisive *per se* in the Court's case-law. Very short terms have been deemed sufficient provided the judge's independence is otherwise guaranteed. Nevertheless, the length of the term of office is a major consideration in evaluating the court's independence where the period so stipulated is combined with other factors, for example the revocability of the term of office or protection from undue pressure.

Virtually all European states enshrine the principle of security of judicial office in their Constitutions as one of the most basic safeguards on the independence of the judiciary. This principle obviously does not preclude the removal of specific judges for disciplinary reasons, following an appropriate procedure. In some states, including a number of Balkan countries, the question has arisen whether it would be justified, further to a change of political system and the adoption of a new Constitution, to subject judges to a verification or lustration procedure in order to remove, or refrain from reappointing, judges who have either compromised themselves under the old regime or been involved in corruption. Although it would be difficult *a priori* to challenge the legitimacy of such procedures following the transition from an authoritarian to a democratic system, for instance, or in countries whose judiciary is steeped in corruption,

4. Findlay v. the United Kingdom, 25 February 1997, and Brudnicka and others v. Poland, 3 March 2005.

such procedures cannot fail to pose serious risks to judicial independence. Such procedures are therefore only acceptable if accompanied by appropriate safeguards on their objectivity and openness, if the challenged judges' rights are protected and, lastly, if the risk of political interference in judicial matters during proceedings can be eliminated. The European Court of Human Rights has in fact declared Article 6 of the Convention applicable to lustration procedures[5]. So great caution is required if we venture into this area.

Independence from the executive

The European Court of Human Rights has singled out various facets of the separation of the judiciary and the executive[6].

The Court's case-law comprises fairly few situations of an objective challenge to the independence of the judges from the executive. The main problems usually involve outward appearances, especially in criminal-law and administrative-law cases.

The Court has held that there must be no hierarchical link between the representatives of the state and the judges in any given case, because where the membership of a court includes an individual subordinate in functions and services to one of the parties, litigants can justifiably doubt his or her independence. The Court holds that such a situation seriously affects the confidence which the courts must inspire in a democratic society[7]. The Court has stressed the sensitivity of outward appearances by finding a violation of the independence of the Turkish National Security Courts because one such court comprised a military judge. The Court considered that the applicant might legitimately fear that the presence of a military judge as a member of the National Security Court would allow the latter to be unduly influenced by considerations that had nothing to do with his case[8].

Similarly, the fair trial requirement set out in the Convention prohibits the executive from enjoying special privileges in the administration of justice, whether such privileges are afforded generally by law or specifically in individual cases[9].

Independence from the executive can also be challenged in civil proceedings, whether the state is party to them or not. Interference by the executive in a spe-

5. Matyjek v. Poland, 24 April 2007 (criminal law), and Turek v. Slovakia, 14 February 2006 (civil law).
6. Stafford v. the United Kingdom, 28 May 2002, and Sacilor-Lormines v. France, 9 November 2006.
7. Sramek v. Austria, 22 October 1984.
8. Incal v. Turkey, 9 June 1998.
9. Bönisch v. Austria, 6 May 1985, Stoimenov v. "the former Yugoslav Republic of Macedonia".

cific case involving private individuals with a view to influencing the outcome cannot be tolerated under any circumstances.[10]

Independence *vis-à-vis* other judges

The appearance of independence can also prohibit judges themselves from playing different roles during proceedings. This prohibition, or rather incompatibility, is particularly important in criminal-law matters. For instance, judges who have taken decisions on matters having a direct bearing on the defendant's guilt during the investigatory stage of proceedings cannot subsequently adjudicate on the merits of the case.[11] On the other hand, if the preliminary decision did not actually involve specific consideration of the defendants' guilt, the judge who took it cannot be subsequently excluded from the trial stages. Similar problems may arise where members of the legal service are allowed to alternate the functions of prosecutor and judge.[12]

That having been said, the Court has agreed that higher-level courts can issue instructions to lower-level courts, especially in appeal proceedings.[13] Mr Paul Lemmens will presently be speaking to us about the guiding role played by Supreme Courts in the context of the implementation of the Convention by lower-level courts, so I shall not dwell on this point here.

Independence of judges *vis-à-vis* the parties

Judicial independence *vis-à-vis* the parties to proceedings sometimes raises complex structural problems, particularly in the so-called *tribunaux paritaires* ("equalisation courts"). Independence is ensured within the meaning of the Convention where the parties represented in court actually reflect all the various interests at stake. On the other hand, if all the representatives in court have interests opposed to those of the applicant, judicial independence cannot be guaranteed.[14] However, we can see that despite this major restriction, many states have nonetheless opted for such systems, notably in the field of labour law. Various "tricks" have been used to settle difficult cases, e.g. providing a special appeal facility before the ordinary courts.[15]

10. Sovtransavto v. Ukraine, 25 July 2002.
11. Hauschildt v. Denmark, 24 May 1989.
12. Huber v. Switzerland, 23 October 1990.
13. Iourtayev v. Ukraine.
14. Holm v. Sweden, 25 November 1993, and Langborger v. Sweden, 22 June 1989.
15. Committee of Ministers' Resolution on the execution of the case of Langborger v. Sweden, ResDH (1991) 25.

As I said before, in some cases the judges' independence is confused with their impartiality. Independence *vis-à-vis* the parties to proceedings must therefore also be appraised in the light of outward appearances. Where there are apparent links between a judge and certain advantages secured by one of the parties, the Strasbourg Court would say that the applicant can legitimately fear that the domestic court lacked impartiality.[16]

Lastly, the physical or material structure of courts can also cause suspicion of lack of independence on the judge's part. Where access to the judge's office is completely open there may be legitimate doubts as to whether one of the parties or the prosecutor has engaged in confidential discussions with the judge. The same applies to hearings in the judge's office.

Judicial independence from the legislature

The independence of judges *vis-à-vis* the legislature is seldom the subject of disputes before the European Court of Human Rights. Independence here means that the legislature must not interfere in the processing of individual cases in order to influence the outcome of litigation.[17] Such interference on the part of the legislature would constitute a violation of the principle of the rule of law and the right to a fair trial as set out in Article 6 of the Convention. Where the importance of outward appearances is concerned, judges must not be involved as advisers in formulating legislation which they will be responsible for implementing.[18]

Other facets of judicial independence

The Court holds that the state cannot prevent the press from discussing an issue that is before the courts.[19] The Court, moreover, agrees that judicial decisions can be criticised, even in harsh, exaggerated terms,[20] but on the other hand it insists that judges must be protected against personal defamatory attacks.[21]

16. Thor Sigurdsson v. Iceland, 10 April 2003.
17. Stran Greek Refineries and Stratis Andreadis v. Greece, 9 December 1994.
18. Procola v. Luxembourg, 28 September 1995.
19. Observer and Guardian v. the United Kingdom, 26 November 1991.
20. Amihalachioaie v. Moldova, 20 April 2004.
21. Barfod v. Denmark, 22 February 1989.

Other European standards

Having outlined a number of specific features of the Court's case-law on the independence of the courts, I would now like to draw your attention to other Council of Europe bodies and other major European standards in this field.

The Consultative Council of European Judges also ensures respect for the principles of judicial independence and impartiality and has detailed the procedure for implementing these principles in a number of Opinions. Its Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges stipulates that the said principles are a prerequisite for law-based states that respect the right to a fair trial.

The Council of Europe has also been organising several specific co-operation programmes over the last fifteen or so years, geared to consolidating the independence of the judiciary, particularly in the new central and eastern European democracies. These programmes, which highlight the Court's case-law and the other Council of Europe standards, have been implemented in most of your countries.

Even though the theme of my presentation is, strictly speaking, judicial independence, I should also specify that to judge independently is not necessarily to judge well. This is why the European Convention on Human Rights does not confine itself to requiring Contracting States to guarantee the independence and impartiality of courts of law. The administration of justice must also comply with a whole series of other requirements. For instance, the Convention requires states to organise their judicial systems in such a way that everyone can have his/her case heard "*within a reasonable time*". This requirement, which is a prerequisite for a fair trial, has been fleshed out under the Court's case-law and specified and complemented by several Committee of Ministers recommendations to member states, on procedures,[22] access to the courts.[23] the functioning of the courts[24] and the role of the professionals involved in the judicial system.[25]

22. Recommendation Rec (84) 5 on the principles of civil procedure designed to improve the functioning of justice; Recommendation Rec (87) 18 concerning the simplification of criminal justice; Recommendation Rec (95) 5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases; Recommendation Rec (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law; Recommendation Rec (2003) 17 on enforcement.

23. Resolution Res (76) 5 on legal aid in civil, commercial and administrative matters; Resolution Res (78) 8 on legal aid and advice; Recommendation Rec (81) 7 on measures facilitating access to justice; Recommendation on effective access to the law and to justice for the very poor; Recommendation Rec (98) 1 on family mediation; Recommendation Rec (99) 19 concerning mediation in penal matters; Recommendation Rec (2001) 9 on alternatives to litigation between administrative authorities and private parties; Recommendation Rec (2002) 10 on mediation in civil matters.

I should like to draw your attention here to the fact that the Consultative Council of European Judges has also defined the principles governing the financing of courts, the accountability of judges, the expedition of proceedings and relations between justice and society.[26]

Alongside the Consultative Council of European Judges we should also mention the European Commission for the Efficiency of Justice (CEPEJ), which was set up in 2002[27] and which is endeavouring to reduce the workload of the European Court of Human Rights in line with the principle that prevention is better than cure. By providing public decision-makers with effective solutions to improving the functioning of national judicial systems, the Commission works to reduce the number of breaches of the right to a fair hearing within a reasonable time and therefore of applications to the Strasbourg Court.

It has therefore been clearly established that no proper justice, however independent, is possible unless it is citizen-oriented. Independent, efficient and accessible judicial systems underpin and reinforce the rule of law on which European democracies are based.

Conclusion

The independence of the judiciary raises many problems with which you have no doubt been personally confronted. Such independence provides the very basis for the courts' authority. It is a highly sensitive field in which outward appearances should not be overlooked, as they can help ensure public trust in the courts. The practical organisation of judges' work concerning the distribution of cases, inter-party contacts and the practical organisation of proceedings can go

24. Recommendation Rec (86) 12 concerning measures to prevent and reduce the excessive workload in the courts; Recommendation Rec (95) 12 on the management of criminal justice; Recommendation Rec (2001) 2 concerning the design and re-design of court systems and legal information systems in a cost effective manner; Recommendation Rec (2001) 3 on the delivery of court and other legal services to the citizen through the use of new technologies; Recommendation Rec (2003) 15 on archiving of electronic documents in the legal sector; Recommendation Rec (2003) 14 on the interoperability of information systems in the justice sector.

25. Recommendation Rec (94) 12 on the independence, efficiency and role of judges; Recommendation Rec (2000) 19 on the role of public prosecution in the criminal justice system; Recommendation Rec (2000) 21 on the freedom of exercise of the profession of lawyer.

26. CCJE Opinion for the attention of the Committee of Ministers of the Council of Europe No. 2 (2001) on the funding and management of courts, Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Opinion No. 6 (2004) on fair trial within a reasonable time and judges' role in trials; Opinion No. 7 (2005) on "Justice and Society".

27. Under Resolution Res (2002) 12 of the Committee of Ministers establishing the European Commission for the Efficiency of Justice (CEPEJ).

a long way towards preventing suspicion of high-handedness or lack of independence. Appropriate initial and further training for judges will help reinforce their confidence and ensure with the requisite equanimity and independence.

Only independent courts can efficiently perform the task of protecting fundamental rights at the domestic level and thus fully guarantee the subsidiarity of the supervision system established by the Convention.

The Convention has very rightly been declared the ultimate binding instrument to safeguard public order in Europe.[28] The Convention and the Court's case-law constitute the cement binding all the European states together.

No wonder, therefore, that States Parties to the Convention undertake to act on Court findings of violations of the instrument. The full and complete enforcement of such judgments is monitored by the Committee of Ministers of the Council of Europe, in which the governments of all Council of Europe member states are represented by officials from these countries' foreign ministries. This supervision is a telling expression of the collective responsibility of the States Parties for guaranteeing the rights and freedoms set out in the Convention. The supervision procedure as implemented by the Committee of Ministers is highly meticulous, and all the breaches which I have mentioned in my address have given rise, under Committee of Ministers supervision, to the requisite legislative, statutory or judicial changes to prevent future violations.

These considerations bring us to the heart of the subject of our Conference.

Although the Convention is intended as a subsidiary instrument, wherever the European Court of Human Rights has found a violation of one of its provisions, the authorities of the respondent state, particularly the courts as directed by the Supreme Courts, must do all that is in their power to comply with the judgment delivered. The authorities of other states with similarly organised judiciaries should also sit up and take notice. The obligation to comply with European standards is a matter for all States Parties to the Convention. The concept of *res judicata* is thus complemented with that of *res interpretata*.

Constant consideration of the effectiveness of the implementation of the Convention at the domestic level is therefore vital if the subsidiarity principle is to become a reality. The Supreme Courts can actively support this endeavour by expanding their own case-law.

In this connection I would remind you that the Council of Europe has adopted five recommendations on this subject since 2000 in order to help the authorities, including the courts, to continue their deliberations on this issue[29]. I hope that our meeting today and tomorrow will also contribute to this end.

28. Loizidou v. Turkey, "preliminary objections", 23 March 1995.

Guidance by Supreme Courts to lower courts on the requirements of the European Convention on Human Rights

Paul Lemmens

Conseiller d'Etat, State Council of Belgium

In this contribution I would like to share some thoughts on an issue that is crucial for a correct and complete implementation of the European Convention on Human Rights (ECHR) in the domestic legal orders. I will indeed look at the relationship between Supreme Courts and lower courts, from the specific point of view of the guidance that can be given by the former to the latter.[30]

29. Recommendation Rec (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights;
– Recommendation Rec (2002) 13 on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights;
– Recommendation Rec (2004) 4 on the European Convention on Human Rights in university education and professional training;
– Recommendation Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights;
– Recommendation Rec (2004) 6 on improvement of domestic remedies.

30. For some other points of view, see the reports in *The competence of Supreme Courts*, Council of Europe Publishing, Strasbourg, 1998, in particular: Cl. Rouiller, "The role of Supreme Courts in the development of democratic societies and human rights in Europe" (29-35); S. Chiarloni, "General jurisdictional functions of the Supreme Courts in European legal culture" (37-45); Cl. Parmentier, "Interpretation of laws by Supreme Courts: implementation and scope" (71-83); E. Róth, "The creative role of Supreme Courts: the role of precedent in national and international law" (95-103).

My presentation will draw heavily on the case-law of the Supreme Courts of three countries with which I am reasonably familiar: France, the Netherlands and Belgium. Each of these countries has already a quite long relationship with the ECHR. The case-law of their Supreme Courts can therefore offer striking examples of how a Supreme Court can influence the implementation process, both in a positive or a negative sense.

I deliberately have not looked at the case-law of the constitutional courts existing in two of the said countries (France and Belgium). Such courts occupy a very special place in the jurisdictional order, and their relationship with the other courts is usually not typically one of a Supreme Court *vis-à-vis* a lower court. As far as the supreme administrative courts (Councils of State) in the three countries are concerned, their case-law has not been examined systematically, but there are a few references to relevant decisions.

This contribution will consist of two parts. In a short first part I will say something about the position of Supreme Courts in the domestic judicial organisation and how their position is affected by the ECHR system. In a longer second part I will then try to explain, on the basis of some concrete examples, how Supreme Courts can and sometimes should deal with the ECHR, thus promoting an effective application of the ECHR.

I. Supreme courts within the domestic and the European legal orders

A. Various types of Supreme Court

Although this conference is focusing on the role of "Supreme Courts" in general, it is clear that there is no uniform model for such courts. Quite to the contrary: each country has its own legal system and its own system of courts, and each Supreme Court has its share of national peculiarities. One may add, paraphrasing what the European Court of Human Rights has said with respect to the non-adjudicatory powers of the Dutch Council of State (supreme administrative court), that the ECHR does not require the application of any particular doctrine of procedural law to the position of a Supreme Court *vis-à-vis* the lower courts, provided of course that the independence and the impartiality of the Supreme Court is fully guaranteed.[31]

Nevertheless, there are some common characteristics too. In 1998, the International Association for Procedural Law held its annual meeting on the role of the Supreme Courts at the national and international level. The general reporter,

31. European Court of Human Rights [GC], 6 May 2003, *Kleyn v. Netherlands*, nos. 39 343/98 et al., *ECHR*, 2003-VI, § 193.

Jolowicz, identified – broadly speaking – three different models: the cassation model, the revision model and the appeal model. Supreme courts belonging to the cassation model deal only with the law, not with the facts. They do not decide afresh the cases that come before them. They can only either reject an appeal, or quash the decision of the lower court and remit the case for a fresh determination elsewhere.[32] Courts of revision also deal only with the law, not with the facts. However, if it is possible for them to dispose of the case without having to gather new facts, they will do so; only if new findings of fact are required will the case be remitted for a fresh decision to the court from which it came.[33] Finally, in the appeal model, a Supreme Court can entertain questions of fact as well as questions of law. The appellate court has the same powers as the court from which the appeal has come.[34] Its judgment replaces the judgment of the lower court, and there is no place for a remittal of the case to any other court.[35]

In the rest of this contribution I will not attach a particular importance to these different models. It is necessary, however, to keep in mind that these models exist, as the issues might present themselves in a somewhat different light according to the model to which a given Supreme Court belongs.[36]

B. Role of the Supreme Court in the domestic legal order

A Supreme Court is in the first place, like the lower courts, a court. That means that it is playing a role in the adjudication of individual cases. To that extent Supreme Courts have what Jolowicz called a "private purpose": the purpose of "achieving, to the maximum possible extent, the application of justice according to law to the parties to the litigation before the (court)".[37]

In this contribution, we are more interested in what Jolowicz called the "public purpose" served by Supreme Courts. These courts are at the top of the court hierarchy, and one may expect from them that they clarify the law, assure its uniform application, and adapt it to changing circumstances.[38] This function is one of the features that distinguish Supreme Courts from lower courts. Because of this role, Supreme Courts have to be considered as law-making bodies. It should be underlined that this is so, even if there is no system of binding

32. J.A. Jolowicz, "The role of the Supreme Court at the national and international level", in P. Yessiou-Faltsi (ed.), *The role of the Supreme Courts at the national and international level*, Thessaloniki, 1998, (37), 52.
33. Ibid., p. 54.
34. Ibid., p. 51.
35. Ibid., p. 54.
36. It is perhaps useful to state that the Supreme Courts of France, the Netherlands and Belgium all belong to the cassation model.
37. J.A. Jolowicz, *o.c.*, *supra*, note 3, at 41.
38. Consult J.A. Jolowicz, *o.c.*, 39.

precedents. The authority vested in the Supreme Court as the court that reviews the legality of the decisions of the lower courts will indeed entail that the lower courts will normally follow the precedents of the Supreme Court.

As long as the state's legal order was confined to norms created within the borders of the country, a Supreme Court enjoyed a certain "sovereignty" within that legal order. However, as has been noticed by Guy Canivet, First President of the French Court of Cassation, Supreme Courts have lost part of their sovereignty since their decisions have become subject themselves to control by a supranational court, such as the European Court of Human Rights.[39] The right of individual petition has indeed changed the role of the Supreme Courts. This development deserves a closer look.

C. Role of the Supreme Court in the European legal order

Supreme courts still are very "supreme" as far as the interpretation and the application of ordinary law is concerned. But when it comes to issues relating to fundamental rights – often very sensitive issues – they do not necessarily have the last word, as their decisions can become the object of an application to the European Court of Human Rights. This means that, in human rights matters, Supreme Courts act as a kind of "bridge" between their country and Strasbourg. They continue to play their traditional role vis-à-vis the lower courts, but they also have to make sure that their own decisions will be able to pass the review by the European Court.

However, the relationship between a Supreme Court and the European Court is not only one of control of the former by the latter. As the European Court has often underlined, the machinery of protection set up by the ECHR is subsidiary to the national systems safeguarding human rights.[40] It is indeed in the first place for the domestic authorities to assure the implementation of the ECHR, and for the domestic courts, in particular the Supreme Courts, to check whether this is done and whether it is done properly. The ECHR recognises and underlines this role of the domestic courts as "guardians" of the Convention. Article 13 provides that, where an individual claims to be a victim of a violation of his or her fundamental rights, he or she has the right to bring a complaint before a "national au-

39. G. Canivet, "National Supreme Courts and the European Convention on Human Rights: new role or radical change in the domestic legal order?", European Court of Human Rights, *Dialogue between judges*, Strasbourg, 2005, (17), 29-30.

40. See, e.g., European Court of Human Rights [GC], 14 December 2006, *Markovic v. Italy*, no. 1398/03, *ECHR*, 2006-XIV, § 109. The subsidiary character of the supervision mechanism set up by the ECHR and the fact that the rights and freedoms guaranteed by the ECHR are to be protected in the first place at national level, have also been underlined by other organs of the Council of Europe. See, e.g., the preamble of Recommendation Rec (2004) 6 of the Committee of Ministers of 12 May 2004 on the improvement of domestic remedies.

thority", normally a court, which should be able to offer him or her an "effective remedy".

Offering an effective remedy to victims of violations of human rights is a responsibility of all national courts. But since the Supreme Court is at the top of the judicial architecture and at the same time also constitutes the "last gate" before a victim can leave his or her domestic system for Strasbourg, it is at the level of the Supreme Court that questions will be concentrated of whether a person's human rights have been violated and, if so, which remedy is to be granted.

The responsibility to ensure that human rights are effectively respected and protected obliges the Supreme Court to take a double action vis-à-vis the lower courts.

In the first place, the Supreme Court will have to exercise an effective control over the decisions of the lower courts. The term "effective" is used here in the sense of effectiveness from the point of view of the ECHR. There is a link with the requirement that domestic remedies have to be exhausted, in order for an application to the European Court to be admissible (Article 35, § 1, ECHR). On the one hand, where the Supreme Court can and does exercise an effective control, the European Court will insist on the need for victims to go to the Supreme Court and thus to give the state concerned the opportunity to prevent the violation complained of or to repair for the damages caused by it. This is illustrated by the judgment of the European Court in the *Civet* case, relating to the admissibility of a complaint based on the length of a pre-trial detention. Even if the French Court of Cassation can only deal with matters of law and is bound by the findings of fact of the lower court, "the Court of Cassation nonetheless has the task of checking that the facts found by the tribunals of fact support the conclusions reached by them on the basis of those findings". The Court of Cassation is thus "in a position to assess, on the basis of its examination of the proceedings, whether the judicial authorities have complied with the "reasonable time" requirement …".[41] The control is effective, and therefore an appeal to the Court of Cassation is a remedy normally to be exhausted. On the other hand, where there would be a clear indication that, in a given area, the Supreme Court does not review decisions of lower courts according to the relevant ECHR standards, the European Court will normally hold that the remedy offered by such appeal is not an effective one. The practical effect would then be that the victim can bring a complaint directly before the European Court, with no need to proceed first through the Supreme Court. An example of such a situation is given by the

41. European Court of Human Rights [GC], 28 September 1999, *Civet v. France*, no. 29 340/95, *ECHR*, 1999-VI, § 43. In the same sense, with respect to appeals against decisions imposing exclusion orders on non-nationals, European Court of Human Rights, dec. 6 March 2001, *Hamaïdi v. France*, no. 39 291/98, *ECHR*, 2001-V.

Scordino case. An appeal to the Italian Court of Cassation was not considered a remedy to be exhausted, since it resulted from an analysis of the judgments of that court that, with respect to compensation to be awarded in the case of an excessive delay in the proceedings, the Supreme Court arrived at amounts that were insufficient compared to the Court's case-law on "just satisfaction". Appealing to the Court of Cassation would have been no point.[42] The European Court thus allowed victims to bypass the Court of Cassation, at least as long as that court had maintained its restrictive case-law.[43]

Control by the Supreme Court over the lower courts is one thing. But it seems that there can hardly be any sustainable improvement without an effective guidance by the Supreme Court to the lower courts. This will be the subject of the second part of this contribution. The question to be examined is how the Supreme Court, through its decisions and more generally its attitude vis-à-vis the European Court, can bring the lower courts to apply the ECHR, fully and correctly, whenever that is relevant.

II. Promoting an effective application of the European Convention on Human Rights

For the ECHR to be effectively applied at the domestic level, it is very important that the Supreme Court conveys the message to the lower courts that the ECHR is an instrument to be taken seriously. Such message will result from the way the Supreme Court deals itself with the ECHR.

A positive attitude of the Supreme Court is not self-evident. Especially in the first years, maybe even the first decades after the ratification of the ECHR, lawyers may not be very familiar with the ECHR and the case-law of the European Court, which may result in invoking the ECHR in an irritating way, without any real chance of success. This in turn can understandably create negative feelings among judges who are called upon to read and listen to the arguments and to give reasons for dismissing them.[44]

As for the application of the ECHR by the Supreme Court, I will follow the distinction made by Canivet when he discussed the creative role of the French

42. European Court of Human Rights [GC], 29 March 2006, *Scordino v. Italy* (no. 1), no. 36 813/97, *ECHR*, 2006-V, §§ 140-149.

43. The European Court noted that meanwhile there had been a departure from precedent, and it explicitly welcomed the Court of Cassation's efforts to bring its decisions into line with European case-law (§ 147).

44. Consult G. Canivet, "La Cour de cassation et la Convention européenne des droits de l'homme" ("The Court of Cassation and the European Convention on Human Rights"), in C. Teitgen-Colly (ed.), *Cinquantième anniversaire de la Convention européenne des droits de l'homme*, Brussels, 2002, (257), 261.

Court of Cassation. There is, on the one hand, the regular, "spontaneous" application of the ECHR at the initiative of the Supreme Court, and on the other hand, the "forced" application in order to conform to the judgments of the European Court.[45] Both situations are very different.

A. The regular application of the European Convention on Human Rights

In a presentation at the "Dialogue between judges", organised by the European Court of Human Rights in 2006, Egidijus Kūris, President of the Constitutional Court of Lithuania, distinguished between two types of (indirect) application of the ECHR by his court:

"Firstly, the Constitutional Court, when it finds it necessary, interprets the Constitution along the lines already drawn in the case-law of the (European Court) –it, in a sense, "imports" the case-law of the Strasbourg Court. Secondly, in some cases the Constitutional Court, in anticipation of the forthcoming case-law of the (European Court) in cases against Lithuania, quashes certain pieces of Lithuanian legislation with, however, few references (if at all) to the existing case-law of the (European Court)."[46]

A similar kind of distinction can be made when we look at the work of Supreme Courts. I will now look at some "good" and "not so good" (or even flatly "bad") examples of the way the Supreme Courts in France, the Netherlands and Belgium have dealt with the ECHR.

1. Reliance on the case-law of the European Court of Human Rights

Very often, when a domestic court is confronted with a human rights problem, guidance as to the interpretation and the application of the relevant provisions of the ECHR can be found in the case-law of the European Court of Human Rights.

For the moment I will leave aside the specific situation of the follow-up to a Strasbourg judgment handed down against the state concerned. At this point, I would like to look at the relevance of the European Court's case-law generally, i.e. the impact of the thousands of judgments and decisions handed down by the European Court against any state party to the ECHR.

At the outset, one point has to be acknowledged. There can be no impact of the Strasbourg case-law if that case-law is not known. It is a fact that it is not easy

45. Ibid., 262.

46. E. Kūris, "The impact of the decisions of the European Court of Human Rights on the national legal system viewed from the standpoint of the Constitutional Court of Lithuania", in European Court of Human Rights, *Dialogue between judges*, Strasbourg, 2006, (23), 32.

to get a good insight in this case-law, especially not in countries where English and French, the languages in which the judgments and decisions are written, are not generally spoken by judges and lawyers. And even for those who do have a good understanding of English or French, it is becoming increasingly difficult to see the forest through the trees, to distinguish between the more important cases and the more routine cases.[47] But I dare think that if there is somewhere in the judiciary of a given country to be the possibility to have access and to study the Strasbourg case-law, it must be at the level of the constitutional court and the Supreme Court. I will therefore assume that it is possible for Supreme Courts to find the relevant European precedents for a case that is adjudicated at the domestic level.

From the point of view of principles, it is clear that the interpretations given by the European Court are inherently linked to the provisions of the ECHR, and therefore are as binding as these provisions themselves. The Belgian Court of Cassation has explicitly acknowledged the special authority of the interpretations given by the European Court, resulting from the fact that Belgium has ratified the ECHR and thereby has recognised the interpretation mission of that Court.[48]

It does therefore not come as a surprise that Supreme Courts regularly respond adequately to developments in the case-law of the European Court, by adapting their own case-law. Sometimes this may even go as far as overruling a vested case-law. Two examples may illustrate this. They belong to the success stories of the ECHR:

- In 1979 the European Court held in the *Marckx* case that a difference in treatment between legitimate and illegitimate children constituted a discrimination, contrary to Article 14 ECHR. The Supreme Court of the Netherlands reacted in 1980 by holding that a provision of the Dutch Civil Code, which referred to "descendants" and which until then was interpreted as referring to legitimate descendants only, had to be interpreted in the sense that it covered both legitimate and illegitimate descendants.[49]
- In 1996 the European Court held in the *Goodwin* case that the confidentiality of the sources of a journalist was an essential aspect of freedom of expression, guaranteed by Article 10 ECHR. A few weeks later the Supreme Court of the Netherlands relied on this judgment to overrule its case-law and to hold that

47. Relatively safe criteria to identify the important judgments and decisions are the fact that they have been handed down by the grand chamber and/or the fact that they have been published in the official reports (*ECHR*).

48. See, e.g., Belgian Court of Cassation, 7 April 1995, *Pasicrisie*, 1995, I, no. 190.

49. Supreme Court of the Netherlands, 18 January 1980, *Nederlandse Jurisprudentie*, 1980, no. 463.

non-disclosure of a source was the principle and forced disclosure the exception.[50]

Notwithstanding the fact that there is an expectation that courts follow the interpretations given by the European Court, there have also been instances where Supreme Courts tried to maintain their own case-law against an emerging case-law of the European Court.

Sometimes Supreme Courts do so by trying to distinguish the situation that has been the object of the European Court's ruling from the situation that they are examining. Sometimes the rebellion is an open one, and the Supreme Court simply refuses to transpose to their own legal order the solution adopted by the European Court with respect to another country.[51]

An example of the first kind of reaction is offered by a judgment of the French Court of Cassation of 1996, in a case in which the Civil Code provision limiting inheritance rights of illegitimate children was challenged. The Court naturally was aware of the already mentioned *Marckx* judgment of the European Court, which had held that the distinction between legitimate and illegitimate children was discriminatory and violated Article 14 ECHR (prohibition of discrimination), read in combination with Article 8 (right to respect for private life and family life). Rather than pursuing the reasoning of the European Court, the Court of Cassation chose to distinguish the case before it from the *Marckx* case: it held that the right to inherit was not covered by the right to respect for private life and family life, and that therefore the Articles 8 and 14 ECHR did not apply.[52] Some years later it became clear that the Court of Cassation could have been better inspired. The plaintiff in the French proceedings filed an application with the European Court, and in 2000 that Court held that the facts could in any event be examined from the point of view of Article 1 of Protocol No. 1 to the ECHR (right of property). The European Court further held that the distinction based on birth could not be justified and that there had therefore been a violation of Article 14 ECHR, read in combination with Article 1 of Protocol No. 1.[53] In retrospect, one can say that the French Court missed the opportunity to prevent a condemnation of France by the European Court.

50. Supreme Court of the Netherlands, 10 May 1996, *Nederlandse Jurisprudentie*, 1996, no. 578.

51. S.K. Martens, "Het Europese Hof voor de Rechten van de Mens en de nationale rechter" ("The European Court of Human Rights and the national judge"), *NJCM Bulletin*, 2000, (753), 758-759. The author was the President of the Supreme Court of the Netherlands and he had been a judge in the European Court of Human Rights. He gives a number of examples of "nationalistic" reactions by Supreme Courts, in particular those of France and Belgium.

52. French Court of Cassation, 25 June 1996, *Bulletin*, 1996, I, no. 268, p. 188.

53. European Court of Human Rights, 1st February 2000, Mazurek v. France, no. 34.406/97, *ECHR*, 2000-II.

An example of the second kind of reaction can be found in the one adopted by the French Council of State against a series of judgments of the European Court with respect to the position of the "advocate general" at the cassation courts of a number of European countries. The advocate general is a member of the "*ministère public*" attached to the cassation court, but his or her role is limited to giving independent opinions to the court on the pleas of cassation. According to the European Court's case-law, which originated in the *Borgers* judgment (1991), the adversarial character of the proceedings nevertheless obliged the cassation courts to allow the parties to reply to the opinion of the advocate general. Moreover, the fairness of the procedure was violated if, after having given an opinion, the advocate general would have the opportunity to assist at the deliberation of the judges. The French Council of State does not know the institution of the advocate general, but it has a very comparable institution: the "*commissaire du gouvernement*" ("government commissioner"). Unlike his title may suggest, he is also an independent adviser to the Council. Rather than to draw the conclusions from the European Court's case-law, and to allow the parties to reply to the commissioner's opinion, the Council of State started a long and painful battle against the European Court, refusing to change its practice and explaining in its judgments why the reasoning of the European Court could not be applied to the government commissioner, notwithstanding the similarity between his functions and those of an advocate general.[54] When a few years later the European Court had to examine the role played by the government commissioner in the proceedings before the French Council of State, it quite naturally subjected him to the same principles as the advocate general, thus rejecting the argument invoked by the government, which was based on the differences between the two functions. It held that some kind of reply to the commissioner's government was necessary, but in a conciliatory way found that the existing possibility for the parties to send a written memorandum for the deliberation was sufficient. As for the commissioner's presence during the deliberation, it considered that it violated the right to a fair trial.[55]

The two examples show that it may be better for a Supreme Court not to defer the adaptation of its case-law or its practices. Refusing to draw the obvious conclusions only aggravates the violation that is likely to be found some years later.

54. See in particular French Council of State, 29 July 1998, Esclatine, with opinion "commissaire du gouvernement" Chauvaux, *Recueil*, 1998, 320. This judgment was handed down right after the European Court had criticised the role of the advocate general with the Court of Cassation of France, in the case of *Reinhardt and Slimane Kaïd* (1998).
55. European Court of Human Rights [GC], 7 June 2001, *Kress v. France*, no. 39 594/98, *ECHR*, 2001-VI.

2. Application of the European Convention on Human Rights in the absence of precedents from the European Court

It would be too easy to think that for every problem that arises before the domestic courts, there is a clear solution in the case-law of the European Court. Sometimes there is simply no such guidance from Strasbourg. It is then for the Supreme Court to "wet its hands", and to try to find a solution that is in line with the principles that result from the European Court's case-law. Or to put it differently: the Supreme Court will have to try to act in the way the European Court would act.[56]

In such a situation the judgments of the European Court become tools in the hands of the Supreme Courts. It may be noted, incidentally, that this idea corresponds to the views of the Committee of Ministers as expressed in Recommendation Rec (2004) 6 of 12 May 2004 on the improvement of domestic remedies. The Committee, among other things, invited the national authorities, when applying national law, "to take into account the requirements of the Convention and particularly those resulting from judgments of the Court concerning their state". Aware of the practical difficulty to follow such a suggestion, the Committee continued that "this notably means improving the publication and dissemination of the Court's case-law (where necessary by translating it into the national language(s) of the state concerned) and the training, with regard to these requirements, of judges and other state officials".[57]

An examination of the European Court's case-law may lead the Supreme Court to the conclusion that it has to increase the existing level of human rights protection. But the result may also be the opposite one. There are examples, albeit rare ones, of judgments of Supreme Courts that have lowered the levels of protection, after having ascertained that the existing higher level did not appear to be required under the ECHR.

A first example is given by the case-law of the Supreme Court of the Netherlands, with respect to the possibility for an accused who does not appear at the trial to be defended by a lawyer. After a condemnation of the Netherlands by the European Court, the legislator intervened and made representation by a lawyer possibility. The law provided, however, that the lawyer had to prove that he had received a mandate from his client. A number of lower courts questioned that condition, and decided to give the floor to the lawyer, even if he or she could not produce a power of attorney. The Supreme Court intervened on (at least) two occasions. It insisted that, apart from exceptional circumstances, the statutory condition had to be respected. In the opinion of the court, that condition was not incompatible with Article 6 ECHR, as interpreted by the European Court.[58] This

56. S.K. Martens, *o.c.*, *supra*, note 22, p. 760.
57. Appendix to Recommendation Rec (2004) 6, § 8.

opinion of the Dutch court does not seem to have given rise to a later condemnation by the European Court.

The case-law of the Supreme Court of the Netherlands offers a second example of lowering the standards in the light of the case-law of the European Court, this time even at the expense of the own precedents. The issue concerns the interpretation of the notion of "family life" (Article 8 ECHR). In two judgments of 1985 the Supreme Court had held that, according to its analysis of the European Court's case-law, the mere existence of a biological relation between a natural father and his child was sufficient to create a "family life" between the two and thus to trigger the application of Article 8 ECHR. In 1989 the question arose again before the Supreme Court. The Court then noted that the European Court had in the mean time handed down a judgment in the *Berrehab* case (1988), in which it had considered that a child born of a union between two married persons was *ipso facto* part of their relationship and the bond between him and his parents amounted to "family life". Considering that it had over-stretched the notion of "family life" in its 1985 judgments, the Supreme Court held that a mere biological relationship between a father and his child was not enough to establish the existence of a "family life" between them.[59] This statement was perhaps a risky one, but the opinion of the Supreme Court seems to find confirmation in the later case-law of the European Court, in particular its *Keegan* judgment (1994).

A last example comes from the Belgian Court of Cassation. For many years the view had been that evidence unlawfully obtained could not be used in a criminal trial. This view came under pressure, not in the least because public opinion did not understand how suspects could escape conviction merely because of procedural irregularities. In 2003 the Court of Cassation reversed its case-law, and made it possible that the evidence be used, except where such use would affect the fairness of the trial.[60] It results from the opinion of the advocate general that the decision to reverse the case-law was taken after the Court of Cassation had convinced itself that the European Court did not require the exclusion of illegally obtained evidence in all circumstances (*Schenk* and *Kahn* cases, of 1988 viz. 2000).

58. Supreme Court of the Netherlands, 23 October 2001, *Nederlandse Jurisprudentie*, 2002, no. 77; Supreme Court of the Netherlands, 23 April 2002, *Nederlandse Jurisprudentie*, 2002, no. 338.

59. Supreme Court of the Netherlands, 10 November 1989, *Nederlandse Jurisprudentie*, 1990, no. 628.

60. Belgian Court of Cassation, 14 October 2003, *Pasicrisie*, 2003, no. 499. See also Belgian Court of Cassation, 23 March 2004, *Pasicrisie*, 2004, no. 165; Belgian Court of Cassation, 16 November 2004, *Pasicrisie*, nos. 549 and 550.

Setting a step back is as such not incompatible with the ECHR, but there is no obligation under the ECHR to adapt national standards to the lower standards of the ECHR. To the contrary, Article 53 ECHR provides that "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party", thus favouring the continuing application of the highest level of protection.

I would like to conclude this part of my contribution by pointing to the "educational" role of Supreme Courts.

The case-law of the European Court may be very complex, or at least appear to be so. Supreme courts can significantly facilitate the implementation of the ECHR by the lower courts, if they explain in their judgments what the implications are of the ECHR, as interpreted by the European Court, on a given point. Two examples of such a "constructive" approach can be mentioned here.

In 1998 the French Court of Cassation, in two judgments handed down on the same day by the full Court, explained to what extent a judge, who in a civil case had taken a decision in summary proceedings, could subsequently decide on the merits of the case. The Court thus explained the scope of the impartiality of the judge, guaranteed by Article 6, § 1, ECHR. The Court clearly seized the opportunity to take a decision in two cases, involving two different factual settings, in order to make clear what the ECHR required and what it did not require.[61]

The other example is taken from the case-law of the Supreme Court of the Netherlands. In a case of 2000, the Court was confronted, once again, with the requirement of the "reasonable time" in criminal matters (Article 6, § 1, ECHR). In a remarkable opinion the Court stated that it had noticed that in the practice of the lower courts there was uncertainty, first, about when the duration of the proceedings became unreasonable, and secondly, about what to do if the duration of the proceedings became excessive. In the light of that uncertainty, the Supreme Court, before turning to the facts of the case, gave a long, general overview of the case-law of the European Court on these questions and explained which lessons had to be drawn from it.[62] It has been said that by spelling out in detail the applicable principles and their implications, the Supreme Court has given a "road map" to the lower courts.[63] It is in any event one of the best exam-

61. French Court of Cassation, 6 November 1998, *Bulletin*, 1998, Assemblée plénière, no. 4, p. 6, and no. 5, p. 7. The cases concerned, on the one hand, a judge who in his initial decision had only taken a conservatory measure and not touched upon the merits (could decide on the merits), and on the other hand, a judge who had based his initial decision on a superficial appreciation of the strength of the claim (could not decide on the merits).

62. Supreme Court of the Netherlands, 3 October 2000, *Nederlandse Jurisprudentie*, 2000, no. 721.

ples of guidance given to the lower courts, and it can serve as a "good practice" for other Supreme Courts.

B. The execution of judgments of the European Court of Human Rights

A very specific situation is the one where the Supreme Court is confronted with a judgment of the European Court, holding that a violation of the ECHR has taken place in the own country. Such a situation can present itself, e.g., where the European Court has found that a general norm constitutes an unjustifiable interference with the human rights of the applicant, and where that norm has also been applied in other cases. That norm might perhaps even be the source of a systemic problem that the European Court has identified. To what extent should the Supreme Court then play an active part in the execution of the said judgment? Should it, where possible, change its own case-law or practice?

I will not enter into the discussion of this subject, since the execution of judgments of the European Court will be the object of a specific contribution. However, it is important to note that this is also an area in which Supreme Courts can and should give guidance to lower courts. Especially when a norm or a practice has been declared incompatible with the ECHR, a legal gap may be the consequence of the European Court's finding. Lower courts will then be in need of guidelines from the Supreme Court.

I will limit myself to two further observations.

First, the execution of judgments of the European Court is a responsibility of all the organs of the state concerned, each within its sphere of competence. It is therefore also a responsibility of the courts, to the extent that they can take measures relevant for a proper execution of the Court's judgment. If they can do something about a situation that continues to be a violation, they should not wait for the legislator to set things straight, at least not wait any longer after a certain period of time. The history of the implementation of the *Marckx* judgment (1979) shows that a timid reaction by a Supreme Court is not always the best solution. As has been said already a few times, the European Court held in that judgment that the Belgian Civil Code discriminated against illegitimate children. The government was in favour of addressing the problem in a serious way, and announced that it would undertake a major review of the provisions of the Civil Code on filiation. This work was done so thoroughly that it took eight years, until 1987, before an amending act was adopted by the legislator. In the mean time, illegitimate children had brought all kinds of new cases before the courts, mainly

63. E. Myjer, "Mensenrechten waar ze thuishoren. Over interactie tussen het EHRM en de nationale rechterlijke macht" ("Human rights where they belong. On the interaction between the ECHR and the national judiciary"), *NJCM Bulletin*, 2003, (404), 408.

in order to claim parts of inheritances. The Supreme Court dismissed all these claims, on the basis that in so far as Articles 8 and 14 ECHR imposed positive obligations on the state (in casu: the obligation to set up a system allowing for a proper filiation status for illegitimate children), they did not have a so-called "direct effect".[64] To put it more simply: the Supreme Court was of the opinion that it was for the legislator, not the courts, to solve the problem. Until the law would be amended, the courts were to apply the old provisions, thus repeating the discrimination each time. One of the post-*Marckx* cases would give rise to the judgment of the European Court in the *Vermeire* case (1991). The Court severely criticised the courts, and in particular the Court of Cassation, for their passivity in this matter:

"25. The *Marckx* judgment held that the total lack of inheritance rights on intestacy, based only on the "illegitimate" nature of the affiliation, was discriminatory […].

This finding related to facts which were so close to those of the instant case that it applies equally to the succession in issue, which took place after its delivery.

It cannot be seen what could have prevented the Brussels Court of Appeal and the Court of Cassation from complying with the findings of the *Marckx* judgment, as the Court of First Instance had done. There was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins Francine and Michel, on the grounds of the "illegitimate" nature of the kinship between her and the deceased.

26. An overall revision of the legislation, with the aim of carrying out a thoroughgoing and consistent amendment of the whole of the law on affiliation and inheritance on intestacy, was not necessary at all as an essential preliminary to compliance with the Convention as interpreted by the Court in the *Marckx* case.

The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 (now Article 46) cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it upheld on 13 June 1979."[65]

Second, one can imagine that a Supreme Court has some or even great difficulty with a judgment of the European Court that has the effect of forcing the Supreme Court to adopt a new position on a given issue. It would, however, be extremely unhelpful if the Supreme Court would refuse to comply with a judg-

64. See, e.g., Belgian Court of Cassation, 10 May 1985, *Pasicrisie*, 1985, I, no. 542.
65. European Court of Human Rights, 29 November 1991, *Vermeire v. Belgium*, Series A, no. 214-C, pp. 83-84, §§ 25-26.

ment of the European Court only because it holds a different opinion. Not only does the court then jeopardise the international responsibility of the state concerned, it also creates a climate of distrust vis-à-vis the European Court, which undoubtedly will be picked up by the lower courts. Moreover, if the Supreme Court would hope that, by resisting to the European Court's holding, it may bring that Court to other ideas, it will most probably be disappointed. The record of the European Court shows that it is much more likely that the Court will stick to its initial point of view. This is not to say that, if a Supreme Court really believes that the European Court was wrong, it should not try to obtain a change of the Court's case-law. However, as this should be the exception rather than the rule, it seems that the Supreme Court can best explain in some detail why it is not convinced by the case-law of the European Court.[66]

III. Final remarks

I have tried to highlight the role of the Supreme Courts as bridges between the lower courts and the Strasbourg Court. Supreme courts should "translate" the principles of the ECHR, as interpreted by the European Court, into workable principles of national law. They should also avoid conflicts with the European Court, by applying the ECHR in the way the European Court would do it and by explaining the European Court's case-law to the lower courts.

This role is a challenge, as some of the examples from the case-law of the Supreme Courts in France, the Netherlands and Belgium have made clear. This is all the more so in countries where there is no easy access to the case-law of the European Court.

Fulfilling the role of a bridge requires judicial and other skills. For that reason too, it is important that the Supreme Courts, composed of experienced and qualified judges, take up this responsibility.

66. S.K. Martens, *o.c.*, *supra*, note 22, pp. 758-759.

Providing remedies for judicial delays in criminal proceedings – the experience of Bulgaria

Bilyana Chocheva

Judge of the Supreme Court of Cassation, Bulgaria

Introduction

For over decade the Bulgarian system of justice, and particularly the courts, have been intolerably overloaded as a result of the increased volume of criminal prosecutions. Insufficiency of resources in order to deal with criminal cases, malpractices on the part of the police and the investigation authorities (mainly in securing sufficient and reliable evidence admissible at the trial stage within due time-limits while respecting the needs of the defence), improperly scrutinized by the prosecution, coupled with the lack of appropriate procedural devices to encourage the parties to dispose of the case by means other than contested trials, have resulted in an enormous case-load and significant delays in the conduct of trial proceedings.

Bound to comply with the principles of the adversarial trial (since only this mode of trial provides the necessary safeguards against miscarriages of justice) and to restore the imbalance of rights occurring at the pre-trial stage, as well as to secure maximum precision in the fact-finding process, the younger generation of judges have hardly been able to reconcile the due process requirements with the need for efficiency and speediness. As a result, the latter factor has come to be considered as the lesser evil that could be undermined for the sake of the protection of other procedural values secured by the formality and complexity of the trial process. However, this is equally undesirable as all aspects of the right

guaranteed by Article 6 of the European Convention on Human Rights ("the Convention") deserve equal protection and the Contracting States are expected to strike a proper balance between the competing interests underlying the administration of justice.

Since its entry into force in September 1992, and pursuant to the Bulgarian Constitution the provisions of the Convention have been directly applicable and should, in case of any conflict with domestic legislation, prevail. Proper implementation, however, requires genuine efforts on the part of the authorities. Furthermore the duty of the state under Article 13 of the Convention to guarantee the availability at national level of remedies to enforce the substance of the Convention rights and freedoms entails the taking of serious steps not only to find inconsistencies and provide forms of redress but also to identify the causes that have brought about these consequences. It is not the main objective of this presentation to assess whether Bulgaria has succeeded in this task with reference to the reasonable time requirement laid down in Article 6 (1) but rather to explain what sort of arrangements/remedies have been introduced and how they operate.

Prior to exploring this issue, however, it is worth drawing your attention to the basic guidelines elaborated by the Strasbourg organs on this particular matter as respect for the authority of the case-law is of crucial importance for the consistent implementation of the Convention.

The case-law of the European Court of Human Rights – basic guidelines and recent developments

The case-law of the European Court of Human Rights ("the European Court") on the reasonableness of the length of criminal proceedings under Article 6 (1) in relation to the nature and scope of Article 13 as interpreted after the significant breakthrough made with the judgment in *Kudła v. Poland*[67] tends to suggest, though in expressive terms, a number of principles which must be followed by the Contracting States if they truly aspire to achieve high standards in the implementation of this provision.

Firstly, in order to afford full enjoyment of the rights guaranteed by Article 6 (1), the Contracting States are under obligation to organise their system of justice in such a way as to enable the courts to comply with all of its various requirements**,** including to conduct the criminal proceedings aimed at the determination of a criminal charge within a reasonable time, which means without excessive delays.[68] The mode of assessing the reasonableness of the length of the

67. Judgment of 26 October 2000, 30210/96 [2000] ECHR 512.
68. *Scordino v. Italy*, Judgment of 29 March 2006, 65655/01 [2006] ECHR 899, para. 224.

proceedings is well established and consistently followed, that is in the light of the circumstances of the particular case and with reference to the complexity of the case, the conduct of the applicant and the relevant authorities, and certainly to the importance of what was at stake for the applicant. A chronic backlog of cases is not accepted as a valid explanation for excessive delays.[69] It is not only the growing frequency of violations of the reasonable time requirement that is to be viewed as "an important danger for the Rule of Law" but rather its combination with the lack of appropriate remedial arrangements on domestic level. This state of affairs necessitates strong response on the part of the European Court,[70] the effect of which should be to encourage states to take urgent measures to redress the situation, thus securing compliance with Article 13.

Secondly, the new interpretation of Article 13 in relation to the time/delay factor under Article 6 (1) suggests that where the judicial system is deficient in this respect (i.e., it is in constant failure to comply with the reasonable-time requirement), and in accordance with the subsidiary principle, it falls primarily to the state to provide for an effective remedy capable of redressing the alleged violation**.** In practical terms, the state is under duty to provide the individuals with an effective remedy either to expedite the proceeding (at the relevant stage insofar such course of action is likely to produce a significant positive impact on the whole length of the proceedings[71]) or to grant him/her an adequate redress for the delays that have already occurred. The effect of Article 13 is thus to require a provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief.[72]

Thirdly, in order to fulfil adequately the aforementioned obligations the Contracting States are afforded some discretion as to the manner in which they provide the remedy which should comply with the general standard of being effective, sufficient and accessible. However, if the remedy inferred from the reading of Article 13 in relation to the reasonable time requirement under Article 6 (1) is to be considered effective in practice, as well as in law, it needs to provide for a procedure (not necessarily before a judicial authority), enabling the individual to challenge the reasonableness of the length of the proceedings (to have an arguable claim on this ground) with the effect of speeding them up (which may mean to expedite a decision by the relevant authority dealing with the case), thus preventing a violation of Article 6 (1) or its continuation or to provide the individual with adequate redress for the delays that have already occurred.

69. *V.A.M. v. Serbia*, judgment of 13 March 2007, 391177/05 [2007] ECHR 220, para. 100.
70. *Kudła v. Poland*, para. 148.
71. *Donner v. Austria*, judgment of 22 February 2007, 32407/04 [2007] ECHR 174, para. 44.
72. *Kudła v. Poland*, para. 157.

It is worth noting, though, that the European Court appears to encourage states to implement preventive remedies – by designing procedural arrangements capable of preventing possible violation or to help the process of its discontinuation rather than to depend merely on compensatory mechanisms, although sometimes the combination of the two types of remedy – one designed to expedite the proceedings and other to afford compensation might satisfy the effective domestic remedy rule.[73] In any case, if prevention is no longer applicable, the redress should cover compensatory remedies.

Fourthly, the effectiveness of the redress is to be tested on the basis of its characteristics. In these terms and with regard to the reasonable time requirement the effectiveness of the particular remedy depends on whether it has a practical and significant impact on the whole length of the proceedings.[74] On this point some of the most important conclusions drawn from the case-law, developed in the recent years, suggest that hierarchical complaints are regarded as ineffective as long as they do not give a personal right of the individual to compel the state to exercise its supervisory power.[75] Unwritten remedy with variable admissibility criteria can also be considered ineffective.[76] Special complaints alleging inaction need to have a statutory basis and if judicial procedure is employed in this respect, the content of the court's order is of significant importance. It needs in particular to contain indications as to the way of speeding up the proceedings or to have a competence to deliver decision in place of the lower court.[77] Acknowledgment in substance of a violation of the reasonable time requirement and affording appropriate and sufficient redress could be deemed as an effective compensatory remedy**.**

In a number of cases brought to the European Court it is recognized that, if the national authority have acknowledged, either expressly or in substance the breach of the Convention and afforded redress**,** the individual can no longer claim to be a victim of a violation complained of[78]. With respect to criminal proceedings a sentence discount (mitigation of the sentence) on the ground of excessive length of the criminal proceedings does not deprive the individual concerned from his status as a victim within the meaning of Article 34 of the Convention. The only exception to this general rule is, however, where the na-

73. *Scordino v. Italy*, paras 183 and 186 and *Surmeli v. Germany*, Judgment of 8 June 2006, 75529/01 [2006] ECHR 607.
74. *Donner v. Austria*, para. 44, and *Surmeli v. Germany*, para. 110.
75. *Surmeli v. Germany*, para. 109.
76. *Ibid*., para. 110.
77. *Ibid.*
78. See *Donner v. Austria*, para. 26, 27 and also *Scordino v. Italy*, para. 186, *Beck v. Norway*, Judgment of 26 June 2001, 26390/95 [2001] ECHR 404, para. 27 and *Eckle v. Germany*, Judgment of 15 July 1982, 8130/78 [1982] ECHR 4, para. 66.

tional authorities have acknowledged in sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an expressive and measurable manner. This mode of action could be considered as an effective remedy provided the courts have clearly stated in their reasoning that the time delay element stood out as being the primary mitigating factor which had a decisive impact on the reduction of the sentence.[79]

However, if the compensatory remedy provided is of the ordinary type – by bringing a civil action for pecuniary or non-pecuniary damages against the state – the proceedings in question would be considered effective, sufficient and accessible remedy as long as do not entail unreasonable restriction on the basis of cost, they are speedy, reasoned and executed very quickly.[80] Also, the effectiveness might depend on the level of compensation which needs to be well balanced with the facts of the particular case, the nature and scope of the rights affected by the delay and the availability of other remedies or their characteristics and effectiveness.

The situation in Bulgaria

Considering these guiding principles and looking at the way they are reflected in our domestic legal order (with particular reference to the procedural arrangements provided in the new Code of Criminal Procedure, adopted in April 2006, and the relevant judicial practice plus some of the measures introduced in the new Judiciary Act, adopted in August 2007) it appears that the Bulgarian approach is represented by a combination of preventive and compensatory remedies.

Application of the principle for designing preventive measures

The state, being aware of the constant failure of the authorities dealing with criminal cases to comply with the reasonable time requirement and strongly committed to handle the problem on domestic level, under the new reform, has employed variety of preventive measures operating on different levels.

Sufficiency of resources

Insufficiency of resources has long been a factor contributing to delays in the administration of justice. With the recent reforms this situation seems to have been corrected to a certain extent by raising the number of people involved in investigation of crime at the pre-trial stage. This has been effected by a structural

79. *Donner v. Austria*, para. 27.
80. *Mostaccioulo Giusepe v. Italy*, (No. 1), 64705/01 [2006] ECHR 271, para. 96.

reform of the investigation which at present is conducted for the majority of offences in the form of a police inquiry by legally educated detectives. The number of prosecutors, judges, as well as of administrative personal in the criminal courts has also been raised although in relatively small proportion.

Better use of resources. Enlarging the scope of alternative case-settlement procedures available at the pre-trial and trial stages.

The idea of making better use of resources and lifting the burden on the courts to conduct contested and time consuming trials in the majority of cases as used to be the situation in the near past appears to have been effected by enlarging the scope of the case settlement procedures available at the two stages of the proceedings.

Thus under the new Code of Criminal Procedure ('the Code') at least 3 alternative to contested trial procedures have been provided. Two of them, the "bargaining procedure"[81] and the "summary proceedings on proposal of the prosecution for imposition of an administrative in exchange of a criminal penalty"[82], supervised and approved by the court with their variations available at the trial stage have existed in the former Code. However, under the new Code the classification of offences for which these proceedings is applicable has been enlarged.

The third "Short trial procedure"[83] is entirely new although its roots can well be found in the English system. Under this procedure once the indictment is registered in court, the trial judge may decide on his own volition or on request of the defendant to conduct a preliminary hearing. In the course of this type of hearing (very similar but not identical to the English pre-trial reviews used to facilitate guilty pleas), the defendant may declare that he admits the facts disclosed in the indictment and consents to no evidence being collected in an adversarial manner in support of these facts. In this case the trial judge is under duty to approve his waiver of rights, provided the corroboration of confession requirement has been satisfied, and to proceed to conviction/or acquittal. The penalty is to be imposed under the prescribed minimum. There is also another variation of this procedure, the effect of which is only to streamline the case by focusing on issues of contestation and dispensing with the possibility of hearing evidence for which the defendant consents not to be collected at the trial stage.

The common feature of all of these procedures (except the latter), is that the fact-finding process which can turn to be complex and time consuming is dispensed with on the basis of the admission of facts on the part of the defendants in exchange for the benefit of imposition of a more lenient penalty. Since its in-

81. Article 381-384 of the Code.
82. Article 375-380 of the Code.
83. Article 370-374 of the Code.

corporation the "Short trial procedure" has become quite popular and over the past year many defendants have opted to use it.

For cases in which proof of facts is relatively easy and require less time and effort, two other procedures are available; "the speedy procedure"[84] and "the immediate procedure"[85] which normally apply to minor offences. Although they are designed as adversarial in nature at some point of the proceedings, the parties may opt to resort to some of the aforementioned alternative procedures.

Another aspect of the idea of assisting better use of the judicial resources is seen in changes to the competence of the Supreme Court of Cassation. Prior to the reform its role was to review as a third instance almost all lower court decisions. At present, their range is limited to decisions of the courts of appeal (except those including imposition of an administrative penalty) whereas those of the district courts are excluded unless a new verdict has been passed. However, under the new provisions for reopening of the proceedings it falls within the competence of the Supreme Court of Cassation to review virtually all lower court decisions on requests filed either by the relevant prosecution authority or the defendant within 6 month time as of the final decision. The appellate courts are competent to decide on reopening of the proceedings only where administrative sanction have been imposed.

Time limiting of judicial work

(a) Pre-trial stage. Time-limits for conducting of the investigation.

According to Article 22 (2) of the Code the prosecution and investigation authorities are under duty to secure the conduct of the criminal proceedings within the prescribed time-limits**.** Thus, at present in ordinary criminal proceedings the investigation at the pre-trial stage is to be concluded within 2 months**.** In cases raising difficulties on point of fact and law and subject to the approval of the prosecutor's authority of higher level, this time-limit may be extended for up to 6 months. Moreover in cases of exceptional complexity the General Prosecutor is vested with the power to grant further extension of unspecified length. However, an important procedural safeguard aimed at preventing abuse of the prescribed time-limits is provided in the form of the exclusionary rule remedy under which evidence collected outside of the time-limits is to be considered inadmissible in court.

(b) Trial stage. Time-limits for listing of cases and of delivery of judgments.

According to Article 22 (1) of the Code the court is under duty to hear and decide cases in reasonable time. However, there are express provisions relating

84. Article 356-361 of the Code.
85. Article 362-367 of the Code.

to the terms within which the cases should be listed and the court's decisions delivered. Thus, once the indictment is registered in the court and the case is assigned to the particular trial judge, he/she is under obligation to list the date of the hearing in 1 month time (unless procedural errors of significant importance have been discovered in which case the indictment is to be reversed to the relevant prosecutor for correcting them). If the case discloses difficulties on point of law and fact this period may be extended up to 2 months on approval by the presiding judge of the court. The length of the trial proceedings can hardly be estimated in advance and in this respect there are no express limitations. Adjournments may well depend on the complexity of the case and the need to safeguard the interest of the defence. At the end of the proceedings at first instance the court's decision (verdict) is to be delivered in public. The written reasoning is to be drafted within 15 days as of the date at which the verdict has been pronounced. The maximum period is 30 days if the case is of certain complexity.

The rules concerning time-limits for listing cases and delivery of judgments (also verdicts) by the appellate courts are the same. The only difference can be seen as to the Court of Cassation where the cases must be listed and heard within 2 months**.** The working practice at the moment is that only the presidents of the respective divisions are to list the cases. The draft judgments are to be prepared in 30 days as of the date of the hearing.

Cases concerning judicial review of detention on remand or in respect of detainees in ordinary trials are to be listed and dealt with as a priority.

The time-limits for conducting the investigation, listing cases for trial and delivering of the judgments in summery trials are much shorter. Thus, under the "Speedy procedure" the investigation is to be concluded within 7 days, and the prosecution is to be brought before the court within 3 days. The trial judge is required to list the case within 7 days and following the hearing to deliver the judgment within 7 days. Under the "Immediate procedure" the investigation is to be concluded within 3 days, and the prosecution is to be brought before the court immediately. The trial judge is required to hear the case the same day, and to deliver the judgments within 7 days. Under the "Bargaining procedure" in use at the pre-trial stage once the agreement on settling the case has been reached and signed by the parties, it is to be entered immediately at the court by the relevant prosecutor, and the hearing is to be listed in 7 days.

Implementing mechanisms for closer supervision on compliance with prescribed time-limits. Providing for harsher disciplinary penalties for inactivity.

It is apparently believed by the Legislature and the Executive that the most effective manner, capable of securing compliance with the reasonable time re-

quirement set out in Article 6 (1) is if the incorporation of rigid time-limits for performing the activities of all branches of the judiciary is combined with strict supervision and imposition of harsh penalties. This concept is best expressed in the new Judiciary Act (following the amendments of the Constitution) where it is provided that the time-limits specified in the procedural codes are mandatory[86] and their compliance[87] is to be reviewed on regular basis or on signals[88] by the new machinery of the Supreme Judicial Council, namely, the Inspectorate. The latter has not yet been constituted but the provisions of the Act specify that it will be a specially designed body of 22 experts with at least 5 years experience as jurists[89] chaired by a General Inspector, all of them being appointed by the Parliament. According to the Judiciary Act these experts should, if in the course of their checking find violations of the rules relating to the time-limits in which judges should run and conclude the cases, inform the relevant presiding judge of the court who is acting as an administrative leader. They may also make proposals as to the solution of the problem and may set terms for their execution. The experts may also review compliance with the proposals they have given. Finally, the Inspectorate may propose the imposition of a disciplinary penalty on any judge who has failed to conclude the cases within the prescribed in the procedural code time-limits. This will be carried out by the Supreme Judicial Council (acting on permanent basis under the present reform) if it concerns dismissal, reduction of salary and of rank. Under the provisions of the Judiciary Act penalties can be imposed for systematic breaches of the time-limits prescribed in the procedural codes or actions of the members of the judiciary that have resulted in unjustifiable delays of the proceedings.[90] However, under the Constitution[91] judges can only be deprived of their irremovability and may be eventually dismissed if they have committed grave violation or are systematically breaching their duties, or have performed actions which affect the authority of the judiciary.

It is impossible to envisage how these rules are going to operate in reality, and what the consequences for the judiciary are likely to be. What is quite plain, though, is that systematic breaches of the prescribed time-limits (the wording used in the Judiciary Act) is not equivalent to systematic breach of duties (the

86. Article 12 (2) of the Judiciary Act which is in conflict with Article 22 (1) of the Code specifying that the courts are to decide cases in reasonable time the assessment of which should be consistent with the well established case-law of the European Court.
87. Article 54 (2) of the Judiciary Act.
88. Article 56 (1) of the Judiciary Act.
89. Article 55 (2) of the Judiciary Act, which means that they may review the work of judges in the higher courts where one of the preconditions for appointment is to have experience of at least 12 years.
90. Article 307 (3), 1 and 2 of the Judiciary Act.
91. Article 129 (2), 5 of the Constitution.

wording of the Constitution) and is in clear conflict with the actual content of the duties of the judiciary as to the reasonable time requirement (specified in the Code). As it was explained above, according to the principal provision of the Code the courts are under duty to hear and decide cases within a reasonable time[92] and the criteria for assessing the reasonableness of the proceedings as established in the Convention case-law have little to do with mandatory limitation of judicial work as judges could not be expected to act as machines for producing judgments in strict time.

Time limiting is not in principal an undesirable and disproportional measure. However, by providing mandatory compliance with the time-limits set out in the Code, effected by rigorous supervision and likelihood of imposition of harsh disciplinary penalties, the Judiciary Act not only extends the limits of obligation of the judges as to the reasonable time requirement and establishes fragrant conflict both with the rule of the Code and the authority of the European Court's case-law on this matter but it also creates serious risks of interfering with the requirements of independence and fair hearing which are not less important and should be well balanced. In this respect the pressure to bear on the judiciary in a state of still very overloaded courts may be detrimental, serving only to put more pressure on the judiciary rather than to help the process of enabling the courts to comply with the various requirements of Article 6 (1) of the Convention, which is one of the basic guidelines that the Contracting State should follow.

Application of the requirement for providing a procedure for speeding up the proceedings

Trial on motion/request of the accused

This specific procedure was first introduced in 2003 by an amendment of the former Code[93] and its main purpose was to grant the individual charged with the particular offence the possibility of being able to compel the investigation and prosecution authorities, under the supervision of the court, to take urgent measures for accelerating the proceedings that have already been delayed for various reasons, either by entering a prosecution (on indictment) in court, or to resort to some other mode of settling the case, or to drop the case. Since it proved its positive impact on speeding up of the criminal proceedings at this stage (which is likely to shorten the length of the whole criminal process) this procedure was retained in the new Code. However, a few additional safeguards were introduced

92. Article 22 (1) of the Code.
93. Article 239a of the former Code; at present incorporated in Article 369 of the new Code.

in order to secure proper compliance bearing in mind the obstacles associated with its application.

In substance, this procedure allows the accused to request the competent court of first instance to try his case provided that as of the date of the charge (which is interpreted in the case-law as of the initial charge) 2 years have expired if it concerns a serious offence, and 1 year has expired for any other type of offences. This precondition is closely related to the deadlines[94] established for the execution of all preventive measures imposed on the individual and associated with his standing as an accused in the criminal proceedings at the pre-trial stage (detention on remand, bail, restriction on movement including travelling abroad or removal from work) which are to be terminated by the relevant prosecutor at the expiry of 2 years in cases involving charges for serious offences (assuming penalty of more than 5 years), and at the expiry of 1 year in any other type of cases. In this respect, the procedure in question appears to reflect both the idea of the desirable acknowledgement by the state of a violation of the reasonable time requirement at this stage (once the period of two years and one year, respectively, have expired, although the length of the proceedings may well have become unreasonable long before), and of the specific way it tends to discharge its obligation arising under Article 13 to provide for a remedy enabling the individual to complain of the unreasonable length of the proceedings (to have an arguable claim on this ground) with the effect of speeding them up thus preventing a violation of Article 6 (1) or its continuation.

Following the request of the accused the court's task is to review the case and verify that the prescribed time-limits have expired. If this precondition is satisfied, the court is under obligation to issue an order to the relevant prosecution authority indicating that in 2 months time it needs to dispose of the case either by way of bringing prosecution on indictment before the court, or by entering a proposal for conducting a summary trial (leading to imposition of an administrative sanction in exchange for a criminal), or by entering an agreement signed by the parties for settling the case, or to drop the case/to discontinue the criminal proceedings. Notwithstanding which one of these steps the prosecutor is likely to choose, the court needs to be properly informed.

If the prosecutor fails to perform the duties indicated in the order within the prescribed 2 months period or the court does not approve the case-settlement agreement, the court is under obligation to discontinue the criminal proceedings. If the prosecutor performs the duties indicated in the order, but the trial judge finds out that in the course of the proceedings significant procedural errors have occurred, he/she is under obligation to discontinue the trial and remit the case to the prosecutor to correct them within 1 month. If the prosecu-

94. Article 234 (7-10) of the Code.

tor fails to comply with the prescribed additional time-limit or even if he does but the trial judge is not satisfied that the significant procedural errors have been corrected or even other errors of the same nature have occurred following the reversal, the trial judge is empowered to order termination of the criminal proceedings with reference to the particular charge.

The whole procedure is closed and performed in chamber by a single judge. The final court's orders leading to termination of the criminal proceedings are not subject to appeal**.** However, under the provisions for reopening of cases/proceedings[95] (which is to be held before the Supreme Court of Cassation), this type of court's orders may be challenged within 6 months, provided that some of the evidence on which the court's reasoning was based proved to be untrue, or the judge/respectively the prosecutor/or a member of the investigation authority has committed a crime in relation of his/her participation in the procedure, or by way of investigation evidence of significant importance but unavailable to the court while ruling on the case has been discovered.

As to the effectiveness of the procedure available to the accused at the pretrial stage, a very important safeguard was introduced in the new Code following the obstacles met during its application. Thus, at present if the single judge while dealing with the request of the accused has failed to calculate properly the timelimits relevant to the ruling on determination of the proceedings, or the relevant judge of first instance court where the indictment has been filed has also missed to consider this issue and has proceed to conviction, the latter is due to be quashed on appeal and the duty of the appellate court is to order discontinuation of the criminal proceedings**.** This type of order by the appellate courts may be appealed before the Supreme Court of Cassation under the ordinary procedure for reviewing lower courts decisions. In the instant case, however, it may uphold or overturn the order and it may also discontinue the criminal proceedings if such course of action is "prescribed by law". Taking into consideration the fact that the procedure in question has a statutory basis and that the appellate courts are under duty to terminate the proceedings if the first instance court has failed to do that, it appears that the correct interpretation of this provision is that it empowers the Supreme Court of Cassation to uphold such orders. Moreover, if the same problem is identified in cases where conviction has been passed, under the same provision the Supreme Court of Cassation should be deemed competent to quash the conviction and rule on the termination of the criminal proceedings.

95. Article 419 (2) of the new Code.

Application of the sentence discount principle (mitigation of sentence) as a compensatory remedy

Sentence discount on the ground of excessive length of the criminal process is not expressly defined in the statutory basis as a factor requiring mitigation of sentence. However, the established case-law both of the lower courts, and the Supreme Court of Cassation suggests that the length factor (the time/delay element) may be considered not only as one of a number of mitigating circumstances requiring imposition of a more lenient penalty, normally below the prescribed minimum, but it may also be viewed as an extraordinary factor permitting a reduction in the penalty. It is worth noting, though, that the court's reasoning should correspond to the guidelines developed in the *Donner* case. Poor reasoning of the lower courts, however, may well be corrected on appeal, including by the Supreme Court of Cassation.

Civil actions against the state

This type of remedy is available provided the individual has been wrongfully detained and/or convicted. On this basis it is not impossible for him/her to argue on the detrimental effect of the length of the proceedings and to request awarding of compensation. Since numerous cases have been brought to the European Court against Bulgaria for breaching the reasonable time requirement in civil proceedings, its is impossible to argue successfully that this type of remedy is effective, thus capable of redressing properly the violation occurred with respect to the length of the criminal proceedings.

Conclusions

As the European Court's case-law suggests, combination of different arrangements of preventive and compensatory nature may serve the purpose of redressing violations on the reasonable time requirement. Whether this will be the case with Bulgaria following the reform it is yet to be seen. However, if the process of designing preventive measures is to be successful it should be based on extensive research and identification of the causes that have led to the consequences which necessitate redress at present. This requires genuine efforts, knowledge and perseverance.

Providing remedies for judicial delays – the experience of Slovenia

Franc Testen

President of the Supreme Court of Slovenia

1. Introduction

The struggle of the Slovene judicial system with the excessive length of judicial proceedings has its roots in the general reform of the organisation of courts in 1994. Another important reason for the extension of the reasonable time, in which the parties could expect the solution of their cases, were the fundamental changes in the legislation that reflected the political and economic changes in the country. It was in June 1994 that Slovenia adhered to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[96] but it was not until 2005 and 2006 that the cases against the Republic of Slovenia in front of the European Court of Human Rights as well as the domestic cases urged the Government to prepare specific legislation, that would tackle the length of proceedings and give parties effective remedies.

2. Right to trial without undue delay as a human right

The first paragraph of Article 23 of the Constitution of the Republic of Slovenia[97] (right to judicial protection) determines:

96. Convention for the Protection of Human Rights and Fundamental Freedoms, amended by Protocol No. 11 and additional protocols and Protocols Nos. 4, 6, 7 and Protocols Nos. 13 and 14, published in: Official Gazette RS, no. 33/94 – International Contracts, No. 7/94; Protocol No. 13 – Official Gazette RS, No. 102/03 – International Treaties, No. 22/03; Protocol No. 14 – Official Gazette RS, no. 49/05 – International Treaties, No. 7/05.

*"Everyone shall have the right to have his rights, duties and any charges brought against him to be decided upon **without undue delay** by an independent, impartial court established by statute."*

On the other hand, the European Convention on Human Rights specifies in the first sentence of the first paragraph of Article 6 (right to a fair trial):

*"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing **within a reasonable time** by an independent and impartial tribunal established by law."*

Leaving aside the theoretical differences in the expressions 'undue delay' and 'reasonable time', it is clear that under both acts the state is obliged to ensure prompt judicial action. **Justice delayed is justice denied.**

The **right to trial within a reasonable time** is connected with the **right to an effective remedy**, specified in Article 13 of the Convention and Article 25 of the Slovenian Constitution, since it is only with an effective remedy that parties can enforce their right to a trial without undue delay.

What was the situation in Slovenia before the introduction of the Protection of the Right to a Trial without Undue Delay Act in 2006?[98] What were the legal instruments a party could use? Were they effective?

3. The situation before the adoption of the Act

Parties and participants in court proceedings had **four different legal remedies**, for which the Government in the proceedings before the European Court of Human Rights argued that were effective. They were the following: an administrative action, a tort claim, a request for supervision and a constitutional appeal. Apart from those, a complained could be filed in Strasbourg, alleging the violation of the right to fair trial and the right to effective remedy. It was following such complaints that the European Court of Human Rights in the precedent case of ***Lukenda v. Slovenia***[99] in October 2005 decided, that "**the Government have failed to establish** that an administrative action, a tort claim, a request for supervision or a constitutional appeal **can be regarded as effective remedies**."[100] Finally, the Court also concluded, that "the aggregate of legal remedies in the circumstances of these case is not an effective remedy.[101]"

97. Official Gazette RS, no. 33/91-I, 42/97, 66/00, 24/03, 69/04 and 68/06.
98. Official Gazette RS, no. 49/2006, 117/2006.
99. Judgment of the ECHR, appl. no. 23032/02, 6.10.2005.
100. Para. 47 to 65.
101. Para. 69 to 71.

The European Court of Human Rights therefore decided that the first paragraph of Article 6 (**right to a fair trial**) and Article 13 (**right to effective legal remedy**) of the European Convention on Human Rights **have been violated**. It awarded compensation for non-pecuniary damage at a level of 3 200 euros for "court delay" in relation to the court proceedings that lasted five years, three months and nine days, of which the procedure at first instance lasted a whole four years and one day.

This judgment of the European Court of Human Rights was followed by a **series of judgments against the Republic of Slovenia** because of the violation of the right to trial within a reasonable time.[102]

Interestingly, in September 2005, before this judgment of the European Court of Human Rights was issued, the **Constitutional Court** of the Republic of Slovenia adopted a similar Decision[103] in which it decided that the **Administrative Dispute Act**[104] of the Republic of Slovenia of 1997 **is unconstitutional** in respect of some of its provisions, which do not contain an effective legal remedy against violations of the right to a trial within a reasonable time in cases in which a violation has already ceased and does not contain special provisions that would enable the claimant to claim just satisfaction in such events. The Constitutional Court consequently held that remedying of these unconstitutional situations requires more complex legislative regulation.

The aforementioned decisions of the European Court of Human Rights and the Constitutional Court of the Republic of Slovenia were among the basic reasons for the adoption of the Protection of the Right to Trial without Undue Delay Act.

4. Adoption of the Protection of the Right to Trial without Undue Delay Act

The legislative model for the Act cannot be exactly specified. Some influences certainly came from the Organisation of Courts Act of the Republic of Austria and the Italian "legge Pinto" of 2001, but most importantly the Act is fairly similar

102. In 2006 the European Court of Human Rights held the Republic of Slovenia liable for the violation of the right to trial within a reasonable time in 176 cases, in which a cumulative monetary compensation for non-pecuniary damages of 595.600 euros has been awarded, plus 153.450 euros for costs and expenses. In the year 2007 the State Attorneys' Office has insofar received 68 motions for settlement and has reached agreements in 8 cases in the total value of 17.420 euros, plus 2.386 euros for costs and expenses.

103. Decision of the Constitutional Court, no. U-I-65/05, 22.9.2005; published in: Official Gazette RS, no. 92/05 as of 18 October 2005.

104. Official Gazette RS, no. 50/1997, 65/1997, 70/2000, 11/2003, 92/2005, 45/2006, 105/2006.

to the Polish Act of 2004 and the amendments to the Czech Courts and Judges Act of 2004, primarily because of the similar legislative tradition and similar judicial organisation of the circle of Central European countries.

The European Court of Human Rights now requires a specific, formalised and fast procedure of deciding on the right to trial in a reasonable time and very precisely analyses national case-law under such internal legislation. In drafting the Act Slovenia followed the reasoning, evident from the case-law of the Court, notably the case of ***Scordino v. Italy (no.1)***, where the Court stressed that "individual countries such as Austria, Croatia, Spain, Poland and Slovakia had perfectly understood the situation in relation to protection of the right to trial in a reasonable time and had chosen **a combination of two types of legal remedy: one t.at is specified for acceleration of court proceeding and the other which is specified for awarding damages**."[105]

5. Main provisions of the Act

The Act entered into force in May 2006 and is applied from the **1 January 2007**. It is applicable in all courts of general jurisdiction and specialised courts, yet not in the procedures before the Constitutional Court.

The party that has the right to a trial or decision without undue delay is defined in quite a wide way, since the Act gives the right to use the remedies to any party in court proceedings as well as to injured parties in criminal proceedings.

Acknowledging the guidelines of the case-law of the European Court of Human Rights, the Act offers **two general types of legal remedy – accelerating remedies** and a specific request for **just satisfaction**.

The circumstances of each particular case that should be taken into account when deciding on the legal remedies are the following:

– the complexity of the case (in terms of facts and law),
– the conduct of the applicant in the proceedings (in particular the use of procedural rights and fulfilment of obligations),
– the conduct of the relevant authorities (in particular the compliance with the rules on the set order of resolving cases and with statutory deadlines) and
– the nature and type of a case and its importance for a party.

The two remedies that are intended to accelerate the unreasonable delay in the proceedings of the court are the supervisory appeal and the motion for a deadline. Their content is fairly formalised in order to assist the parties on the one hand, while facilitating the operations of court management on the other.

105. Judgment of the ECHR, appl. no. 36813/97, 29 March 2006.

5.1. Supervisory appeal

A supervisory appeal is the legal remedy given to a party that considers that the decision-making of the court is unduly delayed. It has to be filed **at the court that is dealing with the case**. When deciding on it the president of the same court is bound by the procedural provisions of the Act as well as by the *mutatis mutandis* application of provisions of the General Administrative Procedure Act,[106] since it is a matter of court management. After receiving a report from the judge, to whom the case has been assigned, in which the possible reasons for the delay have been analysed and an expected deadline for the solution of the case has been given, the president can reject the appeal as unfounded or use one of the following **mechanisms to accelerate the proceedings**:

– order a deadline for performing certain procedural acts (in no longer than six months);
– order that the case be resolved as a priority due to the circumstances of the case;
– order that the case be reassigned to another (lawfully appointed) judge.

A new supervisory appeal cannot be filed within the time limits set in the decision of the president or within six months from the decision on the previous appeal.

5.2. Motion for a deadline

A motion for deadline as the second accelerating remedy is somehow **an appeal against the decision about the supervisory appeal**. It can be filed when the latter has been rejected or when no decision has been taken about it within two months. While the supervisory appeal is dealt with inside the court, where the dealing with the case is supposedly unreasonably delayed, the motion far a deadline is **a devolutionary legal remedy**, for jurisdiction over it is with the president of the superior, i.e. higher by instance court. A motion for deadline is thus a legal remedy that simultaneously contains elements of judicial protection and elements of legal remedy. The measures that the president of the superior court has are the same as the ones applicable in the supervisory appeal procedure; however, the Civil Procedure Act[107] is applied. There is no appeal against the rejection of the motion for a deadline, although a constitutional complaint can be filed.

None of the measures that the president of the court has at his disposal to prevent the unreasonable delays in court proceedings infringes the constitutional and conventional principle of independence of the judges. Similarly, none

106. Official Gazette RS, no. 24/2006 – official consolidated text ZUP-UPB2, 105/2006.
107. Official Gazette RS, no. 73/2007 – consolidated official text – ZPP-UPB3.

of the assisting competences, assigned under the Act to the Ministry of Justice, gives the executive branch of power the right to decide on the right to trial without undue delay.

5.3. Just satisfaction

The **accelerating legal remedies** that a party can file are a **procedural precondition** for deciding on just satisfaction. This means that in order to be able to demand just satisfaction, the supervisory appeal had to have been granted or a motion for deadline had to have been filed. When deciding on just satisfaction, the state attorney and the civil court are not bound by the president's ruling on the accelerating legal remedies.

The main form of just satisfaction is **monetary compensation** for non-pecuniary damage, caused by a violation of the right to a trial without undue delay. The Republic of Slovenia is strictly held liable for the caused damage. The Act specifically limits the amount this compensation can reach, ranging from **300 up to 5 000 euros**. Regarding pecuniary damage, the provisions of the Obligations Code[108] apply. The essential reason for specifying limits to compensation is the standpoint that the purpose of the constitutional right is primarily ensuring fast judicial proceedings and determining legal remedies that should ensure this, and not monetary compensation for non-pecuniary damage.

The two other forms of just satisfaction provided in the Act are a **written statement** by the State Attorneys' Office, indicating that a violation of the right to a trial without undue delay occurred and the **publication of the judgment** with the aforementioned content that can accompany the monetary compensation.

Before demanding monetary compensation in court, the claimant is obliged to file a **motion for settlement at the State Attorneys' Office** with a view to reaching an agreement on the type or amount of just satisfaction. Only in the case when no settlement has been reached within the time period of three months can an action be brought before the competent court. State bodies, bodies of self-governing local communities, public enterprises, public funds and public agencies may not be afforded just satisfaction by way of payment of monetary compensation for damage caused by a violation of the right to a trial without undue delay.

6. Current situation

In spring of this year the European Court of Human Rights issued the first two judgments[109] on the Protection of the Right to Trial without Undue Delay Act of

108. Official Gazette RS, no. 83/2001, 32/2004, 28/2006, 29/2007, 40/2007.

the Republic of Slovenia in relation to the question of whether Slovenia has an effective legal remedy for the protection of the right to trial in a reasonable time. The court stated that as of the 1 January 2007 – the introduction of the Act – Slovenia has an aggregate of legal remedies that are effective and that applicants should firstly resort to the domestic procedures to protect their right. This means that around 1 700 cases which were before of the European Court of Human Rights will fall back into the jurisdiction of Slovenia. However, the European Court of Human Rights will certainly continue to carefully analyse the practical impact of the new law and eventually it might hold the position that although effective in theory, the provisions of the domestic legal remedy for the protection of the right to trial within reasonable time do not represent an effective remedy in practice.

Some difficulties have already arisen in the handling of accelerating legal remedies. Firstly, additional human and financial resources had to be granted. Secondly, the hybrid nature of the procedural provisions (combining administrative and civil procedure rules) causes some uncertainties. Most importantly, accelerating remedies have little or no value in the case of the 'systematic backlogs'. When the delays in court proceedings cannot be attributed to the conduct of the court, the use of acceleration remedies could unjustly favour the active parties that file such remedies. Insofar, the position of the judiciary on this issue has been strict – remedies should be rejected as unfounded, although the time frame of the proceedings could clearly be qualified as unreasonable. I am confident that answers to current problems should come from the future application of the Act in practice – *Legum corrector usus.*

7. Conclusion

It has to be underlined, that the purpose of this Act was not a reduction of court backlogs. For this purpose the Republic of Slovenia has set a special project – the Lukenda project of reducing court backlogs until 2010, including measures such as hiring additional judges and professional court assistants. Other steps that include amending procedural legislation as well as the material provisions of the laws should be taken. The purpose of the Act is to provide effective legal remedies for the protection of the right of a party to a trial without undue delay and give clear indication of the circumstances that should influence the decision on whether this right has been violated.

An effective and conscientious application of the Act is therefore a commitment of the Republic of Slovenia, above all the judiciary and State Attorneys'

109. *Grzinčič v. Slovenia* – appl. no. 26867/02, 3 May 2007 and *Korenjak v. Slovenia* – appl. no. 463/03, 1 July 2007.

Service. However, this is not a commitment only to the European Court of Human Rights or the European Convention on Human Rights but mainly to the Constitution of the Republic of Slovenia itself and to parties in judicial proceedings, whose right is of little or no benefit, if it is delayed.

Securing of legal remedies for court delays

Vladimir Babunski

Judge of the Supreme Court of "the former Yugoslav Republic of Macedonia"

I.

Like in any other contemporary democratic society, in the Republic of Macedonia the fundamental values are the basic freedoms and rights of the individual and citizen. According to their meaning, they are defined in the basic provisions of the Constitution of the Republic of Macedonia, Article 8 paragraph 1, alinea 1, worded as follows: "The fundamental values of the constitutional order of the Republic of Macedonia are the basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constituion."

For the purpose of providing and materialization of these values, Article 118 appearing in the normative part of the Constitution specifies that the international agreements ratified in accordance with the Constitution are part of the internal legal order and may not be changed by law. Consequent with the determination that the basic freedoms and rights of the individual and citizen are the fundamental value of the constitutional order of the Republic of Macedonia, for the purpose of their being secured, the framer of the Constitution has specified explicitly in amendment XXV of the Constitution of the Republic of Macedonia that the courts exercise the judicial authority, that they are independent, and that they try on the basis of the Constitution and the Laws and the international agreements ratified in accordance with the Constitution.

The European Convention for protection of human rights and basic freedoms as an international agreement was signed by the Republic of Macedonia and ratified in accordance with its Constitution, and came into force on 10 April 1997.

As of this date, in accordance with Article 1 of the Convention, the Republic of Macedonia is obliged to secure to all persons under its jurisdiction fulfilment of the rights and freedoms defined in part 1 thereof.

Article 13 of the Convention provides that "anyone whose rights and freedoms defined by the Convention are violated shall have an effective remedy before the domestic authorities, irrespective of whether the violation has been committed by persons who have performed official duty."

Regarding the substance, meaning and scope of Article 13 of the Convention, the European Court of Human Rights ("the Court") has declared in several verdicts, and by reason of limited space, on this occasion we are quoting only the verdict *Asenov and others v. Bulgaria* dated 28 October 1998, item 117. The Court points out that "Article 13 guarantees the existence of domestic legal remedy that exercises the substance of the rights and freedoms specified in the Convention, irrespective of the form in which it protects the domestic law. Therefore, the purpose of this Article is to ask for securing of a domestic legal remedy that enables the domestic authorities to deal with the substance of the complaint in connection with the Convention and to allow an appropriate remedy, although the contracting countries are allowed a certain flexibility in respect of the manner in which they adhere to their obligation related to this provision." Furthermore, the Court points out that "one may not refer separately to the provisions of Article 13 of the Convention; rather, one may do so only if the main objection is within the scope of the implementation of the Convention." Regarding the range of the obligations referred to in Article 13, the Court notes that the range is applicable subject to the nature of the appellant's complaint in connection with the Convention."

II.

The question of court delays arises when an applicant to the Court points out that the trial before the domestic court has lasted too long and has not satisfied the requirement from paragraph 1 of Article 6 of the Convention stating that "everyone, when his/her civil rights and obligations are determined, or when criminal charges are brought against him/her, has the right to fair and public trial within a reasonable period before an independent and impartial tribunal founded by law."

The experience that the Republic of Macedonia has as a defendant sued by its citizens before the Court for violence of the rights and freedoms defined in the Convention, through the passed verdicts, shows unambiguously that most of the verdicts have established violation of the right to trial within a reasonable period specified in paragraph 1 Article 6 of the Convention (concerning length of the proceeding).

Out of 35 Court final verdicts, in 18 cases violation of the right to trial within a "reasonable period" has been established.

The analysis of the 18 verdicts establishing violation of the right to trial within a "reasonable period" leads to the discovery of some very important facts. The first fact is that in 15 cases the proceeding has been conducted according to the rules for contentious procedure with various legal bases: ownership, title, indemnity, cancellation of agreements, claim for money, termination of employment, etc. In one case, the proceeding was conducted according to the rules of the Law on Executive Procedure, and in two cases an administrative procedure was conducted with participation of the Supreme Court of the Republic of Macedonia in an administrative dispute. The second fact is that the total duration of the procedures including the time within the competence of the European Court of Human Rights – 10 April 1997 is from at least 6 years up to 20 years. The third fact is that the procedures before the first instance and the second instance courts took the longest time, and those before the Supreme Court of the Republic of Macedonia took the least time, except in four cases, where the duration in three cases was 3 years, and in one case 2 years and 7 months. The explanation of the Government of the Republic of Macedonia concerning these four cases was that the Supreme Court had too many cases, which for the ECHR was irrelevant and unacceptable in view of its position taken on a great number of decisions that the contracting state has to organise its legal system in a manner that will enable anyone to acquire his/her right to final decision within a reasonable period, in a dispute for his/her civil rights and obligations.

It is important to point out that in two cases out of the analysed 18 verdicts, in which the proceeding lasted 14 years and 6 months – for execution, and in which no final decision was passed (verdict in the case of *Atanasovik and others*),[110] and 20 years – for determination of the right to ownership, in which a final decision was passed (verdict in the case of *Kostovska*),[111] the Court, in addition to the violation of Article 6 paragraph 1 for long duration of the proceedings, also established violation of Article 13 of the Convention for the right to effective legal remedy.

III.

According to the practice of the European Court of Human Rights, "every contracting state is free to decide on how it will organise its legal system in order to ensure the exercise of the rights and freedoms guaranteed by the Convention

110. *Atanasovik and others v. "the former Yugoslav Republic of Macedonia"*, 22 December 2005.

111. *Kostovska v. "the former Yugoslav Republic of Macedonia"*, 15 June 2006

and by the protocols as its integral part." Experience shows that this target cannot be achieved with one, two or more legal remedies incorporated in the domestic legal system. Rather, it can be achieved with a multitude of legal enactments that will govern thoroughly and comprehensively the matters of formal and legal nature in a way that will ensure finalisation of proceedings before courts and other state authorities within a "reasonable period."

Proceeding from such experience, the Republic of Macedonia decided (one may say with a delay) to pass new process laws (the amendments and supplements to the old ones did not achieve the desired effect) that will substantially eliminate old legal solutions.

These laws are: The Law on Contentious Procedure (Official Gazette of the Republic of Macedonia No. 79/2005), which has been in force since 29 December 2005 and the Law on Execution (Official Gazette of the Republic of Macedonia No. 35/2005), in force since 25 May 2006.

III/1.

The current Law on Contentious Procedure focuses on the hearing principle for account of the investigation principle (Article 7). Namely, the activity of the parties in the proceeding is dominant, as the parties are obliged to state the facts of importance for decision making and to propose proofs to establish such facts, and the court is under no obligation to establish at all cost the relevant facts and to determine presentation of proofs that the parties have not proposed. There is an exception to this rule in one case only, i.e. when the parties want to dispose of the claims that are contrary to the compulsory regulations, contrary to the provisions of the international agreements ratified in accordance with the Constitution of the Republic of Macedonia and contrary to the ethics, in which case the court is also authorised to establish facts and present proofs that the parties have not stated and proposed. This is for a single purpose of the court to prevent non-allowed disposal by the parties.

Such basic determination of the Law for the active role of the parties, and consequently, for the responsibility for their possible passive conduct resulting in negative consequences for them in respect of the outcome of the dispute, is maintained in all phases of the proceeding. Thus, the claimant is obliged to state in his/her claim the facts on which his/her claim is based and to propose proofs establishing these facts (Article 176, paragraph 1), and the defendant, if he/she disputes the claim, is obliged to state in his/her written answer that he/she is bound to give within at least 15 up to not more than 30 days (Article 269, paragraph 1), the facts on which his/her allegations and the proofs by which such facts are established. The failure of submission of rejoinder by the defendant results in passing a verdict by which the court accepts the claim if the other conditions provided in Article 319 – "verdict due to non-submission of rejoinder"

are also fulfilled. If the conditions for passing a verdict referred to in the preceding Article are not fulfilled, the parties may state the facts and propose proofs only and right at the preparatory audience, if such audience is held, and if not held, at the first audience for general hearing (Article 271, paragraph 3 and Article 384, paragraphs 1 and 3). As an exception, the parties may during the general hearing state new facts and propose new proofs only if they make it likely that they were not able to state them without their fault, i.e. to propose them at the first appearance for general hearing.

The failure by the parties to state the facts and to propose proofs in the previous phase of the proceeding, leads to the consequence that they may not state in their complaint new facts and proofs except that they relate to substantial violation of the provisions from the contentious procedure due to which the party may lodge a complaint. In this context and for the same purpose – acceleration of the proceeding, is the impossibility to state in the complaint an objection for expiration of the claim as well as another substantial legal or process legal objection to which the first instance court pays no attention ex officio (Article 341, paragraph 2). For the purpose of a more expeditious and more efficient finalisation of legal proceedings, very significant is the solution specified in the Law, contained in the provision from Article 351, paragraph 3 worded – "when the council meeting establishes that the verdict against which a complaint has been lodged is based on a substantial violation of the provisions of the contentious procedure or on an erroneously and incompletely established factual state, and the verdict has once been repealed, the second instance court will schedule a hearing and decide relevantly."

The improper service of process produced by the previous Law on Contentious Procedure from 1998 had a great impact on the long duration of legal proceedings. The current Law, with its solutions, reduced to a great extent the adverse impact of the old law. First, it enriched the circle of persons authorised to serve process – with notaries public and other persons defined by law (executors etc.) Second, it extended the time for service of process – every day from 6.00 to 21.00 hours, not only on working days. Third, extended to the maximum the place to which the process is served – in every place where the person to whom the process is to be served will be found. Fourth, the deliverer may ask to identify the person, and, if necessary, the deliverer is authorised to ask for assistance from the police. And fifth, maybe the most important is the provision in the Law that the party that is duly invited to attend an audience or has been informed of taking a specific action does not appear at the court, the court is under no further obligation to invite him/her (Article 125, 126 and 135).

Not less important for acceleration of legal proceedings is the legislator's solution stated in the current Law to exclude whole institute that have been contained in the old law such as: adjournment of the proceeding, request for protec-

tion of legality from the Public Prosecutor and participation of third parties in the trial – the Ombudsman and the Public Prosecutor. A direct acquisition from the non-existence of the institute "adjournment of the proceeding" for its prompt finalisation, are the legal solutions in Article 277 and 280, paragraph 1, according to which, if the claimant, although duly invited, fails to appear at the preparatory audience, and/or at the first audience for general hearing as well as at any later audience, and fails to excuse the absence, the claim will be considered as withdrawn, if the defendant agrees thereto (orally in the minutes or by written submission).

Also, very important for acceleration of the proceeding at the court is the solution contained in the provision from Article 367 obligating the council chairman and/or the judge upon receipt of the second instance court's decision to schedule an audience for general hearing within 8 days, and then hold the audience within 45 days from the date of receipt of the second instance court's decision. The method of "determination of short terms" for taking trial actions by the court for the purpose of accelerating the proceeding was also selected by the legislator in the provisions from Article 405, paragraphs 4 and 5 of the Law, where he has prescribed that in the case of a procedure in employment disputes, the proceeding before the first instance court must be finalised within 6 months from the date of submission of the claim and/or the second instance court is obliged to pass a decision under a complaint lodged against the first-instance court's decision within 30 days from the date complaint was received, i.e. within 2 months if a hearing is held at the second-instance court.

For any abuse of the rights pertaining to the parties and intermediaries, the legislator has opted for the method of "pecuniary punishment" for the same purpose – acceleration of proceeding – with a fine of 50 to 500 euros for natural persons and the responsible person in a legal entity, and for the legal entity with a fine of 250 to 2 500 euros, in the denar equivalent. No separate complaint is permitted against the ruling on the pronounced penalty, and it is executed compulsorily *ex officio* (Article 9, paragraphs 2, 5 and 6).

III/2.

The Law on Execution provides abandonment of the system of court execution of enforceable court decisions and court settlements, executive decisions and settlements in administrative procedure, if they are intended for pecuniary obligations, and other documents provided by law as enforceable documents, and establishes a system of execution by private executors vested with public powers and appointed by the Minister of Justice based on open competition.

In addition to the above mentioned decisions and settlements the Law defines as executive documents implemented by the executors the executive notarial document and the conclusion for execution costs drawn up by the executor and,

naturally, decision passed by a foreign court, if the decision meets the assumptions on recognition prescribed by law or international agreement ratified in accordance with the Constitution of the Republic of Macedonia.

Regarding private executors it is worth mentioning that before their being appointed for a particular region of a Basic Court, they should fulfil specific conditions provided for by the Law (citizen of the Republic of Macedonia, graduate jurist with 5 and/or 3 years working experience depending on whether he/she has worked on legal operations or on executive operations and other usual conditions), and, naturally, pass an examination for executors before an examining panel made up of five members appointed by the Minister of Justice. The executors and the executors' association are regularly supervised once a year and extraordinarily at any time by the Ministry of Justice.

With this system of execution the solutions given in the Law on Executive Procedure applicable prior to the application of the Law on Execution that decelerated and complicated the procedure are wholly abandoned, notably: the execution proposal of the creditor by designation of the means and subject of execution, the permission for execution together with a decision passed by the court, the complaint against the execution decision, lodging of complaints after expiration of the time limit, objection by a third party, and other solutions causing long duration of the proceeding.

According to the Law on Execution, the party holding an execution document applies orally or in writing in the form of record to the executor for compulsory execution, and, if the executor assesses that the executive document is provided with a certificate of enforceability and eligible for execution, simply issues an order for execution determining the means and subject of execution (if a pecuniary claim is concerned), and/or an appropriate order on the manner of execution applicable for non-pecuniary execution.

The orders, conclusions and other documents issued by the executor must in form and substance be prescribed by the Ministry of Justice, otherwise they are void.

The executors are obliged to act in accordance with the Law on Execution, otherwise they face disciplinary procedures and measures, and the most serious measure is their discharge. The executor's job is subject to legal control through objections made by the parties or the participants for irregularities committed by the executor during implementation of the execution. The objection for elimination of the irregularities is filed to the president of the basic court in whose region the execution is implemented within 3 days as of the date of realization of the irregularity, but not later than 15 days as from the date of finalisation of the execution.

The president of the court is obliged to decide on the objection upon a held audience or without audience within 72 hours.

The Law did not permit a complaint against the decision of the president of the court in accordance with paragraph 7 of Article 77, however, by decision passed by the Constitutional Court of the Republic of Macedonia U. No. 175/2006-0-0 dated 17 January 2007 this provision was repealed and removed from the legal order. In the meantime, although no law on amendment and supplement to the Law on Execution (which is in governmental procedure) has been enacted, the discontent parties use the right to lodge a complaint against the decision of the president of the court by referring to direct application of the provision from Article 15 of the Constitution of the Republic of Macedonia that guarantees the right to appeal against individual legal acts issued in a first instance proceeding by court, administrative body or organisation or other institutions performing public mandates, and the second instance courts decide on lodged complaints.

In the Republic of Macedonia 49 executors work with their deputies and other supporting staff. The experiences from the one-year work of the private executors are positive and optimistic as their efficiency in execution is approximately 35%, settled cases unlike the efficiency of the courts that ranged between 10% and 15% settled cases at an annual level.

The appointment of new executors, which is necessary and justifiable in accordance with the sub-law Rules passed by the Minister of Justice determining the number of executors, and the development and acquisition of experience of the existing executors, and in view of the initial success is expected to overcome the problem of execution inefficiency in the future, thus satisfying the requirement from Article 6, paragraph 1 for trial within a "reasonable period."

III/3.

The Republic of Macedonia, aware that the right to trial within a reasonable period cannot be provided completely with the adoption and implementation of the above mentioned process laws, however good and efficient they are, without the existence of a separate legal remedy pursuant to Article 13 of the Convention, which is its obligation, which, according to the practice of the ECHR "is efficient if used for the purpose of accelerating the passing of a decision by the court acting upon the case, or providing to the party an appropriate compensation for delays that have occurred" decided to incorporate in its legal system a "separate legal remedy." It did it in the Law on Courts (Official Gazette of the Republic of Macedonia No. 58/2006) that has been applied since 1 January 2007. First of all, the basic principles of the law, Article 6, paragraph 2 that has practically been taken from the provision in Article 6, paragraph 1 of the European Convention on Human Rights, define that "when deciding on civil rights and obligations and when deciding on criminal responsibility, everyone has the right to fair and

public trial within a reasonable period before an independent and unbiased court founded by law."

The implementation of this provision is specified in Article 35, paragraph 1, item 6 of the Law defining the competence of the Supreme Court of the Republic of Macedonia. This paragraph provides that the Supreme Court of the Republic of Macedonia is competent to decide upon request of the parties and other participants involved in any proceeding for violation of the right to trial within a reasonable period before the courts of the Republic of Macedonia, in a procedure specified by law.

The next provision of Article 36 working out this legal remedy contains the following:

According to paragraph 1, the party that considers that the competent court has violated the right to trial within a reasonable period, has the right to submit a request for protection of the right to trial within a reasonable period to the directly higher court. According to paragraph 2, the directly higher court acts upon the request within 6 months from its submission and decides whether the lower instance court has violated the right to trial within a reasonable period. According to paragraph 3, if the higher instance court establishes violation of the right to trial within a reasonable period, it will adjudge a just compensation for the applicant. According to paragraph 4, the pecuniary compensation is to be borne by the court budget.

Although Article 35, paragraph 1, item 6 of the Law specifies explicitly that the request of the party and the other participants in the proceeding for violation of the right to trial within a "reasonable period" will be decided on "in a procedure defined by law", such law in the Republic of Macedonia has not been enacted so far.

Due to non-enactment of the law on the procedure in which the violation of the right to trial within a reasonable period in the Republic of Macedonia will be decided on, the "separate legal remedy" provided in the Law on Courts is not applied in practice.

The general meeting of the Supreme Court of the Republic of Macedonia held on 16 July 2007, discussing the possibility of application of Article 35, paragraph 1, item 6 and Article 36 of the Law on Courts adopted a legal opinion that these provisions are inapplicable without their amendment and supplement.

Such legal opinion was immediately submitted to the Ministry of Justice of the Republic of Macedonia, which informed us that such opinion has been accepted and that legislative measures have been taken for amendment and supplement to the subject legal provisions.

Acquisition by judges of skills and expertise essential for the application of the European Convention on Human Rights and the case-law of the European Court of Human Rights

Vida Petrović-Škero

President of the Constitutional Court of Serbia

The acquisition by judges of expertise essential for the implementation of the European Convention on Human Rights and the implementation of the case-law of the European Court of Human Rights as well as the acquisition of essential skills by the judges of national courts is an unquestionable guarantee of the independence and impartiality of judges in accordance with the terms of the Convention. In order for that guarantee to be effective, a national programme must be drawn up to define the competences of judges. Judges must, above all, be unbiased, capable, ethical, professional, conscientious, broad-minded and highly educated. Only those judges with the necessary expertise and skills will be able to acquire the necessary competences.

In order to achieve the desired goal, it is necessary to create a legal framework for the acquisition of expertise and to provide an institution responsible for the implementation of the legal framework. Supreme courts, including the Supreme Court of Serbia, must play an indispensable role in this process given that its judges must participate in the training of courts of lowers instances. On the other hand, the judges of the Supreme Court of Serbia, as the court of the highest in-

stance, must ensure, wherever possible, the full protection of the rights of citizens at the national level by directly implementing the European Convention on Human Rights and through their thorough knowledge of the case-law of the European Court of Human Rights.

Serbia's place in light of these obligations and needs

The Law on the Training of Judges, Public Prosecutors, Deputy Public Prosecutors and Assistants to Judges and Prosecutors was passed in June 2006, and it governs, among other things, the method for acquiring expertise and skills for the implementation of the European Convention on Human Rights and the direct application of the case-law of the European Court of Human Rights. Under this Law, the future judges will undergo initial training, an important segment of which will be the acquisition of expertise for the implementation of the European Convention and case-law, and this training will be mandatory.

There will also be voluntary continuing training. This type of training, associated with such specific expertise and skills, is provided through a Training Centre, established by the Association of Judges of Serbia and the Ministry of Justice of Serbia as institutions responsible for the training of judges and prosecutors. The body responsible for the implementation of this Law is the High Judicial Council. The High Judicial Councils has set up a Commission that has drawn up a programme of initial training. However the funds required for this training have not yet been earmarked in the state budget.

The case-law of the International Court has given rise to autonomous concepts and calls for a human rights protection mechanism that must be effective within the national system. Therefore, the priority for the Training Centre and Supreme Court of any country, including Serbia, is to ensure a mechanism for the direct implementation of the European Convention and provide information about the Court's case-law and its direct application by national courts.

With regard to continuing education, communication has been established between the Training Centre and judges at all levels as the target group. However, the number of trainers in the country is still inadequate. At present, there are nine national human rights trainers in Serbia. Their own training was made possible by the Council of Europe.

The problem is that the employment status of the judge-lecturers has not yet been regulated in order to allow them to work as trainers only for a period of time. It is therefore necessary to pass legislation that will make this possible. In addition, the necessary and adequate funds have not yet been earmarked in the national budget, so that we have to rely on donors in our work. We receive most of the assistance from the Council of Europe, the Belgrade Human Rights Centre and the ER Centre, which, along with the assistance of the British Government,

helps judges obtain information about the direct implementation of the European Convention and the case-law of the European Court in proceedings conducted before national courts. This training is still inadequate and unsystematic.

In order to ensure the desired effects of this training, it is necessary to develop a good methodology and provide specific levels of training for judges at different levels and with varying degrees of experience. It is necessary to define the quality of the lecturers in the institution. Work on ensuring these conditions is constantly in progress.

In addition to the issue of institutional training, which calls for the creation of special budgets for these purposes, the most important thing is for judges themselves to want to gain knowledge and receive advanced training in this important area.

They should be encouraged to do so through legislation, which must make the election and promotion of judges conditional on their advanced training. This will only be possible once there are adequate funds for a programme of sustainable training, which should not be limited to substantive and procedural law but should also comprise communication techniques and skills (hearing witnesses, establishing contact with special categories of participants in proceedings etc.) Judges must be trained to use computers that will give them very easy access to the case-law of the European Court of Human Rights and to the website of the Supreme Court of Serbia, which already features the most important published judgments of the International Court and decisions handed down against Serbia. It is important to achieve the main goal, the creation of a judiciary with a good understanding of proportionality in the exercise of the right to a legal remedy and the importance of the actual protection of rights compared to the observance of form. A judicial system that fails to ensure this can create greater problems for citizens who seek human rights protection from the courts. A court must exist not for its own sake but for the protection of the rights of citizens seeking such protection. The fact that legal norms are not harmonised with the provisions of the Convention must not be a problem for the courts given the possibility of a direct application of the International Convention made possible by the Constitution. The Supreme Court should assume leadership in this area on account of its expertise.

It is for these very reasons that the continuing training of judges must be of paramount importance in shaping the personnel policies of the courts and must be an integral component of every judge's career.

In defining the method for acquiring expertise and skills it should be noted that some of the conclusions from Opinion No. 4 of the Consultative Council of European Judges of 27 November 2003 indicate that training is necessary for a judiciary to be held in high regard. The law, as the legal framework for the acquisition of this type of expertise, should not deal with the minutiae of training, and

the drawing up of training plans should be entrusted to a special body, which will modify the plans in accordance with specific needs. The state has the duty to raise funds for this training because the continuing acquisition of knowledge by judges is a matter of general importance for the state. Training must primarily be provided by judges and experts in each specific area, and it must always be related to practice.

The main purpose of all training is to raise the awareness of judges that they are "European judges" and that they must be familiar with European standards and international instruments, particularly the Convention.

If we are to achieve the desired goal, many segments of the state must be reformed. The first step is to intensify the studies of European law at the university. The next step is definitely the initial training, an important part of which is the acquisition of knowledge regarding the application of the European Convention on Human Rights and the direct implementation of the case-law of the European Court. Continuing education must be provided given that the Convention is a living instrument, which must ensure the protection against new forms of violations of rights.

It is with regard to the decision of the International Court handed down against other countries with similar problems and a similar legal system that it is necessary to ensure all the conditions for the continuing monitoring of case-law and methods of rights protection in order to overcome problems of the same type faced by national courts.

Judges in Serbia receive the Bulletin with summaries of the important decision of the Court in Strasbourg in view of our legal system and the mentality of our people.

Decisions against Serbia and other important decisions of the International Court are published on the Supreme Court's website.

Numerous laws implementing the provisions of the European Convention have been amended in Serbia. Specialised judges responsible for the acquisition of special expertise and skills to guarantee the protection of human rights are to be appointed. This specialisation is required of judges in cases concerning the protection of minors, family, employment-related rights…

It is also reasonable for the Supreme Court to provide guidelines for future proceedings and interpretations of the law through its decisions and, especially, to contribute to case-law equalisation. The Supreme Court will therefore play the most important role in the implementation of international instruments, especially the European Convention on Human Rights. It will provide guidelines for trials to be held within the domestic legal system in accordance with the already established case-law of the European Court. It is crucial to prepare a quick reference guide for applying precedents in order to help courts of lower instances. This has been done for Articles 5 and 6 of the European Convention on

Human Rights in connection with national legislation and the existing case-law of European and domestic courts, as well as for Article 1, para. 1, of the Protocol. The entire system of training must be streamlined by carrying out an optimum reform in keeping with national capabilities. The passage of legislation that is not implemented or is not suited to specific possibilities and needs will do little to help judges acquire skills and expertise.

The knowledge gained must also facilitate preventive and corrective measures for the very purpose of safeguarding the rights of citizens and justifying the *raison d'être* of judicial institutions.

Ensuring that judges have the skills and knowledge to apply the European Convention on Human Rights and the case-law of the European Court of Human Rights

Gabor Szeplaki-Nagy

Judge of the Supreme Court of Hungary

Madam President, ladies and gentlemen,

I sincerely thank the organisers for giving me the opportunity to present our experience in fostering knowledge of Strasbourg case-law for the benefit of Hungarian judges.

If I may, I shall begin my statement with a brief historical recapitulation.

After the collapse of the Soviet bloc, Hungary took the path of democratic reform. One of the milestones was 6 November 1990 when our country joined the Council of Europe. Hungary was the first country of the former Soviet bloc to do so, in becoming the 24th member state.

Hungary's accession was preceded, from 8 June 1989 onwards, by a period during which we enjoyed the special guest status created by the Parliamentary Assembly in order to forge closer links with the parliaments of Central and Eastern European countries progressing towards democracy.

The objective was the promotion of human rights in these countries. So it was that, thanks to the hastening of the process of reform and democratisation, Hungary ratified the European Convention on Human Rights on 5 November 1992.

After that date, an acquaintance with the practice of the European Court of Human Rights was indispensable for Hungarian judges too, as our national judges were to apply the provisions of the Convention while upholding the Court's interpretation of it. Although Article 7 of our Constitution provides that Hungary undertakes to harmonise its international obligations with its domestic law, this provision does not mention in express terms the judgments of international courts.

Thus the influence of the case-law was becoming increasingly significant. Concurrently, certain obstacles arose, in particular our judges' unfamiliarity with foreign languages. At that time, the Ministry of Justice was still responsible for supervising the judicial professions and therefore organised seminars and colloquies for judges to familiarise them more with the Convention and with Court precedent. Unfortunately the judgments were not translated into Hungarian.

As from October 1992, the Supreme Court began to publish summaries of the Strasbourg Court's important and telling judgments, in the Bulletin of court judgments in the section: "Judgments of the European Court of Human Rights". I have in my hands the first edition from the year 1992, and the latest from August this year, showing that publication of the Bulletin has not lapsed since that time.

The Bulletin, issued by the Supreme Court, provides Hungarian jurists with first-class information on the case-law of the Hungarian courts. This publication comes out each month, with a print run of 12 000 copies. Not only judges but also lawyers and legal advisers can consult it. This ensures access to the case-law of the Strasbourg organs for Hungarian judges not commanding either of the Council of Europe official languages.

Since the promulgation of the European Convention on Human Rights in Hungary by Law No. XXI of 1993, the Supreme Court has closely followed the activity of the Strasbourg organs, given that its constitutional function is to guarantee consistency in the case-law of the Hungarian courts. Moreover, it relies on the case-law of the European Court of Human Rights in its decisions.

The then President of the Supreme Court, Mr Pál Solt, decided to set up within the Court a bureau whose principal activity was to make the case-law of the European Court and of the European Commission known to Hungarian judges.

The Human Rights Bureau operated starting from April 1994 with three permanent assistants. I was appointed director of the Bureau, and my team was made up of an assistant, a retired judge who spoke English very well and had advanced knowledge in the field of European Court of Human Rights case-law, and a secretary.

To support the Supreme Court in its function of ensuring consistency in the case-law, one of the Bureau's tasks has been to keep abreast of the European

Court's jurisprudential development and to compare it with the judgments delivered by the Supreme Court.

If the Bureau found a judgment to be incompatible with the judgments of the European Court of Human Rights, it reported the fact to the President of the relevant chamber of the Supreme Court.

Meanwhile the number of translations of judgments has also grown in the Bulletin. The translators are mainly legal specialists with a thorough knowledge of English or French, and about the legal system of the country concerned in the judgment. This has made it possible to ensure the quality of the translation from a linguistic and legal standpoint.

After 1995, we broadened the publication of Strasbourg case-law. We began to produce a quarterly appendix to the Bulletin called the Human Rights Review, in which not only summaries of judgments but also studies dealing with the various articles of the Convention were published. The first Review appeared in 1997 and the latest in 2002.

In this collection, studies on Article 5 – Right to liberty and security, Article 6 – Right to a fair trial, Article 8 – Right to respect for private and family life, Article 9 – Freedom of thought, conscience and religion, Article 10 – Freedom of expression and Article 11 – Freedom of assembly and association have been prepared. We have also published a study on the fight against corruption and organised crime, and on protection of witnesses. These studies have drawn upon the case-law of the Strasbourg supervisory bodies and on the legal instruments of the Council of Europe, such as the recommendations on these subjects.

I can assure you that the outcome of our work is significant, because more and more references to the case-law of the European Court of Human Rights are found in the decisions of the Hungarian courts. These references occur not only in the decisions of the ordinary courts but also in those of the Constitutional Court, which cite the Review or the Bulletin as the source.

But the work done by our Bureau has not been the sole source of knowledge of the European Court's case-law for our judges. The Council of Europe put a great deal towards this endeavour by organising seminars and colloquies up to the end of the 1990s. The National Council of Justice, the body for self-regulation of justice since 1997, in its initial training programme for judicial service entrants and in-service training for judges who have held office for years, also looks after human rights education.

Since September 2006 the judges' training college has been responsible for the initial and in-service training of judges.

It must be acknowledged that the young judges appointed after the 1990s are in a more favourable position than their elders, because these young jurists have higher proficiency in foreign languages. Indeed, they must learn foreign languages and pass two language examinations to obtain an academic diploma. Fur-

thermore, during their university course they have already had the chance to study fundamental rights and human rights as a subject. I myself was a lecturer for several years in the Law Faculty of Eötvös Loránd University in Budapest, where I taught the case-law of the European Court of Human Rights.

May I end my statement with a brief presentation of the website of the Supreme Court of Hungary, carrying the page of the Human Rights Bureau. The site is accessible free of charge to the public; everyone interested in human rights can enter it. On it can be found practical instructions concerning the bringing of an application, the decisions of the European Court of Human Rights relating to Hungary, the text of the European Convention on Human Rights, the recommendations of the Council of Europe and the Court's judgments. In addition, the recommendations and decisions of the Council of Europe organs can be retrieved using a search engine.

Thank you for your valued attention.

Evaluation of supposed obstacles to an effective implementation of the European Convention on Human Rights by national courts

Jeremy McBride

Barrister, Monckton Chambers, London and Visiting Professor, Central European University, Budapest

Introduction

Apart from the demonstration of considerable productivity, the annual statistics of the European Court of Human Rights ("the Court") are a depressing testament to the poor level of implementation of the European Convention on Human Rights ("the Convention"). In the course of 2006 over 50 000 applications were lodged and by the end of that year the number of applications still pending had reached almost 90 000[112]. Furthermore during that year over 1 500 judgments were handed down, with the majority of them entailing the finding of violations of one or more provisions of the Convention.

Of course, statistics never give the whole picture and some might say that the fact that each year between 90 and 95% of applications are found inadmissible is actually an indication of how well the Convention is being implemented. However, to take this view would be complacent. Many of the applications found in-

112. See Part XI of the Court's *Annual Report 2006*.

admissible concern appalling stories and their rejection often occurs only because of the delay in bringing them to the Court or a failure to pursue a domestic remedy which allows a claim of non-exhaustion to be raised, notwithstanding that a successful outcome is far from assured. Indeed in many instances the deficiencies in such unsuccessful applications are themselves merely reflections of the failure of the Convention to be fully embraced by the legal systems of the High Contracting Parties since they are the inevitable consequence of inadequate understanding or knowledge on the part of the lawyers who are representing the applicants concerned before the Court.

Moreover, although the number of cases in which violations are found by the Court to have occurred might seem relatively small given that there are now forty-seven High Contracting Parties, they often involve many applicants and they are no more than an indicator of a more widespread problem, something confirmed not only by the subject matter of cases that do not pass the admissibility hurdle but also by reports of other intergovernmental supervisory mechanisms and of non-governmental organisations on the human rights situation in the respondent states. Furthermore these cases are often repetitive in their subject matter, whether dealing with an issue that has already been addressed in rulings against the same respondent state or against another when the implications for the current respondent state should have been obvious. The existence of so many repetitive cases, in particular, underlines the failure to achieve effective implementation of Convention rights and freedoms throughout the member states of the Council of Europe.[113]

The problem of implementation is not a matter of the Convention's status in domestic law as its provisions are now, through one means or another, part of the law of all High Contracting Parties.[114] This was not always the case yet the Court would then say that incorporation was not an essential requirement of the Convention for a High Contracting Party.[115] Nonetheless this view did not deter the making of considerable efforts to implement the Convention in countries where

113. It has been suggested that the existence of such cases is a distraction from the Court's "essential role", i.e., determining the more important cases concerning the interpretation and application of the Convention (*Report of the Group of Wise Persons to the Committee of Ministers*, CM (2006) 203, 15 November 2006, para. 35), but whatever the merits of that view there is no question that the ever-growing resort to the individual application procedure under Article 34 is a reflection of the failure of High Contacting Parties through their national institutions (including courts) to take seriously their obligation under Article 1 to secure Convention rights and freedoms to everyone within their jurisdiction.

114. The most comprehensive survey of the domestic status of the Convention is to be found in R. Blackburn and J. Polakiewicz, *Fundamental Rights in Europe: the ECHR and its member states* (2001).

115. E.g., *Swedish Engine Drivers' Union v. Sweden*, Judgment of 6 February 1976, para. 50.

it had not automatically become part of the law through the act of ratification. However, these tended to occur while the fact that the domestication of the Convention in one form or another has not, and still does not, prevent violations of the guaranteed rights and freedoms from occurring was often overlooked. Indeed the mere fact of formal incorporation has led to some complacency on the part of some High Contracting Parties about fulfilling the fundamental obligation undertaken by them in Article 1 of the Convention. As the Court has long recognised, the crucial issue remains not whether the Convention has been incorporated into national law but what measures are being taken to ensure that its provisions are effectively implemented in practice.

The failure to achieve full implementation of the Convention is undoubtedly first and foremost attributable to action and inaction on the part of the executive and legislative branches of government and extensive efforts to change practices and introduce new procedures to deal with this are required, notably the effective training and supervision of officials and the thorough scrutiny of legislative proposals to prevent violations from ever occurring.[116] However, notwithstanding the primary responsibility of the executive and the legislature for non-compliance with the requirements of the Convention, the courts also contribute to the problem of their inadequate implementation. They are implicated after all by the fact that they are often the institutions which last dealt with a matter before proceedings are instituted in Strasbourg – a consequence of the obligation to exhaust domestic remedies – and, of course, some of the complaints about breaches of the Convention relate to the very functioning of the justice system.

The difficulties that are said to face courts in securing effective implementation of the Convention would seem to be threefold. Firstly the requirements of the Convention are considered not to be clear and as a consequence they cannot be properly applied. Secondly the requirements of the Convention are suggested to be not of a character that courts are always in a position to address without measures first being adopted by the legislature. Thirdly implementation is regarded as being impeded by the absence of appropriate resources for the task involved, whether in terms of personnel or access to literature and argumentation. These difficulties are, in at least some instances, interlinked and to some extent they are genuine ones. However, there is no basis for regarding them all as insurmountable and more substantial efforts to deal with them are clearly appropriate, even if this might need some collective steps on the part of Council of Europe member states and not just by acting alone.

116. Neither is yet comprehensively undertaken but the position has improved, particularly as a result of programmes undertaken or assistance provided by both intergovernmental and non-governmental organisations.

Lack of clarity

Suggestions that the Convention is insufficiently clear to be applied by national courts have been made many times over the years since its adoption and a typical example was the comment of Lord Denning, an English judge that

It contains wide general statements of principle. They are apt to lead to much difficulty in application because they give rise to too much uncertainty. They are not the sort of thing which we can easily digest.[117]

These comments were made by way of contrast to the case method of the common law, together with its highly detailed form of legislation. However, uncertainty about the Convention's requirements is not restricted to judges and lawyers in common law systems. This is hardly surprising given that it uses concepts such as "arrest" and "detention" which mean quite different things in the legal systems of High Contracting Parties. Furthermore, although other, broader concepts such as "national security" and "public safety" may be found in all the various legal systems to which the Convention is supposed to apply, these are ones that can easily be approached with quite different perspectives in them, depending on factors such as history, culture and social circumstances. In addition the Convention uses terms which have quite different resonances, depending on which of the two official language versions is used, such as "civil rights and obligations" and rights and obligations "d'un caractère civil" in Article 6.

Moreover the Convention is not a static instrument so that its evolving interpretation can lead to quite different conclusions as to the requirements of particular provisions, based on a supposedly changing consensus which might actually reflect the prevailing rather than universal view within the High Contracting Parties.[118] It is also an instrument that is given a deeper meaning than a literal reading of the text might suggest so that, for example, the use of terms such as "lawful" and "prescribed by law" is not limited in its effect to requiring a formal legal basis for restricting rights and freedoms since they are to be taken as also implying that any application of a permitted restriction will not be arbitrary and will be effected pursuant to a provision that is both accessible and foreseeable.[119]

Perhaps even more demanding is the fact that the Convention is an instrument that must be given a purposive meaning and thus requirements such a right

117. *R. v. Chief Immigration Officer, ex parte Salamat Bibi* [1976] 3 AllER 843 at 847.
118. See, e.g. *Sheffield and Horsham v. the United Kingdom* (22985/93 and 23390/94), 30 July 1998 [GC] and *Christine Goodwin v. the United Kingdom* (28957/95), 11 July 2002 [GC] on the issue of recognising the effect of gender reassignment.
119. See, e.g., *Silver and Others v. the United Kingdom* (5847/72 et al), 25 March 1983 and *Witold Litwa v. Poland* (26629/95), 4 April 2000.

of access to court and a prohibition on self-incrimination must be read into the text of Article 6 which, in contrast to most others, is a provision that is quite precise in its formulation.[120]

The changing circumstances in which the Convention is to be applied are also challenging. Certainly it is doubtful if the drafters ever imagined that the Court would be confronted with cases relating to the recognition of gender reassignment[121], the use of voluntary euthanasia[122] and the inability of two unmarried sisters to claim the same exemption from inheritance tax following the death of one of them as is enjoyed by the survivors of a marriage or civil partnerships[123], to take just some of the recent matters brought before it. The handling of such cases is nonetheless evidence of the enduring relevance of the Convention since its adoption nearly 57 years ago.

Yet difficult though all these issues are, there is much less justification for invoking the problem of clarity today, even where it concerns the need to balance the competing interests in the expressly qualified rights found in Articles 8-11 and in particular to apply the variable concept of a margin of appreciation.[124] This is because there is now plenty of guidance on these and many other matters in the case-law of the Court (there was hardly any case-law on the merits at the time of Lord Denning's remarks), leaving aside for the moment the question of its accessibility.[125]

There will always be matters where the Court has yet to give guidance and there are undoubtedly some instances where the reasoning in cases decided by it might be considered opaque or even absent.[126] However, very many of the issues relating to the Convention that will be raised before national courts will have also already been addressed by the Court, albeit on some occasions in proceedings involving another High Contracting Party. Even if a particular issue has

120. See *Golder v. the United Kingdom* (4451/70), 21 February 1975 and *Funke v. France* (10828/84), 25 February 1993.

121. See the cases cited at n 7.

122. Such as *Pretty v. the United Kingdom* (2346/02), 29 April 2002.

123. Such as in the case of *Burden and Burden v. the United Kingdom* (13378/05), 12 December 2006, now pending before the Court's Grand Chamber.

124. *Cf*, e.g. the approach in cases such as *Lingens v. Austria* (9815/82), 8 July 1986 and *Muller v. Switzerland* (10737/84), 24 May 1988, the former involving a restriction that affected political expression and the latter concerning efforts to protect public morality.

125. In addition to the case-law there is also an extensive body of analytical literature. The problem of the accessibility of the case-law is discussed below.

126. E.g. the justification for including a right not to incriminate oneself within the fair hearing guarantee in Article 6 when, unlike Article14 of the International Covenant on Civil and Political Rights, it was not specifically listed was not explained by the Court in *Funke v. France* (10828/84), 25 February 1993.

not yet been considered by the Court, the methodology required to deal with it will generally be quite evident to those who are prepared to seek it.

This does not mean that a national court and the Court in Strasbourg cannot legitimately reach a different conclusion as to what the Convention requires in a particular situation but that can only genuinely be regarded as having occurred where due account has been taken of the relevant case-law and unfortunately this often seems to have been ignored, dismissed too readily or applied with an excessively narrow reading.[127]

Moreover, even if some allowance might still be made for understanding the ostensibly difficult methodology involved in applying the Convention and its case-law, the real difficulty in giving effect to the Convention's requirements arises somewhat less in respect of the complexities of finding the right balance between competing interests – for which the progress of an issue through national courts to Strasbourg can be a useful exercise in clarifying the position under the Convention – than in dealing with what might be thought to be the more relatively straightforward provisions in Articles 5 and 6, as well as the need for a formal legal basis for any restriction on a right or freedom.

Thus the case-law has long made it abundantly clear that more than seven days before a first appearance before a judge is unacceptable for the purposes of Article 5(3) – actually even this period is well in excess of the interval that will generally be accepted – yet cases still come to Strasbourg because a delay of this magnitude has not been taken to task in an appropriate manner by national courts[128]. Furthermore where there has been an appearance before a judge there are still numerous instances in which the justification for continued detention advanced by prosecutors is not subject to any scrutiny and in which no action has been taken even though it ought to have been evident that the lapse of time spent in prison between a person first being remanded in custody and being tried was unduly long[129]. Similar observations could also be made about the lack of speediness of judicial review of the lawfulness of detention[130] and of a sufficiently broad scrutiny of the basis for that detention,[131] to say nothing of the lack of an

127. Contrariwise a full consideration of such case-law may indeed lead the Court to defer to the conclusion reached at the national level; see, e.g. *Tammer v. Estonia* (41205/98), 6 February 2001.

128. See, e.g. *Pantea v. Romania* (33343/96), 3 June 2000 and *Ahmet Özkan and others v. Turkey* (21689/93), 6 April 2004.

129. See, e.g. *Ilijkov v. Bulgaria* (33977/96), 26 July 2001 and *Hüseyın Esen v. Turkey* (49048/99), 8 August 2006.

130. See, e.g. *M B v. Switzerland* (28256/95), 30 November 2000 and *Jablonski v. Poland* (33492/96), 21 December 2000.

131. See, e.g. *I I v. Bulgaria* (44082/98), 9 June 2005 and *Hüseyın Esen v. Turkey* (49048/99), 8 August 2006.

appropriate response to procrastination in legal proceedings, whether criminal or civil, leading to unreasonable delay contrary to Article 6.[132]

Furthermore it is amazing that there are still cases coming to Strasbourg where national courts have never questioned the legal basis for taking of measures such as search or interception of communications but the absence of this was readily apparent to the Court, providing the sole basis for its finding of a violation of the Convention.[133]

None of these are particularly difficult issues and they are also not ones requiring a deep familiarity with the jurisprudence of the Court. Indeed one might regard them as only involving the most basic of legal tasks which one should expect any judge to be able to carry out. Such shortcomings in the application of the Convention may be mitigated through training but they are unlikely to be seriously overcome without substantial efforts to change entrenched attitudes towards the relationship between the individual and the state, as well as a stiffening of the resolve of judges so that they feel comfortable exercising the independence which the Convention and membership of the Council of Europe requires that they enjoy.

One other problem bearing on the issue of clarity concerns the quality of the translation of the text of the Convention into languages other than the two official ones. As the discrepancies between the texts in English and French demonstrate, it is not easy to render accurately a concept used in one language into another[134]. Unfortunately it is not unusual to hear judges and lawyers complaining about the poor rendering of a particular term found in the Convention into languages other than English and French. Generally this is not problematic for these persons as they are complaining because they have a good understanding of what the Convention actually requires. However, such errors or infelicities in translation can be misleading for others and there is a need for them either to be corrected or for appropriate guidance to be given by national courts that a given formulation is to be understood in the sense that the Court treats the English and French text as meaning.

132. See, e.g. *Guiraud v. France* (64174/00), 29 March 2005 (10 years and 3 months for an investigation, which had taken more than 6 years and 8 months and three levels of jurisdiction) and *Munari v. Switzerland* (7957/02), 12 July 2005 (9 years, 11 months and 12 days for one level of jurisdiction).

133. See, e.g. *A v. France* (14838/89), 23 November 1993, *Hewitson v. the United Kingdom* (50015/99), 27 May 2003 and *Elci and others v. Turkey* (23145/93), 13 November 2003.

134. E.g. in Article 6 the use of "droits et obligations de caractère civil" suggests private law issues more than the English expression "civil rights and obligations".

Lack of competence

The problem facing national courts with regard to the implementation of the Convention is not, of course, always one of being clear about what is required. There is also the question of whether that requirement is something which is within the competence of a court to deliver. Certainly the mere fact that a treaty is part of the law of a state does not necessarily mean that this is in itself sufficient for the fulfilment of the obligation that has been accepted. Thus there is a well-recognised distinction between treaty provisions that are self-executing and those that are not self-executing, that is between those that can be applied without any further legislative intervention and those that require such an intervention before full effect can be given to a provision by a court.[135]

The non-self-executing character of Convention provisions has not tended to be pleaded as an excuse before the Court by respondent states, not least because this would be given short shrift by it, given the impossibility as a matter of international law of relying on constitutional arrangements as a defence to non-performance of international obligations and thus the need for a High Contracting Party to find the necessary means whatever those arrangements may be.[136]

Even where the possible non-self-executing character of a Convention provision might be a contributing feature to a violation, this has not been remarked upon by the Court itself, although some dissenting judges have done so, such as Judges Valticos and Matscher in *Ciulla v. Italy*[137] in respect of the right to compensation under Article 5(5) for a deprivation of liberty contrary to the Convention. In their view

> Even supposing that the domestic law incorporates the terms of the Convention, it is difficult to see how a national court could give effect to the terms of Article 5 para. 5 unless there were a more specific national provision giving practical expression to the content of this provision.[138]

Of course, which provisions of the Convention are to be regarded as non-self-executing is a matter for national courts and it is thus not one that the Court can formally give guidance. Insofar as national courts have expressly addressed this issue – as opposed perhaps more frequently to deciding effectively on this basis without any more specific articulation of it in the reasoning – there has often been a very conservative approach as to whether it is possible to implement a

135. See T. Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', 235 *Recueil des cours*, 1992, pp 303-400.
136. Vienna Convention on the Law of Treaties, Article 27.
137. 11152/84, 22 February 1989.
138. Paragraph 2 of their dissenting opinion.

provision, particularly in the early years after ratification, with decisions by some national courts suggesting, for example, that provisions such as Articles 5, 6, 11 and 13 in their entirety are not to be regarded as self-executing, while others appear to have had no difficulty in giving full effect to them.[139]

Undoubtedly there may be some elements of those provisions that a national court could not apply without some implementing measure but it is difficult to conceive of a provision such as Article 5(3) not being, particularly when taken with the case-law of the Court, sufficient to enable a court to find that the interval between initial apprehension of a suspect and his or her first appearance before a judge was not prompt where several days had elapsed, or to rule that a use of a detention power was arbitrary and thus unlawful when, taking account of a drunken person's age and actual behaviour, it would have been more appropriate to take home than take him to a police cell.[140] Similarly it must be unreasonable to suggest that it would not be possible to rely upon the right in Article 6(3)(d) to have witnesses summoned in the absence of any specific provision in national law.

The elements of provisions that cannot be implemented without further legislative measures – it seems improbable that a provision in its entirety would not be self-executing – are particularly likely to encompass many of the positive obligations that have been found by the Court to arise from Convention rights and freedoms. Notably the fulfilment of the duty to investigate a loss of life and allegations of torture and inhuman and degrading treatment[141] might not be practical without a specific legal basis for its performance. Similarly the need for arrangements to protect persons at risk[142] and the obligation to have an appeal system for both the expulsion of lawfully resident aliens and persons convicted of a criminal offence – as required under Protocol 7 – are matters which courts could hardly give effect to in the absence of specific legislation.

However, these matters concern only the minority of Convention requirements and it does not seem tenable to pass the buck to the legislature when it comes to requests to courts to give effect to Convention rights and freedoms.

A related problem to this is the preference for relying on specific provisions of national law which, notwithstanding the requirements of the Convention, appear to run counter to the way the latter's provisions have been interpreted by the Court because of the view that a specific national legal rule cannot be ig-

139. See, e.g., A.A. Khol, "The Influence of the Human Rights Convention on Austrian Law", 18 *AJCompL* 237 (1970).

140. *Witold Litwa v. Poland* (26629/95), 4 April 2000.

141. See, e.g., *Aksoy v. Turkey* (21987/93), 18 December 1996 and *Salman v. Turkey* (21986/93), 27 June 2000 [GC].

142. See, e.g., *Osman v. the United Kingdom* (23452/94), 28 October 1998 [GC] and *Öneryildiz v. Turkey* (48939/99), 30 November 2004 [GC].

nored.[143] Of course, it is more comfortable to rely upon a provision of national law but to do so in isolation from the requirements of the Convention not only ignores the fact that the provisions in it are part of national law through the act of incorporation, whatever form this might take, but also involves a very narrow form of legalism. In at least some instances the conflict between the Convention and the national legal provision only arises because of the way in which the latter has been understood and there is nothing intrinsic in the words used in it which requires that the Convention be breached. Given that the Convention is part of the law – to say nothing of the fact that most countries have constitutional provisions to similar effect – there is no justification for it not being part of the equation when determining the true meaning of the text of the law.

Furthermore, if there is a choice between an interpretation that is compatible with the requirements of the Convention and one that is not, the former should be preferred and to do so is not an objectionable disregard for the legislative provision concerned; it is simply applying it with appropriate account being taken of the full legal context. The need to take account of the Convention in giving effect to the law is something that has been specifically required in the United Kingdom by its Human Rights Act of 1998[144] but this really only built on an approach that was already being followed by courts in recognition of the significance of the country's international obligations.[145] This seems all the more appropriate in countries where there is clearly an internal legal force being given to the Convention as an automatic consequence of its ratification. Moreover, although interpreting provisions in laws to achieve compliance with the requirements of the Convention cannot overcome explicit conflicts, the latter are rarer in practice than is sometimes thought and such interpretation need not await an adverse ruling being first given by the Court. In addition it should be noted that reliance on interpretation in this way does not put the national court in the position of refusing to apply a legal provision, which may not in any event be within its competence.[146]

It might be added that this approach could even provide a basis for reviewing the understanding of *res judicata* where the Court has found that there has been a violation of Article 6 and allow the provision of the most effective remedy for

143. See, e.g. *Enhorn v. Sweden* (56529/00), 25 January 2005, which concerned reliance on legislation to keep someone infected with the HIV virus in compulsory isolation for three months when the possibility of using less severe measures was not considered.

144. By virtue of section 3.

145. See, e.g. *R v. Secretary of State for the Home Department, ex p Leech* [1994] QB 198 and *R v. Lord Chancellor, ex p Witham* [1998] QB 575.

146. In some jurisdictions it may only be the constitutional court that has that competence but this need not be exercised if a Convention compliant interpretation prevents any conflict with constitutional guarantees or treaty obligations from arising.

such a violation, namely, the reopening of proceedings. Certainly the doctrine of *res judicata* can stand as an impediment to proceedings being reopened in the absence of a specific legal provision allowing this to happen after a Convention violation has been established. Happily the latter is much less common than it was but an integrated approach to the application of a country's law – drawing upon both the Convention and nationally generated provisions – would be a legitimate way of fulfilling a remedial obligation arising the Convention.[147]

This might equally true of other remedial obligations that arise under the Convention. There is often a tendency to rely upon the provision of damages as the only way of dealing with violations, relying inappropriately upon the fact that this has been the principal response of the Court and ignoring the fact that in so doing it has been applying Article 46 – an ostensibly narrow provision – and not Article 13 when it is the latter that establishes the remedial obligation for High Contracting Parties. As the case-law in respect of Article 13 – together with that in respect of its mirror provision relating to the duty to exhaust domestic remedies in Article 35 – indicates,[148] there are many more remedies that can and should be used to deal with violations of the Convention. Interpreting provisions in national law that already exist to deal with complaints about failure to respect Convention rights and freedoms, even if this was not their original purpose, is something that should be considered wherever possible instead of leaving the matter to be resolved in Strasbourg.

Resources

The third obstacle to effective implementation is one of resources. This is something that also affects the executive and the legislature but the nature of the obligations under the Convention is such that they are of immediate effect and a resource difficulty, while appreciated by the Court, is not one that it can accept as an excuse for their non-fulfilment.[149] The need is to find solutions through both a reorganisation of budget priorities and the more efficient use of available resources, as well as through the assistance of other members of the Council of Europe.

The issue of an adequate number of judges undoubtedly has a bearing on the ability to provide hearings within a reasonable time and thus comply with the re-

147. Concern that this remedy is still not sufficiently available led to the Committee of Ministers of the Council of Europe to adopt its Recommendation No. R (2000) 2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

148. See P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th ed), pp. 125-161 and ch. 32.

149. See *Prodan v. Moldova* (49806/99), 18 May 2004.

quirements of Article 6(1). However, this issue is not one to dwell upon here as this is not a matter over which judges generally have any real control. Nevertheless the most effective use of judicial resources is one over which senior judges do – or should – have some say. Furthermore, although procedural rules – which can institutionalise unnecessary delays – may not be matters which judges in all systems can change by themselves, other working practices may well be ones that they do have the competence to modify.[150] Changing such practices may only lead to modest improvements but this is an area in which any gain in time is worthwhile, both for the parties to the proceedings and for the state which might otherwise be impugned in Strasbourg.

It should also not be overlooked that some delays can be attributable to individual judges who do not pull their weight and a failure to address such a problem – whether because of embarrassment, a misguided sense of collegiality or an unwillingness to intrude on personal difficulties – will only exacerbate the situation, with damaging effects for the justice system as a whole.[151] Furthermore where such situations do exist, a reactive approach – responding only to complaints that are made – may not be enough since not all persons who suffer from delays can be bothered to pursue the matter, particularly if there is ultimately a successful outcome in their case. A proactive approach – looking for problems before people complain about them – might be a more appropriate way of tackling the problem, hopefully with encouragement and practical assistance rather than sanctions being sufficient to get results.

The problem of resources is not just about a sufficiency of personnel, it is also concerned with them having the appropriate level of competence for the task at hand. Thus they must not only have at least an adequacy of knowledge concerning the requirements of the Convention but they must also be disposed to apply them in the appropriate manner. The former is something that concerns not only the judges of national courts but also the lawyers who appear before them, whether for claimants or respondents in civil proceedings or for suspects and prosecutors in criminal ones – as the way in which issues are raised by them, as well as the argumentation that they advance, can have a significant impact on the way a case develops, even if the judge has overall responsibility for the proper application of the law. The latter is relevant only to the judges and is a reflection of the fact that knowledge is never enough; those who judge must be prepared to embrace the requirements of the Convention in their understanding of the overall purpose of the legal enterprise.

150. It is recognised that the practices of lawyers may also have to be modified if such changes are to prove effective.

151. This does not mean that sensitivity cannot still be shown where the delay arises from a judge's personal difficulties.

It is understandable that in most countries knowledge about the requirements of Convention has been limited in the early years following ratification to a relatively small group of judges and lawyers. However, it is essential that education about these requirements be provided comprehensively and it is evident that that this is still lacking, despite the efforts of the Council of Europe, other organisations and members of the judiciary and the legal profession. Unless this deficiency in knowledge is tackled there will continue to be enduring difficulties in getting effective implementation of the Convention.

However, knowledge about the Convention is not just a matter of familiarity with the fundamentals – for which training of judges and lawyers in post is the essential short-term solution – but the acquisition of the capacity to follow the development of the case-law and to understand its relevance and implications for the different issues that can arise before national courts.[152] In the long term this can only really be achieved through a transformation of the curricula of universities and professional institutions so that these are truly permeated by an appreciation of the Convention and its case-law. Moreover it is no good just having a specialised course on human rights – even if this is important for training experts – as courses in criminal law and procedure, property and family law and even commercial law need to take account of the way in which the Convention and its case-law has a bearing on their scope and application. Furthermore the provision of continuing education for all legal professionals with respect to the Convention will be essential if judges and lawyers are to keep abreast of developments that are relevant to their field of work.

Nevertheless it is not enough to have the raw technical skills. It is also important that there be actual access to the case-law and a genuine obstacle to this for many lawyers and judges is that this is still mainly just in English and French. The Committee of Ministers of the Council of Europe has underscored the fact that it is primarily the responsibility of each member state to ensure that the case-law is translated into the language(s) used in it.[153] Yet it remains the case that the extent of the translation of the case-law into other languages of Council of Europe member states is insufficient for the task, often being limited to some of the key judgments and also judgments involving the particular High Contracting Party. This is clearly insufficient for the task; it only allows a partial knowledge and only allows a focus on problems that have already been identified rather than

152. See Recommendation Rec (2004) 4 of the Committee of Ministers to member states on the European Convention on Human Rights in university education and professional training.
153. Recommendation Rec (2002) 13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights.

an understanding of the way in which cases concerning other High Contracting Parties reveal deficiencies in one's own country which have yet to be recognised.

It is regrettable that, unlike the position with accession to the European Union, translation of the existing case-law into the language of the acceding state is not something that is done automatically so that it is available from the moment ratification of the Convention becomes effective. Of course, the volume of material that comprises the case-law on the Convention is considerable, although it is doubtful if it exceeds the amount involved in the European Union exercise when all the regulations and directives that are translated are also taken into account. However, the cost would be substantial and meeting it is not within the budgetary capacity of the Council of Europe, even if the expenditure would be well worthwhile.

Although the member states of the Council of Europe should not shirk the responsibilities that they have collectively recognised with respect to translation of the case-law, it may be that consideration should also be given to another approach, focusing on ensuring full translation of the case-law into the core second languages that are used within Europe – including German, Russian and Spanish – as this could ensure that in the medium term at least the case-law is in practice readily available to the majority of lawyers and judges at not too prohibitive a cost, even if it is not in the native language of everyone. A collaborative approach to funding and implementing this by member states could ensure that the burden on any individual one was not too great.

Translation is not, however, the only aspect of access to the case-law that is problematic. Unfortunately many judges and lawyers still do not have sufficient computing facilities to ensure that they can have access to the case-law when it is required and the upgrading of court facilities needs to be extended, with the objective of ensuring that every judge can access the relevant databases of Convention case-law as and when this is needed. Ultimately each judge should have his or her own computer with internet access.[154]

All the emphasis on the case-law is something that can seem overwhelming to some judges and lawyers coming from the civil law tradition. Indeed it can be an obstacle to them taking seriously the importance of the case-law for the effective implementation of the Convention. When confronted with references to the case-law, some civil law judges and lawyers respond by saying that this is something alien to their tradition, that they are not common lawyers.

Undoubtedly the need to have regard to the case-law – particularly given the volume of what is involved – can be off-putting because of the supposed difference in the approach of these two legal traditions but it is a difference that is more

154. This could also contribute to achieving greater efficiency in communication between judges and lawyers and in preparation of judgments.

apparent than real. Cases are not just a feature of common law systems; many civilian systems also make considerable reference to past case-law, even if this is not done in the sometimes strict precedent manner of the common lawyer. Moreover the significance of cases is that they concretise the application of relatively abstract provisions to specific situations and thus provide guidance for dealing with the same or similar situations in the future. In systems that do not rely on cases – not least because this are not always published – such guidance is often provided by special rulings on the higher courts and thus having resort to Convention case-law is not really the radical departure that it might at first seem.

It should also be borne in mind that only four of the 47 judges on the Court are from common law countries[155] and there is no sense in which the use of case-law is seen by the other 43 as an imposition by the minority (although at least one of these has had a long exposure to the common law in the United States).[156] Rather it is appreciated as the most useful tool for applying the Convention effectively. The continued reliance on the case-law by successive judges on the Court from civil law countries is indeed testament to the fact that this is something that can be readily mastered by all judges and lawyers whatever their legal tradition so long as they are given sufficient training and support for this purpose. Nonetheless this does involve some change in legal culture and some understanding for the process of transition is appropriate.

However, another cultural problem is one that possibly deserves less tolerance – one that I mentioned at the beginning – namely, that there is reluctance on the part of some judges to embrace fully the philosophy underpinning the Convention that restrictions on rights and freedoms must be closely scrutinised and should not be disproportionate. This failing is evident, for example, in the many cases concerned with the undue length of pre-trial detention. It might also be seen in the repeated favouring by some national courts of the protection of reputation of public figures over the right to freedom of expression. Such an approach may reflect a difference of values but once the general approach of the Court has become well-established it is that approach that should shape the resolution of such conflicts, even if the circumstances of individual cases will always need to be taken into account. The continued disregard of the Court's case-law on matters where its position is clear not only results in unnecessary proceedings in Strasbourg but it can also evince a serious disregard for the law which the judges concerned have sworn to uphold. This is a matter which requires strong leadership from Supreme Courts and ultimately repeated failure to apply the

155. Cyprus, Ireland, Malta and the United Kingdom.
156. Judge Zupančič from Slovenia.

Convention case-law when this is clear ought perhaps to lead to consideration of whether the judge concerned is fit to continue in post.

Consideration might, however, also be given to the adoption of a national legal provision explicitly requiring national courts to have regard to the case-law of the Court when applying and interpreting Convention provisions if there is not already a well-established practice of doing so. Such a provision – which has had considerable success in the United Kingdom[157] – would underline the relevance of the case-law and provide a formal basis for considering it for those who might otherwise regard it as improper.

Conclusion

The "obstacles" which have been considered have certainly inhibited the effective implementation of the Convention but they do not always concern matters which should primarily be so characterised, particularly as they could often have been more satisfactorily addressed by courts – sometimes with the assistance of the executive and the legislature – than has in fact been the case. There may have been a fear of the unknown in the early days after the acceptance of the Convention which discouraged efforts to understand its requirements but neither that instrument nor its case-law should now be seen as the mystery which it still seems to be for some judges and lawyers. The key to overcoming this is to ensure that the link between the Convention and the case-law of the Court is not broken but is fully embraced. This may require some additional resources – particularly for translation and training – but ultimately effective implementation will only come with the cultural transformation involved in treating the Convention and its case-law as a major national source of a state's law rather than an external one. The leadership by example of Supreme Courts will be indispensable in order for this to occur.

157. The requirement to take the case-law into account was established by the Human Rights Act 1998, s 2(1).

Pilot judgments of the European Court of Human Rights

Dragoljub Popović

Judge of the European Court of Human Rights in respect of Serbia

1. Precedential nature of European Court of Human Rights law

The European Court of Human Rights has created a pan-European system of human rights protection by implementing the European Convention on Human Rights (ECHR). ECHR law is precedent law. A person capable of reciting all the provisions of the ECHR and its protocols would still not be able to implement the provisions of the ECHR because the system of human rights protection before the European Court of Human Rights is essentially enshrined in the judgments of that court. This is mainly due to the fact that the European Court of Human Rights employs the precedent technique.

The precedent technique is commonly regarded as a product of the Anglo-Saxon legal system, but it really stems from the elementary notion of justice, which requires that those who are equal should be treated equally. If a case to be decided is found to be equal to an earlier case, it is only natural for the judge to feel bound by the earlier decision.[158]

However, it would be incorrect to say that the precedent technique is only employed by the Anglo-Saxon system. European continental law has largely em-

158. This sentiment on the part of judges is very old in Anglo-Saxon law, but the doctrine of the binding force of precedent, *stare decisis*, became firmly established in the 19th century; cf. L. Wildhaber, *The European Court of Human Rights 1998-2006; History, Achievements, Reform*, Kehl-Strasbourg-Arlington 2006, 155; D. Popović, *Uvod u uporedno pravo*, Belgrade 2005, 157-8 .

braced this technique, and the importance of a court judgment is much greater today even in the continental-law countries than could have been expected at the time the great codes were promulgated, when the passage of judgment was regarded as an almost mechanical procedure of applying the law. The more recent interpretations of law in France, Germany and some other countries have changed their view on the relationship between law and court judgments. Today that view is very different from the view prevailing in continental law during the period of great codification.[159] France is a case in point in this regard as numerous legal branches there are to a large extent the product of case-law. Administrative law is the work of the State Council, while civil law is largely based on judgments passed by the Court of Cassation, whose creative jurisprudence has adapted the norms of the old code to modern times.

For all these reasons it is quite understandable why the European Court of Human Rights employs the precedent technique and why its judges feel bound by earlier judgments.[160]

2. The precedent technique in the procedure of the European Court of Human Rights

The precedent technique, as noted by a former president of the European Court of Human Rights, the Swiss Judge Wildhaber, "is best suited to the requirements of legal security and certainty, the rule of law and the effective protection of human rights".[161]

An example will serve as an illustration of the precedent technique in Court procedure. Nearly every week the Court passes a judgment in cases relating to the expropriation of property in Turkey, where the state has failed to pay fair compensation for expropriated property. Equally often the Court passes judgments dismissing applications in Turkish cases of the aforementioned type if it is established that fair compensation was paid in due course. In handing down these types of judgments and decisions, the Court is guided by the precedent set by the judgment in *Akkus v. Turkey*. In view of the rule set forth in this underlying judgment, the court determines whether or not fair compensation has been paid in due course or whether or not there has been a violation of the ECHR.[162]

159. D. Popović, 82-3.

160. For an extensive treatment of the role of precedent in the case-law of the European Court of Human Rights, cf. Wildhaber, 154-173.

161. Wildhaber, 173.

162. *Akkus v. Turkey*, Recueil 1997-IV. All European Court of Human Rights judgments are available on line (http://hudoc.echr.coe.int/). For the bibliography relating to this judgment, cf. V. Berger, *Jurisprudence de la Cour européenne des Droits de l'Homme*, Paris 2007, 689.

Furthermore, in addition to the disposition of its judgments based on the judgment in *Akkus v. Turkey*, the European Court of Human Rights also provides a brief statement of grounds and makes reference to the precedent. This technique makes it possible for the Court to process cases more quickly.[163] By employing the technique and thereby solidifying its case-law, the court is able to decide a large number of case in a shorter period of time In other words, the judge feels bound by the precedent, from which he or she does not deviate, but being bound by the precedent ensures that the case will be processed quickly.

All the advantages of the precedent technique notwithstanding, the European Court of Human Rights recently found itself faced with a major problem, whose dimensions can be grasped if we say that at one point there was a dangerous possibility of a single type of case from a single country virtually doubling the number of cases the Court has to deal with. This number is huge as it is, having reached 81 000 as early as the end of 2005.[164] The case that gave rise to this problem was *Broniowski v. Poland*.

3. Broniowski v. Poland

The problem that brought *Broniowski v. Poland* before the European Court of Human Rights dates back to the end of the Second World War. When Poland's present-day borders were drawn, a large number of Poles found themselves east of the Bug river, which constitutes Poland's eastern border. This population was repatriated, and due to their relocation to Poland, the repatriated persons had to leave behind the property they owned in the regions they were leaving. The number of repatriated persons exceeded 1 200 000. The Polish state assumed the obligation to compensate them, i.e. to allow them to acquire title to property of adequate value within the Polish borders.

While this obligation was based on the law that was in force at the time Poland ratified the ECHR, the state failed to fulfil this obligation in the decades that followed, citing its inability to keep its pledge as the reason for this failure. The earliest Polish legislation that addressed this issue was passed in 1946. It was amended over time, and there were even interventions by the Constitutional Court, which annulled some of its provisions. The legal provisions governing indemnification were also a source of a potential financial burden. The state was at risk of incurring huge budget expenses. For all these reasons, a large number of repatriated persons did not receive compensation for their abandoned prop-

163. E. Lambert-Abdelgawad, *La Cour européenne au secours du Comité des ministres pour une meilleure exécution des arrêts « pilotes »,* Rev. Trim. Dr. H. 61/2005, 223.
164. Wildhaber, 71.

erty or received inadequate compensation that amounted to a fraction of the value of the property in question.

In this particular case, the applicant's grandmother left Lavov in 1947 and, having moved to Poland, received a document confirming that she had left property including four hectares of land and a house with a farmstead 2.6 hectares in size east of the Bug river. In 1968 a Polish court declared the applicant's mother heir to his grandmother's property. The estate also included the right to compensation for the property abandoned as a result of repatriation. In 1981 the applicant's mother, as the heir to the estate, received 4.67 hectares of land on a perpetual lease by way of compensation. In June 2002 a government committee of experts found that the compensation in this particular case amounted to a mere 2% of the value of the repatriated person's property, which had been abandoned as a result of that person's relocation to Poland. In the meantime, the applicant, having inherited his mother's property, requested full compensation in administrative and judicial proceedings, but his request was dismissed. He therefore brought an application before the European Court of Human Rights in March 1996, claiming that the provision of Article 1 of Protocol No. 1 to the ECHR, which guarantees the peaceful enjoyment of possessions, had been violated in his case.

A large number of applications of this type were filed with Polish administrative and judicial authorities, while there was not enough land to be given to the relocated persons by way of compensation.[165] The number of people registered in Poland who claimed compensation on these grounds reached 80 000. This was the number of potential applicants before the European Court of Human Rights, which had already received more than 160 cases of this type at the time the Court passed its judgment.[166] It was therefore obvious that the Court in Strasbourg could have faced an insoluble problem that threatened to create a deluge of cases and block the Court.

As a result of all these circumstances, the huge number of applications of the same type coming from a single country, the difficulties faced by national legislators, domestic economic circumstances as well as the effects of the large number of applications on the state budget, it was clear that the usual precedent technique would most likely be an inadequate instrument of action in the hands of the Court.

It should be noted here that the European Court of Human Rights had already anticipated the possibility of a situation such as that described above. This led to

165. *Broniowski v. Poland*, ECHR 2004-V, paras. 9-38; cf. L. Garlicki, "Broniowski and After: On the Dual Nature of 'Pilot Judgments'", in: *Liber Amicorum Luzius Wildhaber, Human Rights – Strasbourg Views*, Kehl-Strasbourg-Arlington 180-1; for the bibliography cf. Berger, 694.
166. For the number of repetitive and potential cases cf. Lambert-Abdelgawad, 210-1.

deliberations about a reform of judicial procedure, and the new element brought by the *Broniowski* case into the Court's case-law can only be understood in view of debates about the reform of the European Court of Human Rights. Furthermore, the very concept of a pilot judgment under discussion here was used for the first time in this debate.[167] It was noted that in some situations cases of the same type repeated themselves, and such cases were described as repetitive or cloned cases, and the Court held that a special procedure should apply to such cases to allow the Court to decide them within a reasonable time. All such deliberations became part of the debate about Protocol No. 14 to the ECHR, whose text has been adopted but has not yet taken effect. The *Broniowski* case was decided under Protocol 11, which is currently in effect, by introducing the pilot judgment technique as a novel device.

4. Pilot judgment as a novel device

The pilot judgment was arrived at as follows. The Committee of Ministers of the Council of Europe, which, under the ECHR, is responsible for monitoring the enforcement of European Court of Human Rights judgments, called on the Court to determine, if necessary, the existence of a structural problem causing a violation of the ECHR, especially where such a problem threatened to result in a large number of applications brought before the Court. The Committee of Ministers recommended that the Court also examine the effectiveness of legal remedies in the domestic legislation of a member state in order to prevent the creation of repetitive cases before the Court.[168]

The recommendations of the Committee of Ministers created the basis for the Court's action in *Broniowski v. Poland*. The Grand Chamber of the European Court of Human Rights ruled on 22 June 2004 that there had been a violation of Article 1 of Protocol No. 1 to the ECHR (paragraph 187). In addition, the Court stressed in the disposition of its judgment (paragraph 3) that the "the violation had originated in a systemic problem connected with the malfunctioning of Polish legislation and practice caused by the failure to set up an effective mech-

167. M. Breuer, *Urteilsfolgen bei strukturellen Problemen – Das erste „Piloturteil" des EMGR,* EuGRZ 16-18/2004, 447; R. Harmsen, "The European Court of Human Rights as a 'Constitutional Court': Definitional Debates and the Dynamics of Reform", in: J. Morison, K. McEvoy and G. Anthony, *Judges, Transition and Human Rights*, Oxford – New York 2007, 45.

168. Committee of Ministers' Resolution of 12 May 2004, Res (2004) 3 and 6; cf. V. Zagrebelsky, *Questions autour de Broniowski,* Liber Amicorum Luzius Wildhaber, Human Rights – Strasbourg Views, Kehl-Strasbourg-Arlington 526-7; Garlicki, 184; P. Ducoulombier, "L'arrêt *Broniowski c. Pologne*, Grande Chambre, du 22 juin 2004 – Les enseignements d'un « arrêt pilote »", *L'Europe des libertés*, March 2005, 16; P. Van Dijk e.a. *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford, 2006, 278.

anism to implement the 'right to credit'". The Court went a step further in saying that "through appropriate remedies and administrative practices, Poland was to secure the implementation of the property right in question."

In the disposition of its judgment, the European Court of Human Rights also postponed its decision on the compensation claim in this particular case and called on the Polish government to report to the Court in writing within six months of receipt of the judgment on its actions with regard to this case and, especially, any agreement on compensation with the applicant. Another fact should be mentioned here. It is not contained in the disposition of the judgment in question, but it will be important for further discussion. While waiting for the Polish government to introduce remedies, the European Court of Human Rights adjourned proceedings in all other cases of the same type that had been brought before the Court by the time the judgment had been passed on 22 June 2004.

This judgment and the action of the Court created a novel device. A pilot judgment was passed for the first time in the *Broniowski* case, which called for a definition of the very concept of an European Court of Human Rights pilot judgment. While the commentaries to date are mostly in agreement with each other, there are still slight differences between them. The commentators mainly emphasize the fact that the disposition of the pilot judgment establishes the existence of a systemic deficiency in national law and urges the respondent state to introduce remedies to eliminate that deficiency.[169] However, some authors place the greatest emphasis on a fact that was not included in the disposition of the *Broniowski* judgment of 22 June 2004. For these authors the essential new development is the very suspension of proceedings in all repetitive cases pending appropriate remedies by the state.[170]

These two opinions are very close, differing in the emphasis placed on some of the properties of a pilot judgment. It could be argued that a European Court of Human Rights pilot judgment is one whereby the court establishes the existence of a systemic deficiency in the national law of the respondent state and expressly calls on that state to employ remedies of a general nature to eliminate that deficiency and adjourn proceedings in all repetitive cases pending such remedies. A fourth element, already referred to by the doctrine, may be added to those above. Pilot judgments can only be passed by the Grand Chamber of the European Court of Human Rights.[171] All four factors are arguably essential for defining the concept of a pilot judgment, no matter which of them is emphasized the most by a particular author.

169. Garlicki, 190 .

170. Zagrebelsky, 533; Ducoulombier, 17-8; Breuer, 447; Lambert-Abdelgawad, 205-11; Harmsen 46.

171. Breuer, 450 (n. 65), who finds arguments for this view in Article 43 of the ECHR.

Each of these elements of the definition should be examined separately to understand the significance of this novel device. Even before its judgment in the *Broniowski* case, the European Court of Human Rights had stressed the existence of systemic problems at the level of national law that led to violations of the ECHR. However, the Court had not done so in the disposition of the judgments.

The Italian cases that concerned the length of proceedings before national courts provide an example of the earlier practice. In *Bottazzi v. Italy*, for instance, the European Court of Human Rights held in its judgment (para. 22) that it had "already delivered 65 judgments in which it has found violations of Article 6.1 in proceedings exceeding a reasonable time". In addition, the Court held that "such breaches reflect a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy"[172]. This Court ruling can be regarded as a kind of recommendation or appeal addressed to national legislators for eliminating a systemic problem. Thus in the example cited above the Italian state responded by passing a special law whose provisions were aimed at ensuring compensation for the damage suffered due to the prolongation of proceedings before national courts. This is the law passed on 3 April 2001 and called Pinto's law for short after the person who had proposed it.[173] The new element of a pilot judgment in respect of such proceedings is that the establishment of a systemic problem in national law is included in the disposition of the judgment. It can be argued that here the European Court of Human Rights went beyond the recommendation because the stated opinion had assumed the form of an order.

This also applies, more or less, to the second element of the definition. As we have seen, in its pilot judgment the Court ordered the respondent state to resolve the systemic problem that had led to human rights violation through its own remedies of a general nature. These remedies may include the passage of legislation or changes in administrative practices. The state is by all means free to choose the remedies by which it will enforces the Court's decision, as has always been the case.[174] While this freedom of a member state is indisputable, there is also a view that by applying the pilot judgment technique the European Court of Human Rights has encroached upon the exclusive jurisdiction of member states. This view is all the more interesting given that it originated with the former Liechtenstein judge, Luzius Caflisch, a professor of international law, whose term of office with the European Court of Human Rights expired recently.[175]

172. *Bottazzi v. Italy*, Reports 1999-V.
173. cf. Garlicki, p. 183; Breuer, 446; Lambert-Abdelgawad, 222.
174. Lambert-Abdelgawad, 206.
175. L. Caflisch, *Rechtsfolgen von Normenkontrolle – Die Rechtsprechung des EGMR: Die Technik der Pilot-Fälle*, EuGRZ 2006, 521.

There is one exception in this respect that predates the judgment in the *Broniowski* case, in which the European Court of Human Rights departed from the principle of freedom for member states with regard to the choice of remedies to be employed in enforcing judgments. This exception arose from *Assanidze v. Georgia* due to the circumstances of the case that may seem like an *ultima ratio*. The Court ordered the respondent state to release a person from custody as there was no other way of ending the violation of human rights.[176]

As for the third element of the definition of the concept of a pilot judgment, which some see as crucial, it should be noted that this point contains the greatest innovation even though it is based on the text of the judgment. Furthermore, the doctrine expresses the view that this procedure did not literally result from the text of the recommendation by the Committee of Ministers of the Council of Europe.[177] Regardless of this objection, it must be noted that the very essence of the pilot judgment technique lies in the adjournment of proceedings in repetitive cases and that the adjournment of proceedings arises from an interpretation of the recommendation by the Committee of Ministers of the Council of Europe. After the original decision in the *Broniowski* case, the European Court of Human Rights discontinued its proceedings in all repetitive cases on 6 July 2004.[178]

Finally, the fourth element of the definition of the concept of a pilot judgment is linked to the third element in our series. The adjournment of proceedings in all repetitive cases is also possible after a judgment is passed by a seven-member chamber, but the effectiveness of this procedure is questionable because such a decision is subject to control by the Grand Chamber. It is only after a Grand Chamber judgment that the adjournment of proceedings shows an indisputable effect.

In light of this definition of the concept of a European Court of Human Rights pilot judgment and the elements of that definition, there is a certain interest in looking first into the final conclusion of the case that gave rise to this novel device and into some of the basic and substantive problems arising in connection with pilot judgments.

5. Conclusion of the Broniowski case and the further development of the practice of pilot judgments

The denouement of *Broniowski v. Poland* played out before the European Court of Human Rights in September 2005, when the Grand Chamber decided

176. *Assanidze v. Georgia*, no. 71503/01, ECHR 2004-II, judgment of 8 April 2004; cf. Breuer, 445.
177. Ducoulombier, 18.
178. Harmsen, 48.

to remove that case from the Court register, having established that the applicant and respondent government had reached a settlement.[179]

It should be noted that this was preceded by a series of events. After the original European Court of Human Rights judgment in this case, Poland's Constitutional Court declared some of the legal norms unconstitutional in December 2004. The government submitted a report to the Committee of Ministers of the Council of Europe as it had been instructed under the judgment of 22 June 2004, and the Committee of Ministers concluded it would give precedence to the enforcement of the judicial decision in this case.[180]

In its judgment in the *Broniowski* case (para. 173), the European Court of Human Rights concurred with the position of the Polish Constitutional Court, so that this court of second instance found it comparatively easy to agree in its subsequent decisions with the position set forth in the Strasbourg judgment. In addition, the legislature had already been presented with the draft of a new law, which was expected to resolve the problem whose existence had been highlighted by the European Court of Human Rights' judgment.[181]

The *Broniowski* case was brought to its conclusion through these actions of various actors at the national and European levels. The applicant received fair compensation on the basis of an amicable settlement with the respondent state. In addition, the Committee of Ministers of the Council of Europe was able to monitor the enforcement of the judgment through the adoption of appropriate measures by the state, which effectively covered the fate of the remaining applications brought before the European Court of Human Rights at the time the first pilot judgment was passed. Namely, the Court found that "by amending legislation and issuing a statement on the amicable settlement, the respondent government indicated its effective commitment to using remedies to eliminate systemic deficiencies" in domestic law. The Polish government also set up a special compensation fund for compensating persons entitled to such damages.[182]

As the pilot judgment had become a template and a novel device in judicial proceedings suitable for bringing resolution in situations that are complex and particularly difficult for the Court, the Court also employed this technique after passing the judgment in the *Broniowski* case. It is interesting to note that the second pilot judgment was also passed in a Polish case. This was the judgment in *Hutten-Czapska v. Poland*, which also concerned the application of Article 1 of Protocol No. 1 to the ECHR, but the applicant claimed that he had been pre-

179. *Broniowski v. Poland*, 28 September 2005, ECHR 2005-IX.
180. Zagrebelsky, 531.
181. Garlicki, 190-1.
182. Cf. the second judgment in this case: *Broniowski v. Poland [GC] friendly settlement, 28 September 2005*, paras. 40-42; cf. Harmsen, 49.

vented from the peaceful enjoyment of his possessions by restrictive legal provisions relating to rent.[183]

The opinion that has just been set forth can only be defended if we are guided by the definition of the concept of a pilot judgment presented in this text. It is a judgment by the Grand Chamber of the European Court of Human Rights establishing the existence of a systemic deficiency in domestic law that gives rise to violations of human rights and urging the member state to eliminate this deficiency, with the Court simultaneously adjourning proceedings in all repetitive cases.

By contrast, the doctrine cites certain judgments that would not fall within the scope of this definition as examples of pilot judgments. Thus Caflisch cites six judgments, including that in *Hutten-Czapska v. Poland*, which rely on the judgment in *Broniowski v. Poland*.[184] The Polish judge Garlicki and Elisabeth Lambert-Abdelgawad are inclined to regard not only the judgment in *Hutten-Czapska* but also the judgment passed by the Grand Chamber in *Sejdovic v. Italy* as pilot judgments.[185] However, it should be noted that both Garlicki and the Italian judge Zagrebelsky claim that some of the judgments described by Caflisch as pilot judgments lack the characteristics of such a judgment.

An example of this may be the judgment in *Lukenda v. Slovenia*[186]. The case concerned the length of judicial proceedings at the national level. In the disposition of this judgment the Court cited the malfunctioning of domestic legislation and ordered the state to resolve this problem through a remedy of a general nature (paras. 4 and 5 of the judgment). However, in his separate opinion, judge Zagrebelsky stated, referring to the judgments in the *Bottazzi* and *Broniowski* cases, that he regarded as too general the part of the disposition of the judgment ordering the introduction of a domestic novella to ensure better functioning of domestic legislation.

At the same time, it should be noted that after the judgment in the *Lukenda* case, the proceedings in repetitive cases were not adjourned, so that this judgment rather served as a precedent even though its disposition contained two elements of a pilot judgment.[187] It should also be noted that the respondent state

183. *Hutten-Czapska v. Poland*, [GC], 19 June 2006.
184. Caflisch, 522-3 (n. 14).
185. Lambert-Abdelgawad, 221-2; Garlicki, 186-8. However, Garlicki notes (p.188) that the judgment in the *Sejdović* case concerns a small group of applicants. This deprives the judgment of its characteristics of a pilot judgment.
186. *Lukenda v. Slovenia*, no. 23032/02 of 6 October 2005. Cf. Garlicki, 187; Zagrebelsky, 532.
187. Cf. by way of example, the judgments in *Mamič v. Slovenia* (75778/01) of 27 July 2006, *Šubinski v. Slovenia* (19611/04) of 18 January 2007, or *Švarc and Kavnik v. Slovenia* (75617/01) of 8 February 2007.

responded quickly to the judgment because a law ensuring guarantees of an effective trial was adopted in Slovenia in 2006.[188]

Naturally, the number of pilot judgments to be found in the case-law of the European Court of Human Rights depends on how this concept is defined. This author believes that all four of the aforementioned elements should be taken into account and that a stricter definition of the novel device should be adhered to in order to better differentiate it from other similar devices that do not contain all the aforementioned characteristics of a pilot judgment.

Regardless of how we understand the concept of a pilot judgment, in its narrower sense proposed in this text or, perhaps, somewhat more broadly, there is still the question of the main problems that are or may be encountered in practice in connection with pilot judgments. Nearly all of these problems arise with both the narrower and broader definitions of the concept, with particular problems being more or less prominent in the presence of one definition or the other.

6. Problems arising in connection with pilot judgments

The main problems arising in connection with pilot judgments is of a theoretical nature. Whether or not any Court decision indicating the existence of a systemic problem in the domestic legislation of a member state and instructing that state to eliminate that problem will be regarded as a pilot judgment depends on the position of each author or commentator and essentially does not have any practical consequences. However, we are, above all, interested in those questions that may cause difficulties in the practice of enforcement of decisions of the European Court of Human Rights. Four different problems should be pointed out in this respect. They include the question of a reasonable time for the enforcement of a Court judgment (6.1) and the question of the Court's procedure in repetitive cases (6.2). They also include two, more complex, issues: the issue of a political problem that may arise when an novella is introduced in domestic legislation (6.3), and what some refer to as the "constitutional dimension" of the new procedure of the Court (6.4).

6.1. Reasonable time for the enforcement of a judgment

The very first commentaries on the Broniowski case included the question of the length of a reasonable time that the European Court of Human Rights can give a member state to eliminate the systemic problem in its domestic legislation. Elisabeth Lambert-Abdelgawad posited this question in very specific terms: "Six months or more?"[189] It is clear that she takes the position of the applicant, whose

188. This is the Protection of the Right to Trial without Undue Delay Act (Official Gazette No. 49/2006), in effect since 1 January 2007. Cf. *Grzinčič v. Slovenia*, judgment of 3 May 2007.

interest is pre-eminent, but it seems that the question is worded in such unambiguous terms mainly in order to highlight the severity of the problem. If the systemic problem of functioning of domestic legislation concerns the large number of specific cases, it is hard to imagine that it can be resolved in only half a year. The Broniowski case is a very telling example in that respect as it concerned a situation that extended over a period of several decades. During all that time a solution was sought at the national level.

The commentators of the judgment in the *Broniowski* case refer to another Polish case, *Kudła v. Poland*, in this context as it has certain characteristics that make it more like a pilot judgment; in that case it took four years for the legislative novella to be introduced.[190] True, there are also examples of a different kind. This happened, for instance, in *Sejdovic v. Italy*, where the state responded comparatively quickly.[191] As we have already seen, the same goes for the judgment in *Lukenda v. Slovenia.*

The differences between states with regard to the course of action taken will certainly depend on a whole nexus of internal circumstances in each particular state. It should also be noted here that this problem can hardly be resolved in principle, and the European Court of Human Rights will most likely have to measure the length of the time it gives each state carefully in each specific case brought before the Grand Chamber. The interest of the applicants require that this time not be too long. On the other hand, the nature of the action taken by the state would require a certain degree of flexibility on the part of the Court in setting the time-frame.

6.2. Court procedure in repetitive cases after the passage of a pilot judgment

The question of how the European Court of Human Rights will deal with repetitive cases in which it has adjourned or – according to the French doctrine – frozen proceedings at the moment of the passage of the pilot judgment is definitely one of the most important ones. The general idea is that by introducing its remedy, whether of a legislative or an administrative nature, the respondent state will make it possible to decide such cases at the national level.[192]

There is certainly a risk that the introduction of a novella in the legislation of the respondent state might create difficulties for the applicants who have already taken their case to the Court in Strasbourg. Domestic legislation may set condi-

189. Lambert-Abdelgawad, 211.
190. Ducoulombier, 18 (n. 56).
191. *Sejdović v. Italy [GC]* 1 March 2006, para. 23; 127.
192. By contrast, cf. Zagrebelsky, 534, who believes that this is not the essence of the ECHR system.

tions for the fulfilment of requests or result in new costs for persons concerned or exhibit some other deficiencies resulting in human rights violations, such as the slow speed of proceedings conducted by courts or administrative bodies.

In such circumstances, persons who have taken their case to the European Court of Human Rights and whose case has fallen into the group of repetitive cases due to the passage of a pilot judgment will find themselves in a specific legal situation. The European Court of Human Rights will not deal with their cases for the time being, while at the same such persons will have to wait for remedies to be introduced at the level of domestic legislation if they want to obtain satisfaction there. If the process of enforcing the pilot judgment, i.e. the introduction of a remedy in the respondent state, becomes prolonged, these persons will certainly find themselves in what science has describe as a *legal no-man's land* for a time.[193] The role the Committee of Ministers of the Council of Europe plays in the enforcement of judgments will certainly be of immense importance at this point.

In the final analysis, the European Court of Human Rights may resume proceedings and decide repetitive cases by judgments, which constitutes a kind of rational pressure on the respondent state for the purpose of enforcing the judgment or ensuring the introduction of a novella in domestic legislation. However, this threat is not effective enough given that the European Court of Human Rights resorted to a pilot judgment in order to avoid getting clogged with cases of the same type. The precedent technique would certainly be more suitable from the standpoint of the individual applicant, but the court resorted to the pilot judgment template for the very reason that the previous standard technique had not proved adequately effective due to the large number of cases of the same type.

6.3. Political problem of introducing a novella in domestic legislation

As the problem of the functioning of the domestic legislation of a member state, which is highlighted and a solution to which is called for by the pilot judgment, is of a systemic nature, it is reasonable to expect this problem to be resolved in most of the cases through amendments to legislation. All Council of Europe member states are democratically organised. Laws are passed in parliament, and, as a rule, parliamentary procedure is not marked by speed. Furthermore, a law is passed in what is essentially a clash between government and opposition, who debate the bill. It is not difficult to imagine a situation in which one

193. Lambert-Abdelgawad, 222, who is the author of this phrase; similarly, also Zagrebelsky, 531 (n. 26).

of these actors will try to exploit the very adoption of such an amendment for purposes not directly linked to the judgment – for instance, for triggering new elections. If nothing else, they would lengthen the respondent state's activity ordered by the pilot judgment.

Judge Garlicki has rightly pointed out that in the *Broniowski* case a favourable outcome was achieved in a situation where a Court judgment was on a par with some judgments passed by domestic courts and certain draft laws which had already been submitted to Parliament for passage. This author tends to agree with his Polish colleague, but does not share his optimistic view that a pilot judgment can be useful where there are conflicting opinions within a member state, i.e. where a specific solution to a problem has both its advocates and opponents.[194] If a debate in parliament or in public gains momentum, a political problem may become much more difficult than it may seem to us at first glance. It is not disputable that the enforcement of a judgment is an international obligation of the member state. However, the trouble begins especially when a legislative novella is required for such enforcement as in the case of pilot judgments.

The possibility of linking the enforcement of a judgment to political circumstances in a Council of Europe member state probably constitutes the weakest point of the novel device under discussion here. It is necessary for pilot judgments to become established so that we can make correct judgments about the risks that may threaten their enforcement. At this point, it is hard to be exclusive in this regard and form an opinion without adequate support from the case-law of both the Court and the Council of Europe member states. Making predictions of this type is a thankless task.

6.4. "Constitutional dimension" of the European Court of Human Rights' procedure

The Court's pilot judgment technique has endowed judicial procedure with a special characteristic that may be described as the "constitutional dimension" of judicial procedure. This term has been taken from Garlicki, who himself puts it in quotation marks.[195] Using this term is unusual ad thought-provoking given that the ECHR is not a European constitution at all. Even so, the phrase seems justified because in the case of pilot judgments the European Court of Human Rights assesses the functioning of the internal system of a member state, doing so from the standpoint of a system of a higher order such as an international agreement embodied by the ECHR. It may be argued that this is standard procedure for the European Court of Human Rights whenever it examines a possible

194. Garlicki, 190.
195. Garlicki, 186, 191-2.

violation of the ECHR, but the specific nature of judicial procedure with pilot judgments lies in the fact that the Court generally subjects the norms of the internal system to control and orders their correction and adjustment to the ECHR. This is very much like the procedure of a constitutional court at the national level. In other words, the European Court of Human Rights resorts to controlling the internal normative system of a Council of Europe member state.

The phrase *constitutional dimension* used by Garlicki at the aforementioned points of the article written in English, while handy and skilfully chosen, is not widespread in English terminology. The German language expresses this notion more aptly, as shown by judge Caflisch in his address to the justices of the constitutional courts of the German-speaking countries in the article quoted earlier in this text. The German term is *Normenkontrolle*, and in this context it is appropriate because it does not contain or allude to the word "constitution"[196]. This term is also accepted by Garlicki, who claims that pilot judgments concern what in German jurisprudence is called *konkrete Normenkontrolle.*[197] It should be noted here that Caflisch is of the opinion – to use the literal translation of this German term – that the Court in Strasbourg does not exercise direct normative control. He does believe, though, that the Committee of Ministers of the Council of Europe has created an exception in that regard with its recommendation of 12 May 2004.[198]

Pilot judgments definitely introduce a novel element in as much as – other than deciding a single specific case brought before the European Court of Human Rights – their effect extends to all other cloned or repetitive cases. This is the fact that best reflects the importance of the corresponding element of the definition of the concept of a pilot judgment such as has been set forth in this text.

At the same time, this is where the difference between the two techniques of judicial procedure – the precedent technique and the pilot judgment technique – is at its most obvious. In the case of precedents, the court feels bound in every subsequent case whose essential elements parallel those of another, already decided, case. In the case of pilot judgments, the European Court of Human Rights requires that the state introduce a novella in its national legislation to remove the systemic deficiency in the domestic legal order that gives rise to human rights violations. The passage of such a judgment is indeed reminiscent of a constitutional and judicial technique, raising the question of whether the European

196. For this term cf. D. Popović, *Judicial Review of Legislation and European New Democracies,* Mélanges Fleiner, Fribourg/Suisse 2003, 663. This term is generally translated into Serbian as *kontrola ustavnosti* ("constitutionality control").
197. Garlicki, 186.
198. Caflisch, 523.

Court of Human Rights is slowly developing into a judicial instance with characteristics of a European constitutional court.

The time to answer this question has not come yet. Knowledgeable experts on the European system of human rights protection tend to speak of the existence of a "pan-European constitutional system of fundamental rights".[199] Those more daring voice their ideas of a possible progression of the Court's procedure towards a system of constitutional and judicial procedure and a "constitutional vision of the role of the Court"[200]. All this is supported by the position of the most recent constitutional law science, which claims that the constitutional systems of European states have a common denominator or core based on the following three guiding principles: democracy, human rights and the rule of law. These principles are largely derived from the case-law of the European Court of Human Rights.[201] The Court itself stated in its judgment in *Loizidou v. Turkey* (para. 75) over a decade ago, that the ECHR represents a "constitutional instrument of the European public order".[202] This instrument is developing gradually.

Final judgments cannot be made at this level of case-law development. The pilot judgment is a novel device, which, should it develop correctly, will improve the work of the Court and, perhaps, give rise to the desire to gradually transform the essence of this pan-European judicial instance and thus change Europe's current system of human rights protection.

199. Wildhaber, 98-9.
200. Garlicki, 192; Harmsen, 51.
201. V. Constantinesco/S.P.CAPS, *Droit constitutionnel*, Paris 2004, 219.
202. *Loizidou v. Turkey, 22 March.1995*, Publications of the ECHR, Series A, vol. 310, 1995.

Reopening of proceedings further to a finding, by the European Court of Human Rights, of a violation of Article 6 of the European Convention on Human Rights

Florin Costiniu

President of the Civil Chamber of the High Court of Cassation and Justice of Romania

As far as constitutional rules are concerned, Article 11 of the Romanian Constitution establishes the principle that the Romanian state is required to fulfil, as such and in good faith, its obligations deriving from the treaties to which it is a party and that treaties ratified by Parliament are part of national law.

This constitutional provision applies the principle of trust between states of the international community – *pacta sunt servanda* ("agreements are to be kept") – while at the same time reflecting the correlation between international rights and domestic rights through the incorporation of rules of international law into the domestic legal order.

This is done by Parliament by means of ratification of international legal instruments (agreements, conventions, protocols, charters, covenants, etc.) so as to render them binding. Once the ratification has passed into statute, the clauses of the international instrument concerned are incorporated in domestic law and acquire legal force.

In contrast to the latter process, Romania's Constitution contains specific rules on international human-rights treaties.

Article 20, for instance, lays down that citizens' rights and freedoms are to be interpreted and enforced in conformity with the international treaties to which Romania is a party and that international human-rights provisions in treaties ratified by Romania take precedence over domestic rules if these are different.

Romania ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), together with Protocols 1, 4, 6, 7, 9 and 10 to it, by Law 30 of 18 May 1994, published in Romania's Official Gazette (No. 135 of 31 May 1994).

Under Articles 11 and 20 of the Romanian Constitution, the Convention and the protocols to it are integral to and prevail over domestic law; in other words, the ECHR and its protocols are now a binding primary source of domestic law, immediately entailing, nationally, enforcement of the Convention and its protocols by the Romanian courts and, internationally, acceptance of review of domestic court decisions as provided for in the ECHR.

The adoption of Protocol No. 11 to the ECHR, which entered into force on 1 November 1998, ushered in a reform of the Court's system of supervision, and efforts to to maintain and increase the effectiveness of the Convention human rights and fundamental freedoms have continued.

To ensure observance of human rights, the Convention lays down (Article 6, paragraph 1) everyone's right to a fair trial: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

As can be seen from the wording of the Convention, the right to a fair trial comprises a number of elements: unrestricted access to the courts, a fair and public hearing within a reasonable time, a hearing by an independent and impartial tribunal established by law, and delivery of judgments in open court.

A. Unrestricted access to the courts

Unrestricted access to the courts is enshrined as a fundamental civil right in Article 6.1 ECHR, Article 21 of the Romanian Constitution, Article 10 of the Universal Declaration of Human Rights and Article 14.1 of the International Covenant on Civil and Political Rights.

In the Romanian Constitution, unrestricted access to the courts is understood as everyone's right to bring a case before the courts for defence of his le-

gitimate rights, freedoms and interests, with the safeguard that this right cannot be restricted by any law.

In terms of specific procedure allowing citizens access to the courts, the Code of Civil Procedure establishes the right to take a legal action (Article 109), together with ordinary and special channels for challenging court decisions (intermediate appeals: Article 282; final appeals: Article 299), such as proceedings to have a decision set aside (Articles 317 and 318) and review (Article 322). As for the Code of Criminal Procedure, this provides for a preliminary complaint (Article 279, paragraph 2(a)), challenging of measures taken by the public prosecutor's office in connection with a prosecution (Article 278, first paragraph), ordinary and special channels for challenging court decisions (intermediate appeal: Article 361; final appeal: Article 385, paragraph 1), proceedings to have a judgment set aside (Article 386) and review or retrial (Article 393).

The above-mentioned procedures ensure that the persons concerned have access to a court whose jurisdiction in civil or criminal cases is established by law.

These rules on right of access to the courts are consistent with the European approach: under the Convention the exercise of this right specifically presupposes that everybody is afforded access to an organ established by law, i.e. a court before which the right can actually be exercised.

The Convention leaves states free to choose the precise means of ensuring unrestricted access to the courts since no means are specifically laid down in Article 6, paragraph 1.

Consequently, domestic law on the means of bringing cases before the courts applies in full. Nevertheless, this does not imply a right of access to all judicial bodies (courts of first instance, county courts, courts of appeal, the High Court of Cassation and Justice) or to all statutory remedies (appeals, proceedings to have a decision set aside, reopening of cases). As decided by the Plenum of the Constitutional Court in its Decision No. 1 of 8 February 1994, special rules for special situations may be laid down by law.

Such rules are found in relation to appeals in civil cases, for example: more specifically, the first paragraph of Article 282 of the Code of Civil Procedure lays down the categories of court decision which, depending on the type of claim, are not open to appeal. Decisions referring a civil case to another court (Code of Civil Procedure, Article 40, paragraph 4) are an example.

In domestic court practice, parties have often criticised the unavailability of free legal assistance and the stamp duty payable by plaintiffs in civil cases as being limitations on freedom of access to the courts.

The view is taken that neither of these things is a genuine limitation on freedom of access.

The obligation to pay judicial stamp duty, for example, does not infringe the principle of justice that is free of charge or, implicitly, the principle of unre-

stricted access, since the plaintiff may be obliged to return sums paid over under the terms of Articles 274 to 276 of the Code of Civil Procedure. In addition, Law 146/1997 on judicial stamp duty provides for exemption for some categories of civil proceedings, and the law also affords other effective safeguards for completion of court proceedings, including for persons with limited resources.

If anybody is unable to pay court fees without jeopardising his or her own livelihood or that of his or her family, Article 74 of the Code of Civil Procedure lays down the right to apply to the court for legal aid, and Article 75 of the same code establishes that the granting of exemptions, reductions or phased or deferred payment of stamp duty, together with free representation and assistance from a lawyer assigned by the Bar, are also covered by the concept of legal aid.

Given the above national provisions, it cannot convincingly be argued that the charges in civil proceedings breach freedom of access to the courts for purposes of Article 6.1 ECHR.

Another problem concerning freedom of access to the courts has emerged with regard to enforcement of Law 10/2001 governing the legal status of real property wrongfully confiscated by the communist state between 1945 and 1989.

This law provides that persons wishing to have their property returned or receive compensation for their losses must apply, through administrative channels, to the owner entity or, as appropriate, to the local authority in whose area the property is located before they can bring the case to court.

The High Court of Cassation and Justice has consistently held that the obligation to complete the preliminary administrative formalities is not a limitation on the principle of unrestricted access, since in the event of problems or dissatisfaction once this stage has been completed, the plaintiffs can always go to court.

B. A fair and public hearing within a reasonable time

This provision is intended to take account of such basic principles as adversarial proceedings and the right to a defence, both of which guarantee full equality of parties to the proceedings.

The adversarial principle enables parties to be equally and actively represented and put forward their claims during the proceedings. It is only by hearing the debate, the parties' replies to the other side's arguments and the differing opinions on the actions of each party that the court will be able to establish the truth and deliver a fair and legally founded judgment.

This principle is enshrined in various provisions of the Code of Civil Procedure. There is therefore no inconsistency between the provisions of the Convention and those of national law as regards the legal implications of the adversarial principle, and the domestic courts operate within a framework that ensures they

do not contravene the adversarial principle or the right to a fair trial in their decisions.

The right to a fair trial includes the court's hearing both sides in a manner that does not place either of them at a disadvantage, a safeguard provided by the right to a defence.

In Romanian law the right to a defence is also a constitutional principle: Article 24.1 of the Constitution states that this right is guaranteed, and paragraph 2 of the same article provides that at any stage of the proceedings the parties have the right to be assisted by a lawyer of their own choosing or an officially assigned defence counsel.

In concrete terms, the right to a defence includes all the rights and safeguards of a hearing that enables the parties to defend their interests. Financially it entails the right of the parties to be able to pay a defence counsel of their own choosing.

The right to a defence is also guaranteed by the organisation and functioning of the courts, which must comply with the principles of the rule of law, equality, non-payment, collegiality, public proceedings, judicial review and an active role for the courts.

Lawfulness means delivery of justice by the courts provided for in law and within the limits of the powers conferred on them by the legislature, and that judges answer only to the law. Equality of the parties means equality in their procedural dealings with the court and in their relations with each other through recognition of the two sides as having the same procedural rights and the same obligations. Non-payment means the availability of judicial solutions not dependent on payment of a fee. Judicial review means that a higher court can verify the lawfulness and merits of a decision delivered by a lower court. Lastly, the active role of the courts represents not interference with the parties' interests but a guarantee that their rights will be complied with and their interests met for the purpose of establishing the truth of the matter.

The requirement of a public hearing is laid down in Article 6.1 ECHR and is achieved, firstly, through the parties' access to the proceedings – a prerequisite for exercise of procedural rights and consisting in the right to a defence and the right to adversarial proceedings – and, secondly, by guaranteed freedom of access to the entire proceedings.

The concept of a public hearing in domestic law is interpreted in the same way.

Thus Article 127 of the Constitution, Article 5 of Law 304/2004 on the organisation of the judiciary, and the first paragraph of Article 121 of the Code of Civil Procedure all state that hearings are to be public unless the law provides otherwise; exceptions to this rule are laid down in law together with the criteria which the courts must apply when ruling on them. Under the second paragraph of Article 121 of the Code of Civil Procedure, the court may decide to exclude the

public from the hearing where publicity might adversely affect public order, morals or the parties themselves.

To guarantee that they are public, hearings take place at the court's usual known seat, at the time and date fixed by the court, according to the list of sittings posted on the courtroom door at least one hour in advance (Article 125 of the Code of Civil Procedure).

Public hearings are a guarantee that judges will act properly, impartially and independently, since it is not enough simply to do justice: justice must actually be seen to be done. It is for this reason that parties cannot be prevented from participating in hearings relating to their own cases – even when the public is not admitted (second paragraph of Article 121 of the Code of Civil Procedure) – and that third persons can be excluded from the courtroom only when a case is being heard in private.

The nature of the hearing does not affect delivery of the judgment, which must always be read out in open court, as expressly laid down in Article 6.1 ECHR and the third paragraph of Article 121 of the Code of Civil Procedure.

The Convention requirement that a case be heard within a reasonable time must be applied in the light of each individual case. Length of proceedings is assessed with reference to the nature of the damage, the complexity of the case, the conduct of the parties and the competent authorities, problems delaying the hearing, any backlog of cases and, lastly, use of remedies.

Prompt judgment is not expressly laid down by domestic law other than in a limited number of cases – for example, return of properties wrongfully confiscated during the communist period (governed by Law 10/2001) or adoption cases, governed by the Emergency Government Order 25/1997 (approved by Law 87/1998).

Similarly, the Code of Civil Procedure contains a series of rules to ensure that applications are settled within a reasonable time, irrespective of their nature. The most important of these rules are those in the first paragraphs of Article 155 and Article 156, which allow proceedings to be adjourned once by common consent of the parties or for lack of a defence, for example, and the rules set out in the first paragraphs of Article 260 and Article 264, whereby the reading of the judgment may be adjourned for a period of no more than seven days and the reasons for the judgment must be drawn up within thirty days after its delivery.

The purpose of trying a case within a reasonable time is to put an end to parties' uncertainty by restoring as far as possible any rights violated and re-establishing the strict compliance with the law which should guide all legal relationships in a law-based state and guarantees a fair hearing.

C. A hearing by an independent and impartial tribunal established by law

This independence must be twofold: for the courts and for the judges and prosecutors.

The independence of the courts is ensured by the fact that the judicial system within which justice is dispensed is not dependent on the legislature or the executive and does not form part of either.

This is reflected by Article 126 of the Romanian Constitution, which provides that justice is to be administered by the High Court of Cassation and Justice and the other courts of law established by law (courts of first instance, county courts and courts of appeal).

Article 126, paragraph 2, of the Constitution states that the jurisdiction of the courts of law and the conduct of court proceedings are to be as laid down in law.

The independence of the judiciary is dealt with in Article 124, paragraph 3, of the Romanian Constitution, which provides that judges are to be independent and subject only to the law.

As in the case of the courts, this provision underscores that justice is to be administered by judges without their coming under the influence of the executive or the legislature.

Independence in this form does not rule out intervention by the courts by means of judicial review further to an application to set aside a court decision.

It must be stressed that the supervision exercised over the president of a court in connection with court organisation (as provided for by Law 92/1992) in no way affects the independence of the judiciary. This supervision never concerns actual trial of a case.

Law 304/2004 on judicial organisation provides as follows: "There are no circumstances under which the verifications carried out can lead to interference in the conduct of the proceedings or the reopening of cases already tried."

The independence of judges is guaranteed by the safeguards specified in the Status of Judges Act.

Thus the appointment and promotion of judges and prosecutors are governed by the special provisions of Law 304/2004 (Part VI) on judicial organisation.

In addition, judges and prosecutors are appointed on the advice of the Judicial Service Commission, as provided in the Judicial Service Commission Act (in accordance with Article 125, paragraph 2, of the Romanian Constitution).

Another safeguard ensuring the independence of judges and prosecutors is security of office (irremovability), by virtue of which they cannot be promoted or transferred without their consent.

The principle of irremovability is laid down in the Romanian Constitution: under Article 125, paragraph 1, judges appointed by the President of Romania are irremovable under the terms of the law.

The same article states (paragraph 2) that promotion for, transfer of and disciplinary action against judges are the responsibility of the Judicial Service Commission as provided in the Judicial Service Commission Act.

As part of a fair trial, impartiality is a guarantee for parties to court proceedings that they can have confidence in judges and prosecutors and the institutions in which these dispense justice.

The importance of this impartiality is recognised by an entire section of the Code of Civil Procedure (Book I, Part V), which specifies the cases in which the participation of a judge, prosecutor or any other person in a trial is deemed inexpedient, together with the procedure to be followed if it is held that such participation is biased.

Other matters relating to impartiality are also addressed in Book I, Part VI of the Code of Civil Procedure, which deals with transfer of proceedings to another court.

The Constitution likewise acknowledges the importance of this aspect of a fair trial by providing that the office of judge is incompatible with holding any other public or private office other than teaching duties in higher education.

Having established that a court of law constitutes an integral part of a fair trial, the law gives it jurisdiction over cases both *ratione loci* (territorially) and *ratione materiae* (based on subject-matter).

In national law there are clear, precise statutory provisions setting out the powers of the authorities responsible for administering justice.

Thus Book I of the Code of Civil Procedure contains provisions dealing with jurisdiction *ratione materiae* (Part I), jurisdiction *ratione loci* (Part II), extension of jurisdiction (Part III) and the procedure to be followed in the event of disputes as to jurisdiction (Part IV).

It should further be stressed that laws relating specifically to a particular field of activity may deal with jurisdiction; to take jurisdiction *ratione materiae* as an example, the Code of Civil Procedure refers to "any subject-matter specified by law as forming part of the jurisdiction", as in the case of Law 14/2003 on political parties.

D. Delivery of judgments in open court

This rule ensures that parties to the proceedings are apprised of a court decision immediately after the deliberation that led to it.

The fact that the operative provisions of the judgment are read out in open court allows the unsuccessful party to renounce an appeal on the spot (Code of Civil Procedure, Article 267, paragraph 1).

A very serious problem – and one very relevant to Romania today – is raised by the reopening of domestic proceedings after a finding by the European Court of Human Rights of a violation of Article 6 of the Convention.

For complex reasons – the large number of cases (especially concerning ownership), legislative instability and some degree of inconsistency – Romania embarrassingly takes "pride of place" among those states most frequently brought before the European Court of Human Rights. For this reason, over and above the administrative measures taken by the Government, it may be worth noting the legislative solutions, in terms of procedure, that are applicable in this situation.

Article 408 of the Code of Criminal Procedure, introduced by Law 576/2004 and amended by Law 356/2006, governs a new type of review resulting from a special appeal against a final judgment.

Under the provisions in question, final judgments delivered in cases where the European Court of Human Rights has found a violation of a right laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms are reviewable if serious consequences of the violation remain and can be remedied only by a review of the judgment delivered.

The following may apply for the review:

- the person whose right has been violated;
- the spouse, or other affected relations, of the person convicted, even after the latter's death;
- the public prosecutor.

The application for a review is lodged with the High Court of Cassation and Justice, which rules on the application with a bench of nine judges. The application must be made no later than one year after the European Court of Human Rights judgment's becoming final.

Once the case has been referred to it, the High Court can stay execution of the impugned judgment of its own motion or at the request of the public prosecutor or the party concerned.

The public prosecutor's participation is mandatory.

The parties are summoned to appear at the hearing of the application for review. The prisoner must be present in court. When the parties are present during the hearing of the application for a review, their submissions are also heard.

The High Court considers the application in conjunction with the case file and delivers a decision.

If the High Court finds that the application is out of time, inadmissible or unfounded, it dismisses it.

If the High Court finds that the application is well-founded:

- it sets aside part of the impugned decision in the light of the right infringed and, by reopening the proceedings pursuant to the provisions of Chapter III, Section II, halts the consequences of the infringement;
- it sets aside the decision and, if necessary to bring forward evidence, decides to reopen the proceedings before the court with which the infringement originated pursuant to the provisions of Chapter III, Section II.

The decision delivered by the High Court of Cassation and Justice is not subject to appeal.

Thus, as we have seen, this special case of review applies wherever the serious consequences of a violation of an ECHR right – as established by a final judgment of the European Court of Human Rights – remain and can be remedied only by review of the final judgment delivered by the criminal court in Romania. Such a situation may arise, for example, when the European Court of Human Rights finds a breach of Article 8 of the Convention through the application to a convicted person of the additional penalty of deprivation of parental rights. Additionally, there will be a breach of Article 6, paragraph 3(d), if witnesses for the defence have not been called and examined and the defendant is then convicted. The serious consequences of the violation of the right to respect for private and family life (in the former case) and the right to a fair trial (in the latter case) remain and can be remedied only by review of the judgment.

The 2003 legislation governing review of final judgments in civil cases introduced a new provision whereby a final judgment can be quashed if the European Court of Human Rights has found a violation of fundamental rights or freedoms as a result of the judgment and if the serious consequences of this violation remain and can be remedied only by a review of the judgment delivered.

The application for review must be made within three months from the date on which the judgment of the European Court of Human Rights is published in Romania's Official Gazette. The application must be made to the court that delivered the impugned judgment.

These are the only circumstances in which Romanian law allows reopening of proceedings after a European Court of Human Rights finding that a court decision has infringed a fundamental right. This is only a partial solution to the problem and is not always satisfactory inasmuch as it sometimes calls in question the certainty and stability of the judicial system and the civil courts. We therefore consider it necessary for Parliament to consider other ways in which judgments delivered by the European Court of Human Rights might lead to prompter and more effective restoration of infringed rights.

Reopening of proceedings to establish violation of Article 6 of the European Convention on Human Rights and assess damage caused by violation of a right protected by the Convention

Dušanka Radović

Judge of the Supreme Court of the Republic of Montenegro

Introductory remarks

In its decision to declare itself independent, the Republic of Montenegro undertook to implement and be bound by international treaties and agreements concluded and acceded to by the State Union of Serbia and Montenegro, which related to Montenegro and were compatible with its legal order. Pursuant to this decision, when it initiated the procedure for accession to the Council of Europe, Montenegro formally declared its readiness to succeed to any convention signed by the State Union of Serbia and Montenegro. The Committee of Ministers of the Council of Europe accordingly adopted a decision confirming the Republic of Montenegro as a party to, *inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Therefore, with respect to Montenegro, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention on

Human Rights) is to be deemed to be in force, and to have been continuously implemented since 3 March 2004.

As part of the plan for reform of the Montenegrin judicial system, adopted by the Government of the Republic of Montenegro in 2000 and running from 2000 to 2005, over 30 laws were passed in that period. These laws were also rendered necessary by ratification of the European Convention on Human Rights.

All these new laws incorporate the principles and guarantees enshrined in the Convention and other international agreements ratified by Montenegro. This has contributed to the successful operation of an independent, impartial and efficient judiciary in the country, while also creating a need for further action to implement reform of the judicial system.

In June 2007, the Government of the Republic of Montenegro adopted a Strategy for Reform of the Judiciary for the period 2007-2012, developed jointly by representatives of the domestic judicial authorities and international organisations. In particular, it should be noted that the draft Strategy was appraised by Council of Europe experts as part of the 2003 CARDS programme in the area of justice.

The strategic objectives to be attained during the said period are: greater independence, autonomy and efficiency of the judiciary, easier access to the courts, guaranteed access to justice and increased public trust in the judiciary. All these objectives are individually discussed in the aforementioned document.

National law

The new legislation – both substantive and procedural – incorporates the guarantees of the right to a fair trial referred to in Article 6 of the European Convention on Human Rights.

These guarantees and principles were incorporated in our legal system pursuant to the relevant provisions of international human and minority rights agreements in force in our territory and directly implemented under Article 10 of the Constitutional Charter of the State Union of Serbia and Montenegro, which, when ratified, take precedence over domestic law under Article 16 of the Charter. That article established the state's duty, in the event of conflict between an international agreement and domestic law, to implement the former.

The draft of the new Constitution of the Republic of Montenegro also provides that ratified and published international agreements, and the generally accepted rules of international law, constitute an integral part of the domestic legal system; they take precedence over domestic law, and are directly applicable in the event of any inconsistency with domestic law regarding the regulation of relations (Article 9). Human rights and freedoms within the meaning of the European Convention are dealt with in a separate chapter, and the Constitution ex-

pressly provides that guaranteed rights and freedoms are exercised in accordance with the Constitution and ratified international agreements.

Specifically, it should be noted that the principle of the right to a fair trial, referred to in Article 6 of the European Convention on Human Rights, is incorporated in the Courts Act and in procedural law.

In terms of the volume of guarantees incorporated, the new Code of Criminal Procedure, the Code of Civil Procedure, the Administrative Procedure Act and the Administrative Disputes Act merit special mention.

In cases where an international court or a domestic court sitting at last instance finds that the rights or fundamental freedoms of a person accused in criminal proceedings have been violated, the new Code of Criminal Procedure makes it possible to reopen the proceedings, using an extraordinary legal remedy: an application for review of the lawfulness of the final judgment (Article 436, para. 2). Such an application may be lodged by the accused and his defence counsel with the court that gave judgment at first instance within one month of receipt of the international court's decision or the domestic court's final judgment. Applications for review of lawfulness are decided by the Supreme Court, whose decisions are the same as those on applications for protection of legality.

Although the 2004 Code of Civil Procedure contains the fair trial guarantees enshrined in the European Convention on Human Rights, practical application of the Code so far indicates that Council of Europe Committee of Ministers Recommendation No. P(2002)/2 regarding the domestic review and reopening of certain cases pursuant to judgments of the European Court of Human Rights has not been implemented.

That Recommendation places special emphasis on the obligation of contracting parties to abide by the final judgment of the European Court of Human Rights on any case to which they are a party, and on the fact that the Committee will monitor enforcement.

In addition to just satisfaction, which the Court of Human Rights may order under Article 41 of the Convention, it should be borne in mind that, in certain circumstances, that obligation may also involve taking action to ensure that the injured party is, as far as possible, placed in the position he occupied before the Convention was violated (*restitutio in integrum*). It is up to the relevant authorities in the state against which an application was filed with the Court for Human Rights to decide on the best way of effecting *restitutio in integrum*, making sure that the measure in question is compatible with domestic law.

To that end, the Act on Amendments to the Code of Civil Procedure of 2006 introduces an extraordinary legal remedy – application for retrial pursuant to a final judgment by the European Court of Human Rights concerning violation of a basic human right.

Within three months of a final judgment by the European Court of Human Rights, finding that a human right or fundamental freedom has been violated, the amended Code allows a party to apply to the domestic court of first instance, asking it to modify the decision which violated that right or freedom – provided that retrial is the only way of remedying the violation. This remedy is implemented by applying the relevant retrial provisions in the Code. Throughout the retrial, the domestic court is bound by the legal opinion set forth in the European Court's final judgment (Article 428 (a)).

This provision makes it possible to review and reopen proceedings in cases where the European Court finds that the Convention has been violated, especially where:

The injured party continues to suffer the grave consequences of the domestic decision, owing to lack of an appropriate remedy in the form of just satisfaction, and retrial or review of the case offers the only remedy.

Now that the rights enshrined in Article 6 of the European Convention have been materially incorporated in the Courts Act, procedural law and the Obligations Act, a law on the right to trial within a reasonable time is now being drafted, for the purpose of introducing an extraordinary legal remedy to protect that right.

The main purpose of this law is to regulate that right, which derives from the basic right to a fair trial guaranteed by Article 6 of the European Convention, and also the right to an effective legal remedy guaranteed by Article 13. On joining the Council of Europe and ratifying the European Convention, every contracting state is required to ensure that the rights guaranteed by the Convention are fully respected by the state authorities, and that anyone whose rights and freedoms under the Convention have been violated is entitled to an effective remedy at national level.

Both the two elements in the right to a fair trial – the institutional element, i.e. independence and impartiality of the court, and the procedural element, i.e. a fair hearing – are guaranteed by the Convention, and each is subject to violation. A further element is trial within a reasonable time.

Public discontent with protracted judicial proceedings and strong feelings on this matter, and the large number of applications concerning violation of the right to trial within a reasonable time dealt with by the European Court of Human Rights – most of them ending in the state's being found guilty and ordered to pay compensation – make it necessary to provide an effective legal remedy and protect this right at national level, in accordance with the European Court's case-law and the Council of Europe's recommendations.

Another purpose of the new law is to make the courts more efficient by setting up machinery to ensure compliance with the time limits for taking procedural

action specified in procedural law, the ultimate aim being to protect the right to a fair trial within a reasonable time.

Draft law to protect the right to trial within a reasonable time

This Law regulates conditions, methods and procedures for ensuring that the right to trial within a reasonable time is judicially protected, and that just satisfaction is made when that right is violated.

The Law provides for two remedies to protect the right to trial within a reasonable time: applications to expedite proceedings/for supervision orders, and claims for just satisfaction. It also stipulates who may avail of these remedies. In particular, it lays down criteria for determining whether proceedings are unreasonably long – criteria which are the same as those used by the European Court when hearing applications alleging violation of the right to trial within a reasonable time. It calls for prompt dispatch of cases, and envisages the possibility of calling judges and court presidents to account under the Courts Act when they fail to act on legal remedies for which it provides.

Applications for supervision orders – The Law provides that applications by parties to expedite proceedings/for supervision orders are decided by the president of the court concerned, since the Courts Act makes court presidents responsible for the regular and timely dispatch of court business, authorising them to take the action needed for this purpose, and also since effective protection of this important right does much to increase public confidence in the work of the courts. Courts with more than ten judges may draw up annual duty rosters of judges to help their presidents to process applications for supervision orders. The Law explicitly provides that court presidents or judges may not deal with applications for supervision orders relating to cases in which they are exercising, or have exercised, judicial functions, and regulates further procedure in such cases. If an application for a supervision order is dismissed or not dealt with promptly, the relevant decision of the court president may be appealed, the appeal being decided by the president of the court of next instance. Reasons must be given for all decisions on applications for supervision orders. The purpose of these applications is to ensure that violations of the right to trial within a reasonable time can already be remedied in proceedings before the president of the court concerned, who may reject them for procedural reasons or because they are manifestly ill-founded. Otherwise, he may ask the judge involved to account for the length of the proceedings, having regard to the criteria laid down in the Law. If he accepts the reasons given by that judge in writing for procedural action to be taken, or decisions to be given, within six months at most, he notifies the applicant party accordingly, thereby terminating the application proceedings. If he finds, having regard to the circumstances and nature of the case, that the court

is being unjustifiably slow in giving judgment, he gives it a deadline for completing certain procedural steps, and the judge a deadline for informing him of the action taken. He may order that a case be given priority treatment, if its circumstances and urgency warrant this.

Since experience has shown that lengthy judicial proceedings are mainly due to failure to act on the part of other public authorities, e.g. non-compliance with judicial requests for documents and other evidence, the Law authorises court presidents dealing with applications for supervision orders to set such authorities a deadline for compliance, and institute disciplinary or dismissal proceedings of they fail to act.

If the court president dismisses an application for a supervision order or fails to reply to the applicant within a certain time, the latter may appeal to the president of the court of next instance, who may dismiss the appeal as being out of time, filed by an unauthorised person or ill-founded, and uphold the lower court president's decision – or alternatively modify that decision if he finds the appeal founded.

Just satisfaction – Application for just satisfaction is made to the Supreme Court of the Republic of Montenegro, usually after first applying for a supervision order. Exceptionally, this may be done by a party prevented for good reasons from applying for a supervision order. The aim is to obtain compensation for non-pecuniary damage resulting from violation of the right to trial within a reasonable time, for which the State of Montenegro is objectively liable. Compensation is set by law at €300-€5 000.

The Supreme Court, sitting as a three-member bench, rules on applications. It does so in a decision (when an application is dismissed as being out of time, being filed by an unauthorised person or not being preceded by an application for a supervision order) or judgment (when an application is upheld or dismissed), on the basis of criteria specified in law.

In ruling on applications for just satisfaction and deciding how much compensation to award for non-pecuniary damage, the court must take account of the extent of the damage and the purpose of the compensation, and also ensure that satisfaction does not give rise to complaints which are incompatible with its nature and social purpose. The Law accordingly allows it to assess the circumstances of the case with reference to criteria which the Law itself lays down, and particularly the party's conduct during the proceedings, and merely find that the right to trial within a reasonable time has been violated, without setting the amount of compensation – which is compatible with the practice of the European Court of Human Rights. In such cases, it may grant the party's request that the judgment be published. In the event of a more serious breach of the right to trial within a reasonable time, it may, at the party's request, order publication of the judgment, and also award compensation.

The Law also regulates the right to compensation for pecuniary damage resulting from violation of the right to a hearing within a reasonable time in civil proceedings, in accordance with the Obligations Act. Provision is also made for application of the appropriate parts of the Code of Civil Procedure in respect of all other matters concerning the determination of remedies for violation of the right to a hearing within a reasonable time which are not regulated by this Law.

Under the Law, state authorities, local authorities, public foundations and other public authorities appearing as parties in judicial proceedings are not entitled to just satisfaction, in the form of pecuniary compensation, for damage resulting from violation of the right to a hearing within a reasonable time.

The Law's transitional provisions provide for its application to judicial proceedings instituted before it came into force, and after 3 March 2004, when Montenegro became bound by the European Convention on Human Rights. This means that the duration of proceedings before 3 March 2004 is relevant when a court, in deciding whether the right to a hearing within a reasonable time has been violated, is considering whether their duration after that date constituted unreasonable delay.

The Law has retrospective effects, in order to ensure effective legal protection of the right to a hearing within a reasonable time, in keeping with the Convention, from the time when Montenegro undertook to abide by it.

Conclusion

From the foregoing, it is clear that, for the most part, the new substantive and procedural laws incorporate guarantees of the right to a fair hearing, and other basic rights and freedoms enshrined in the Convention on Human Rights, and that existing laws are continually being improved for that purpose.

As for practical problems arising with reopening of proceedings in cases where the Strasbourg finds that rights have been violated, experience is still lacking, since the Court has not so far given final judgment on any application against the Republic of Montenegro.

Final observations

Vida Petrović-Škero

President of the Supreme Court of Serbia

Esteemed colleagues and guests,

I too would like to address you once again.

I am not going to repeat the conclusions and assessments as they are the same as those already mentioned, and I don't think there is a single judge here that would not make a very similar assessment. I will only make a few remarks of my own as a judge participating in this conference. I am almost certain that each judge thinks the same – that only an independent judge can always interpret and apply national law in accordance with the provisions of the European Convention and in keeping with the case-law of the European Court. And only a judge with substantial knowledge can be truly independent.

Supreme courts and their judges play the most important role in creating a good judiciary. First and foremost, they must have substantial knowledge to have full independence, which will ensure – the provisions of national legislation notwithstanding – as effective human rights protection before national courts as possible.

This conference has proved that the experiences of the participating countries and the exchange of those experiences are crucial. It has become clear that most of us face the same or similar problems and that we resolve them in similar ways. It was very good to hear how the direct application of the Convention and precedents is regulated in other countries, especially as the countries of the region are faced with similar legal problems, but are at different levels of their resolution.

National courts and judges must make every effort to ensure the adequate protection of other rights for citizens involved in proceedings where the right to a fair trial is secured. However, no judiciary in any country functions independently in protecting these rights. It is necessary to provide laws with a well-implemented case-law of the International Court and standards from international

conventions. The executive branch of government must ensure the necessary conditions for the application of laws. The exercise of the rights of citizens must not depend on whether the judicial budget is adequate, whether there is a sufficient number of courtrooms or whether the salaries in the judiciary are high enough. Citizens must expect their rights to be protected within their country because, failing that, they will have to seek protection in Strasbourg rather than in the country that failed them. Such functioning of the judiciary of a country, capable of guaranteeing the real protection of rights, must be ensured solely through the joint work of all three branches of government.

It is my special pleasure to be able to say that the invitation of the Council of Europe and the Supreme Court of Serbia to participate in the work of this conference was accepted by all the countries of the region. I believe this shows that we have the need and desire to speak the same language, the judicial language. Linguistic barriers, political systems or, perhaps, some other problems were not an obstacle for us. The desire to use the judicial language and the acceptance of the invitation were indicative of the desire and need to exchange views. Only Greece, due to the current fires and the resulting state of emergency, had to cancel its participation several days before the beginning of the conference.

As a co-organiser and host of this conference, I hope that all the participants will leave with useful knowledge and experiences obtained from other countries. Someone may find certain practices in other countries not applicable to the specific conditions of his or her own country, but there will be new ideas, which will provide a solid basis for improving the protection of citizens' rights. I hope that we will all leave this place with more experience and excellent impressions. I hope that we will also leave enriched by new acquaintances, new plans for networking and a new understanding that we can change our experiences and benefit from it greatly. I hope we are leaving with the desire and need to continue to exchange experiences because the countries of the region certainly need to do so.

In particular, I wish to express my appreciation to all the participants in this meeting for their active involvement. The quality of any conference and any meeting, regardless of its good organisation, can only be ensured by its participants. I therefore believe that we owe much appreciation to each other because we made this conference successful through our joint effort. I see it as a great success.

I want to thank our dear guests and, of course, the Council of Europe, on their joint work. To the office of the Council of Europe in Belgrade. On behalf of the Supreme Court, I would also like to thank the foreign relations advisor, who made a special effort – in addition to fulfilling his regular duties – to carry out all those tasks that would normally fall within the ambit of an entire team. Our team consists of Ms Ljubica Pavlovic.

I also wish to thank our excellent interpreters. We were not faced with a barrier as regards the language of the judges, but we were faced with the literal linguistic barrier and without such good interpreters we certainly would not have been able to exchange our experiences, ideas and expertise.

The organisers of this conference, the Council of Europe and the Constitutional Court of Serbia have prepared a small gift for you to remind you of this conference – our group photo and a CD that will take us back to the time we spent together.

Thank you all, and I hope we are all sharing the same good feelings.

Philippe Boillat

Director General of Human Rights and Legal Affairs, Council of Europe

I should like first of all to express my warmest thanks to the speakers and all those who took the floor for the quality of their contributions. I believe we have identified the role of Supreme Courts and pinpointed the difficulties they have in implementing the European Convention on Human Rights.

The Convention, as has been pointed out, is the real **constitutional European public policy instrument**. The Convention and the Court's case-law are what binds European states together.

The Convention is a living instrument that must be interpreted in the light of present-day conditions. What are the prerequisites if the Court's wealth of case-law is to be taken into account by domestic courts and influence the domestic law of the States Parties to the Convention? First all, the Convention must be **directly enforceable**. The 47 States Parties have now incorporated it into their domestic legal systems and we can but welcome this decisive step. Secondly, it is necessary to recognise that Convention law, as interpreted by the Court, takes **precedence** over any domestic legislation that runs counter to it. Lastly, **res judicata**, which in principle applies only to the State against which the judgment has been handed down, should in future be supplemented by the **binding force of the Court's interpretation**: in addition to respecting the binding force of the judgment, as stipulated in Article 46 § 1 of the Convention, under which states undertake to abide by the judgment in any case to which they are parties, domestic courts are urged to apply the Court's case-law "in anticipation". This "horizontal" application of its case-law will make it possible to avert a very large number of applications to Strasbourg.

The role of Supreme Courts is to guide lower courts, in particular by **applying the Convention's principles in their own case-law** so that these become part and parcel of domestic law and its implementation. Admittedly, this is a real challenge for judges, who must often display legal imagination, but we are convinced that Supreme Courts are ready to rise to it.

As was repeated in the course of the conference, Supreme Courts are the prime guarantors of the effectiveness of the rights and freedoms safeguarded by the Convention. It is up to them to serve as a **filter** between domestic courts and the European Court of Human Rights. This is crucial if the **principle of subsidiarity** set forth in Article 13 of the Convention, which requires an effective remedy before a national authority making it possible to ascertain a violation and, if necessary, put a stop to it, is to be fully observed.

Needless to say, if they are to be able to follow developments in Strasbourg case-law and apply it, they must have **access** to it. This is a *sine qua non* condition. There are already commendable practices in many Council of Europe member states, in particular your own countries, where not only are the judgments translated and published in full, but summaries and comments of particular relevance to the country concerned are also translated and published. This good practice needs to become universal. Domestic courts, and in particular Supreme Courts, must encourage national authorities to **translate, publish and disseminate the judgments of the European Court of Human Rights**. The Council of Europe can of course help with this, and indeed is doing so, particularly through conferences such as this one. I would nevertheless remind you that, in accordance with Committee of Ministers' Recommendation R (2002) 13, responsibility for this rests primarily with the national authorities.

I should also like to stress the importance of what has been called the "**dialogue of judges**": frank, open dialogue between the Strasbourg Court judges and domestic court judges, particularly where domestic courts are responsible for harmonising case-law at national level. If such dialogue is to bear fruit, however, the judges must be familiar with the European human rights law they are being called on to apply.

If domestic courts are to implement the Convention, the judges must therefore have been trained in its requirements. The Council of Europe has, along with other international organisations and non-governmental organisations, done a great deal here. Once again, however, this is a responsibility that lies primarily with the member states. The idea is to put the training given to judges on an independent, institutional footing, for example by setting up judicial academies or legal service training colleges that are entirely state-financed. Lastly, states must ensure that **training in t.e Convention** is given to judges at all levels during their **initial training** and by means of **in-service training** throughout their careers, as called for in Committee of Ministers Recommendation R(2004)4. We are on the right track, particularly with the Council of Europe HELP programme, which is designed precisely to ensure that training in the Convention and the Court's case-law is included in the professional training curriculum of every judge and prosecutor in Europe.

To come back to the fundamental principles referred to at the conference, I would stress in particular the **independence of judges and t.e judiciary**, without which it is impossible to have a truly democratic society that respects human rights and the rule of law.

We dwelled at length on issues connected with respect for the right to have proceedings concluded within a **reasonable time**. The European Court of Human Rights is snowed under with applications concerning violations of this right, which is guaranteed in Article 6 of the Convention, in cases where there

are no effective domestic remedies, i.e. no effective domestic means of appeal that make it possible to ascertain the existence of any violation and, if necessary, compensate the victims. It is not enough to provide a remedy for the symptom, however: it is necessary to attack the disease itself in order to prevent further violations. It is therefore essential to introduce other measures, for example to increase the number of judges when this is the cause of the problem, and to carry out the legislative reforms needed to speed up proceedings. That said, proceedings should on no account be speeded up to the detriment of the requirements attached to a fair trial.

I should like to make a few comments on the execution of judgments under the supervision of the Council of Europe Committee of Ministers (Article 46 § 2 ECHR). When the domestic courts have failed to implement the Convention and the Court finds a violation, the question of just satisfaction arises. The respondent state will be required to take the **individual measures** needed to remove the consequences of the violation for the applicant (*restitutio in integrum*). **Measures of a general nature** will also be called for to prevent further violations. In principle, the respondent state has an **obligation to produce a specific result** and not just to use its best endeavours. In this context, domestic courts – and particularly Supreme Courts – will have to interpret the law in such a way that it is compatible with the judgment handed down by the Court. This **interpretation in accordance wit. t.e Court's judgment** will, however, very often need be supplemented by a **c.ange in t.e legislation** to meet the requirements of the judgment. I would remind you that the States Parties to the Convention are **collectively responsible** for the execution of judgments. This responsibility is set out in the Preamble to the Convention, pursuant to which the states are responsible for the collective enforcement of the rights and freedoms guaranteed by the Convention.

The pilot judgments also received our attention. This procedure has **great potential** as a means of removing repetitive or identical applications from the Court's case list. By highlighting **structural s.ortcomings and systemic problems** in member states' domestic legal systems, pilot judgments also indicate to the states concerned how these should be remedied. These judgments require, firstly, that steps be taken to remedy the domestic shortcoming and, secondly, that effective remedies be introduced to deal with similar applications to the Court that have been suspended.

I should like to remind you of the importance of Committee of Ministers Recommendation R(2000)2 on the **reopening of cases** and say how pleased I am that so many Council of Europe member states now provide for this possibility, not only in the case of criminal proceedings but also in the case of civil and even administrative proceedings. Reviewing and re-examining cases on which there

has been a final ruling at domestic level is sometimes the only way of properly remedying the violation ascertained by the Court.

We have, throughout the conference, drawn attention to the obstacles to the effective implementation of the Convention by domestic courts. But I am sure you will have noticed over the last two days that you are not tackling these obstacles on your own. The Strasbourg Court can provide guidance. The Directorate General of Human Rights and Legal Affairs is also ready to offer support. So you need have no hesitation in applying the Convention and the Court's case-law.

Lastly, allow me, once again, to express my warmest thanks to Serbia for including this important conference in the programme of its Chairmanship of the Council of Europe Committee of Ministers, and to our host, the Supreme Court of Serbia, and more particularly its President, for the outstanding work they have done to organise the conference and for their very generous hospitality, which has been much appreciated all round.

I hope you have a good journey back and that I shall have occasion to see you again before long, whether in your own countries or in Strasbourg.

Appendix I: Programme

Wednesday 19 September 2007

20.00 Welcome dinner and musical programme, hosted by the President of the Supreme Court of Serbia

Thursday 20 September 2007

9.00 Registration/Coffee

9.15 Opening of the Conference

Ms Vida Petrović-Škero, President of the Supreme Court of Serbia
Mr Philippe Boillat, Director General of Human Rights and Legal Affairs, Council of Europe

9.30 Welcome Address

Mr Dušan Petrović, Minister of Justice of the Republic of Serbia
Ambassador Radojko Bogojević, State Secretary of the Ministry of Foreign Affairs of the Republic of Serbia

9.45 Short break

Morning Session chaired by Ms Vida Petrović-Škero, President of the Supreme Court of Serbia

9.50 The authority of the jurisprudence of the European Court of Human Rights

Mr Jean-Paul Costa, President of the European Court of Human Rights

10.10 Coffee

[Press conference
Ms Vida Petrović-Škero, President of the Supreme Court of Serbia
Mr Jean-Paul Costa, President of the European Court of Human Rights
Mr Philippe Boillat, Director General of Human Rights and Legal Affairs, Council of Europe]

10.40 Using the "precedents" of the European Court of Human Rights: the experiences of Austria and Albania

Hon. Prof. Dr. Irmgard Griss, President of the Supreme Court of Austria
Mr Perikli Zaharia, Justice of the Supreme Court of Albania

11.10 Discussion

11.30 The independence of the judiciary: current problems and possible solutions

Mr Philippe Boillat, Director General of Human Rights and Legal Affairs, Council of Europe

12.00 Discussion

12.30 Providing guidance to lower courts on the requirements of the European Convention on Human Rights

Mr Paul Lemmens, Conseiller d'Etat, State Council of Belgium

13.00 Discussion

13.40 Group photo and lunch

Afternoon session chaired by Ms Nadia Čuk, Deputy to the Head of the Council of Europe Office in Belgrade

15.00 Providing remedies for judicial delays: the experiences of Bulgaria, Slovenia and "the former Yugoslav Republic of Macedonia"
Ms Bilyana Chocheva, Justice of the Supreme Court of Cassation of Bulgaria
Mr Franc Testen, President of the Supreme Court of Slovenia
Mr Vladimir Babunski, Justice of the Supreme Court of "the former Yugoslav Republic of Macedonia"

15.45 Discussion

16.00 Ensuring that judges have the skills and knowledge to apply the European Convention on Human Rights and the case-law of the European Court of Human Rights

Ms Vida Petrović-Škero, President of the Supreme Court of Serbia

Mr Gabor Szeplaki-Nagy, Conseiller référendaire, Supreme Court of Hungary

16.40 Discussion

18.00 Belgrade sight-seeing and dinner at Kalemegdanska Terasa hosted by the President of the Supreme Court of Serbia

Friday 21 September 2007

Morning session chaired by Mr Philippe Boillat, Director General of Human Rights and Legal Affairs, Council of Europe

9.30 Evaluation of obstacles to an effective implementation of the European Convention on Human Rights by national courts

Mr Jeremy McBride, Barrister, London, and Visiting Professor at Central European University, Budapest

10.00 Discussion

10.30 Responding to pilot judgments

Mr Dragoljub Popović, Judge before the European Court of Human Rights in respect of Serbia

10h50 Discussion

11.20 Coffee

11.45 The reopening of proceedings following a finding of a violation of Article 6 of the European Convention of Human Rights

Mr Florin Costiniu, President of the Civil Chamber of the High Court of Cassation and Justice of Romania

Ms Dušanka Radović, Justice of the Supreme Court of Montenegro

12.20 Discussion

13.00 Final observations by Ms Vida Petrović-Škero and Mr Philippe Boillat

13.30 Lunch

Appendix II: Participants

Member States / Etats membres

Albania / Albanie

Gani DIZDARI, Judge of the Supreme Court/Juge de la Cour suprême

Ardian DVORANI, Judge of the Supreme Court/Juge de la Cour suprême

Ardian NUNI, Judge of the Supreme Court/Juge de la Cour suprême

Perikli ZAHARIA, Judge of the Supreme Court//Juge de la Cour suprême

Sokol PECI, Chief of the Foreign Relations Department of the Supreme Court/Chef du département des relations extérieures de la Cour suprême

Austria / Autriche

Irmgard GRISS, President of the Supreme Court/Président de la Cour suprême

Ronald ROHRER, Vice-president of the Supreme Court/Vice-président de la Cour suprême

Peter SCHIEMER, Senatspräsident of the Supreme Court/Senatspräsident de la Cour suprême

Bosnia and Herzegovina / Bosnie-Herzégovine

Ignjacije DODIK, Deputy President of the Supreme Court and President of the Criminal Division of the Federation of Bosnia and Herzegovina/Vice-président de la Cour suprême et président de la division criminelle de la Fédération de Bosnie-Herzégovine

Hajrudin HAJDAREVIC, President of the Civil Division of the Supreme Court of the Federation of Bosnia and Herzegovina/Président de la division civile de la Cour suprême de la Fédération de Bosnie-Herzégovine

Gorjana POPADIC, Judge of the Supreme Court of Republica Srpska/Juge de la Cour suprême de la République Srpska

Staka GOJKOVIC, Judge of the Supreme Court of Republica Srpska/Juge de la Cour suprême de la République Srpska

Vojislav DIMITRIJEVIC, Judge of the Supreme Court of Republica Srpska/Juge de la Cour suprême de la République Srpska

Meddzida KRESO (apologised/excusé), President of the Supreme Court of Bosnia and Herzegovina/Président de la Cour suprême de Bosnie-Herzégovine

Bulgaria / Bulgarie

Ivan GRIGOROV, President of the Supreme Court/Président de la Cour suprême

Bilyana CHOCHEVA, Judge of the Supreme Court/Juge de la Cour suprême

Fidanka PENEVA, Judge of the Supreme Court/Juge de la Cour suprême

Boyka POPOVA, Chief of the First Criminal Department/Chef du premier département pénal

Ruzhena KERANOVA, Judge of the Supreme Court/Juge de la Cour suprême

Croatia / Croatie

Senka KLARIC-BARANOVIC, Judge of the Supreme Court/Juge de la Cour suprême

Vesna VRBETIC, Judge of the Supreme Court/Juge de la Cour suprême

Greece / Grèce (apologised /excusé)

Vasileios NIKOPOULOS, President of the Supreme Civil and Penal Court/ Président de la Cour suprême civile et pénale

Anastasios Filitas PERIDIS, Vice-president of the Supreme Civil and Penal Court/Vice-président de la Cour suprême civile et pénale

Vasileos RIGAS, Judge of Supreme Civil and Penal Court/Juge de la Cour suprême civile et pénale

Mimis GRAMMATIKOUOIS, Judge of Supreme Civil and Penal Court/Juge de la Cour suprême civile et pénale

Joannis–Spyridon TENTES, Judge of Supreme Civil and Penal Court/Juge de la Cour suprême civile et pénale

Hungary / Hongrie

Karoly HORECZKY, President of Chamber/Président de chambre

Bertalan KAPOSVARI, Vice-president of the Supreme Court/Vice-président de la Cour suprême

Gabor SZEPLAKI-NAGY, Judge of the Supreme Court/Juge de la Cour suprême

Moldova

Vasile CHERDIVARA, Judge in the Economic College/ Juge de la Chambre économique

Tatiana CERNEI, Principal Consultant in the President Apparatus of the Supreme Court, Protocol and Foreign Affairs/Conseiller principal auprès du cabinet du Président de la Cour suprême, protocole et relations extérieures

Vera MACINSKAIA, Vice-president of the Civil College of the Supreme Court/Vice-président de la Chambre civile de la Cour suprême

Ghenadie NICOLAEV, Judge of the the Supreme Court/Juge de la Cour suprême

Tatiana VIERU, Judge of the Supreme Court/Juge de la Cour suprême

Montenegro / Monténégro

Ratko VUKOTIC, President of the Supreme Court/Président de la Cour suprême

Dusanka RADOVIC, Judge of the Supreme Court/Juge de la Cour suprême

Resad MUZUROVIC, Judge of the Supreme Court/Juge de la Cour suprême

Vesna BEGOVIC, Judge of the Supreme Court/Juge de la Cour suprême

Romania / Roumanie

Florin COSTINIU, President of the Civil Chamber of the High Court of Cassation and Justice of Romania/Président de la Chambre civile et de propriété intellectuelle de la Haute Cour de Cassation et de Justice de Roumanie

Serbia / Serbie

Dusan PETROVIC, Minister of Justice of the Republic of Serbia/ Ministre de la justice de la République de Serbie

Radojko BOGOJEVIC, State Secretary, Ministry for Foreign Affairs of the Republic of Serbia/Secrétaire d'Etat, Ministrère des Affaires étrangères de la République de Serbie

Vida PETROVIC-SKERO, President of the Supreme Court/ Présidente de la Cour suprême

Predrag TRIFUNOVIC, Judge of the Civil Division/Juge de la Division civile

Ljubica MILUTINOVIC-TRIFUNOVIC, Judge of the Civil Division/Juge de la Division civile

Jasminka STANOJEVIC, Judge of the Civil Division/Juge de la Division civile

Dragisa SLIJEPCEVIC, Judge of the Civil Division/Juge de la Division civile

Milomir NIKOLIC, Judge of the Civil Division/Juge de la Division civile

Vladimir TAMAS, Judge of the Civil Division/Juge de la Division civile

Slobodan DRAZIC, Judge of the Civil Division/Juge de la Division civile

Vesna POPOVIC, Judge of the Civil Division/Juge de la Division civile

Snezana ANDREJEVIC, Judge of the Civil Division/Juge de la Division civile

Sonja BRKIC, Judge of the Civil Division/Juge de la Division civile

Spomenka ZARIC, Judge of the Civil Division/Juge de la Division civile

Stojan JOKIC, Judge of the Civil Division/Juge de la Division civile

Milena SAVATIC, Judge of the Administrative Division/Juge de la Division civile

Katarina MANOJLOVIC-ANDRIC, Judge of the Administrative Division/ Juge de la Division administrative

Zoja POPOVIC, Judge of the Administrative Division/Juge de la Division administrative

Obrad ANDRIC, Judge of the Administrative Division/Juge de la Division administrative

Gordana DZAKULA, Judge of the Administrative Division/Juge de la Division administrative

Dragan SKOKO, Judge of the Administrative Division/Juge de la Division administrative

Nevena MILOJCIC, Judge of the Administrative Division/Juge de la Division administrative

Snezana ZIVKOVIC, Judge of the Administrative Division/Juge de la Division administrative

Ljubodrag PLJAKIC, Judge of the Administrative Division/Juge de la Division administrative

Bata CVETKOVIC, Judge of the Criminal Division/Juge de la Division criminelle

Nevenka VAZIC, Judge of the Criminal Division Juge de la Division criminelle

Zoran SAVIC, Judge of the Criminal Division/Juge de la Division criminelle

Predrag GLIGORIJEVIC, Judge of the Criminal Division/Juge de la Division criminelle

Slobodan RASIC, Judge of the Criminal Division/Juge de la Division criminelle

Ljubica PAVLOVIC, Advisor, International Cooperation, Supreme Court/ Conseillère, coopération internationale, Cour suprême

Bosa NENADIC, Judge, Constitutional Court of Serbia/Juge, Cour constitutionnelle de Serbie

Dragica MARJANOVIC, Judge, Constitutional Court of Serbia/Juge, Cour constitutionnelle de Serbie

Branka CURCIJA, Judge, Constitutional Court of Serbia/Juge, Cour constitutionnelle de Serbie,

Slavoljub CARIC, State Agent before European Court of Human Rights/ Agent du Gouvernement auprès de la Cour Européenne des Droits de l'Homme

Slovenia / Slovénie

Franc TESTEN, President of the Supreme Court/Président de la Cour suprême

Borivoj ROZMAN, Judge of the Supreme Court/Juge de la Cour suprême

Janko MARINKO, Secretary General of the Supreme Court/Secrétaire général de la Cour suprême

"The Former Yugoslav Republic of Macedonia" / « L'ex – République yougoslave de Macédoine »

Dane ILIEV, President of the Supreme Court/Président de la Cour suprême

Faton PACUKU, Judge of the Supreme Court/Juge de la Cour suprême

Nevena KRCKOVSKA-MALINKOVSKA, Judge of the Supreme Court/Juge de la Cour suprême

Vladimir BABUNSKI, Judge of the Supreme Court/Juge de la Cour suprême

Sabit KRANLI, Judge of the Supreme Court/Juge de la Cour suprême

Lidija TANEVSKA-JADROVSKA, Chief of the President's Cabinet of the Supreme Court/Chef de cabinet du Président de la Cour suprême

Turkey / Turquie

Mustafa ÖZMEN, Judge of the Court of Cassation/Juge de la Cour de cassation

Mine KAYA, Judge of the Court of Cassation/Juge de la Cour de cassation

Ibrahim ŞAHBAZ, Judge of the Court of Cassation/Juge de la Cour de cassation

Ilyas ŞAHIN, Judge of the Court of Cassation/Juge de la Cour de cassation

Council Europe Experts / Experts du Conseil de l'Europe

Paul LEMMENS, State Council (Belgium)/Conseiller d'Etat (Belgique)

Jeremy McBRIDE, Barrister, Monckton Chambers (United Kingdom)/ Avocat, Monckton Chambers (Royaume-Uni)

Council of Europe / Conseil de l'Europe

Philippe BOILLAT, Director General of Human Rights and Legal Affairs/ Directeur général des droits de l'Homme et des affaires juridiques

Jean-Paul COSTA, President of European Court of Human Rights/Président de la Cour Européenne des Droits de l'Homme

Dragoljub POPOVIC, Judge of the Supreme Court elected in respect of Serbia/Juge de la Cour suprême élu au titre de la Serbie

Tatiana TERMACIC, Head of Unit in the Legal and Human Rights Capacity Building Division/Chef d'unité de la Division du renforcement des capacités en matière juridique et des droits de l'homme

Nadia CUK, Deputy Head of Office Council of Europe Office in Belgrade/ Chef adjoint du Bureau du Conseil de l'Europe à Belgrade

Vladan JOKSIMOVIC, Human Rights Adviser, Council of Europe Belgrade Office/Conseiller droits de l'homme, Bureau du Conseil de l'Europe à Belgrade

Maja STOJANOVIC, Assistant, Media and Human Rights, Council of Europe Belgrade Office/Assistante, média et droits de l'homme, Bureau du Conseil de l'Europe à Belgrade

Interpreters / Interprètes

Marianne DE SUSBIELLE
Danica KRALJEVIC
Biljana OBRADOVIC-VUJNOVIC
Vesna Koncar-Nikolic