

Implementation of the ECHR case-law in the national systems,
comparison and experience

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**The European Court of Human Rights –
yesterday, today and tomorrow**

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Chairman, colleagues and friends, ladies and gentlemen!

It is a great honour for me to be speaking here in the Main Hall of the Senate of the Parliament of the Czech Republic. And all this in Prague, which according to its emblem is the “Mother of all cities” (*Praga mater urbium*). Thank you very much for the invitation!

For my presentation today, I have chosen the title “The European Court of Human Rights – yesterday, today and tomorrow”. I wish to give you an overview – a very brief overview – of how the Court started and developed, where it stands today, and what we can expect for the future of the Court.

I will start with yesterday, with the Court’s past.

The Convention was created in 1950 on the basis of the Universal Declaration of Human Rights of 1948. Some of its procedural provisions were taken over *verbatim* from the instruments of minority protection of the League of Nations.

The Convention was created in the context of the Cold War as an instrument against communism – and as a demonstration of the values of the then Western European world.

This is confirmed by the fact that in the original text of 1950 individual applications played only a subsidiary role – States had to make a special declaration to accept jurisdiction as to the right to individual application – whereas inter-State complaints were part and parcel of the compulsory settlement of disputes established by the Convention.

This political context is reflected in a citation of the first President of the European Commission of Human Rights, Sir Humphrey Waldock, who in 1958 stated, I quote: "It [the Convention] was not primarily established for the purpose of putting States in the dock [i.e. before a court] and registering convictions against them."

Indeed, the first application declared admissible in the history of the Convention was not an individual application but an interstate application, namely *Greece v. United Kingdom* in 1956.

In 1950, individual applications were a completely new concept, so much so, that the original Convention did not allow individual applicants to take their case from the Commission to the Court (this had to be done by the then Commission itself).

So sensitive were individual applications at that time, that the mere decision to communicate an application had first to be taken by a Subcommittee of the Commission, before it was brought to the plenary.

What nobody expected: more and more individual applications were filed. Early in its career, the Commission decided to deal with them judicially, as a *quasi-court* (in fact, the Commission had not much choice - given the admissibility conditions listed in the Convention).

The Commission then developed an abundance of case-law on principles of judicial procedure and admissibility conditions which govern the Court's work to this day, for example the strict equality of all parties in the Strasbourg proceedings. Or take as a further example the rule of the exhaustion of domestic remedies which originally stemmed from general international law and diplomatic protection. Today, the conditions of this rule of the exhaustion of domestic remedies in international law are to 95% defined by the Strasbourg case-law.

The growing number of individual applications in the 1960's and 1970's required the Commission to streamline its procedures and to introduce procedural changes. The Commission installed its first working-group to examine its overload of cases in 1984 - at that time there were 6'000 cases pending! Eventually, the Committee of Ministers of the Council of Europe was short-circuited and the individual received *locus standi* before the

Court: by 1990 the individual, who had filed an application before the Commission, was allowed to bring his case and plead it before the Court.

The Convention was also extended as regards substantive rights. In 1952, the Additional Protocol, as it was then called, i.e. Protocol no. 1, included the right to property. There followed Protocol no. 4 guaranteeing, *inter alia*, the freedom of movement, Protocol no. 6 as one of the most important prohibited the death penalty in times of peace. There followed Protocols nos. 7, 12 and 13, the last one prohibiting the death penalty in all circumstances.

In the first decades it was mainly the Commission which was busy. The Court which commenced its work in 1959 set off on a slow start. There is a period of 18 months in the 1960's where the Court had no cases at all on its docket. But its work soon picked up, and it issued in the 1970s and 1980s landmark judgments on the prohibition of inhuman treatment and torture according to Article 3 of the Convention; on the definitions of civil rights and obligations in Article 6; on the margin of appreciation and subsidiarity in Articles 8-11; and indeed on the concept that the Convention is a "living instrument" and must be interpreted in the light of present day conditions rather than according to the standards of 1950. As the Court said in *Artico v. Italy* in 1980, the Convention enshrines, not theoretical and illusory rights, but those which are practical and effective.

In 1989, the Berlin wall fell, that was the beginning of the end of the old Strasbourg system – but every end is a new beginning! The number of Member States of the Convention jumped from 29 to today 47 States. The number of cases grew: 6'000 pending cases in 1984, in 2007 there were 100'000 cases, by 2011 160'000 cases pending. The Court's Registry grew: from some 30 Registry staff in 1984 to nearly 700 today.

States realised that the old Court and Commission were no longer suitable for the challenges of the 21st century. Two instances were too many; the Committee of Ministers of the Council of Europe no longer served its purposes. In 1998 the 11th Protocol to the Convention entered into force which was to be a watershed for the Convention system, it provided for a Copernican revolution. The two bodies of the Commission and the Court merged to become one European Court of Human Rights with full time Judges who reside permanently in Strasbourg.

Still, at that time European States were divided as to the functioning of the Court. There were those who wished that a two-body-system would continue with a first and a second instance. Other States wished one single European Court. A compromise was found for the 11th Protocol in truly European fashion: there was henceforth only one Court, however, within that Court there were two instances, enabling an appeal, under certain conditions, from a Chamber to a second instance, the Grand Chamber.

The 11th Protocol contained some flaws; in particular, it failed to deal with the great increase of new applications. The 14th Protocol to the Convention provided for further changes, among them in particular the Single Judge who has since been able to declare, on his or her own, inadmissible applications which are clearly inadmissible. The Single Judge has singlehandedly, if I may say so, saved the Convention system from its overload of cases.

But States were aware that the Court was suffering from an overload of cases; also, not all States were entirely happy with the Court's case-law. Three conferences were convened – in 2010 in Interlaken in Switzerland, in 2011 in Izmir in Turkey, and in 2012 in Brighton in the United Kingdom. All these conferences aimed at further streamlining the procedures of the Court. All these conferences were unanimous in that they stressed the importance of the Strasbourg court for the protection of human rights in the future.

The consensus of all States as regards the Court's position in Europe today is a valuable starting point for the next part of my presentation, namely the Court's present, its today.

I have straight away good news: today, the Court has today only some 88'000 pending cases. This is an incredible reduction of the 160'000 cases which the Court had in its docket some 3 or 4 years ago. This reduction has to do, as I said, with the institution of the Single Judge who has proved to be most successful. Also, the 14th Protocol introduced Committees of three Judges which are able not only to declare cases inadmissible, but also – in the case of well-established case-law – to find violations of the Convention. These Committees of three Judges are particularly successful

in respect of systemic violations: where, on account of a law which is not in conformity with the Convention, tens of thousands of cases have to be dealt with in a streamlined manner. These cases concern, for example, the non-execution of judgments in the Ukraine, or detention on remand in Italy.

I have more good news: I am sincere in my appreciation that the Court is functioning on a highly professional basis, both as regards its Judges and its Registry. Clearly, today, the Court is at the centre of human rights protection in Europe. On the global level, it is an important player. Indeed, it is the largest international court in the world.

As regards the statistics, it is business as usual. For 2014 the Court expects some 65'000 new applications, which is slightly less – by 5% - than the year before. As to the output, it is expected that the Court will produce some 80'500 judgments and decisions in 2014, which is about the same number as 2013. To give you another statistic as regards the incoming mail in the Court: every two minutes day and night somebody in the world is writing a letter to the Court (of course, this may also be follow-up correspondence), and every 8 minutes day and night a new application is registered.

At this stage, I should also point out that today the Court has a record number of Interstate cases pending.

Now for the less good news, namely the various difficulties with which the Court remains confronted. I will mention four of a number of difficulties.

First, while a large part of the clearly inadmissible cases have been dealt with by the Single Judges, it transpires that another segment of the Court's docket is building up, namely the so-called priority cases. Here, I should explain that the Court has divided its cases into six priority groups, to be treated according to their urgency.

The first group concerns danger to life and limb, inter alia very young and very old applicants, vulnerable applicants. These must be treated with the utmost priority. The second priority are cases concerning so-called systemic deficiencies, where, because of legislation, hundreds if not thousands of cases are building up with potential violations. The third priority concerns cases under Articles 3 and 5 of the Convention, i.e.

concerning inhuman and degrading treatment and torture, on the one hand, and detention, on the other.

There follows the fourth category of cases concerning Articles 8-11, namely the right to respect for family life, religious freedom, freedom of expression, and freedom of collation. The fifth category concerns issues of fair trial under Article 6 of the Convention, and the sixth category all clearly inadmissible cases.

Where is the difficulty? To the Court's dismay, it has transpired that the priority cases have not actually been treated with the necessary priority. Thus, there are sufficient cases under categories 1-3 to keep the Court busy for 2 or 3 years – never mind the important cases under category 4 concerning family life and freedom of speech. Here, the Court is called upon to reorganise itself and give absolute priority to the urgent cases.

A second difficulty confronting the Court is the reaction, mainly by practising lawyers (*avocats*), to its “decisions” concerning Single-Judge cases. In fact, these “decisions” are mainly presented in the form of a letter to the applicant or lawyer, and often contain no more than the indication that the case appears inadmissible as a whole. This has stirred much unrest in the legal profession who consider that every court – also the Strasbourg Court – should give reasons for its decisions. Why does the Court not do so? Previously, it motivated its decisions – leading to extraordinarily lengthy correspondence with applicants who contested the reasons, arguing in detail why their application was not inadmissible. In order to save human resources – namely answering countless applicants in many letters – the Court decided no longer to give reasons. However, there is a bright lining at the horizon: now that the Court has dealt with the large backlog of inadmissible cases, it is considering how to change its practice and start giving at least a minimum of reasons again.

A third difficulty concerns the difficulties in implementing the Court's judgments. This is and should actually be the business of the Committee of Ministers of the Council of Europe which is called upon to supervise the execution of the Court's judgments. I know of no court in the world which executes its own judgments

However, whilst most judgments eventually get implemented, it is certainly taking some States a lot of time to do so. There are in particular

delays in dealing with cases which concern systemic deficiencies: these are deficiencies concerning hundreds and thousands of applicants, for instance concerning prison conditions or the length of proceedings. Of course one can understand the problems confronting respondent States with such series of applications: it is not easy to bring about decent conditions for all prisons of a country; or to reform the court procedures in such a way that thousands of domestic courts no longer take too much time in deciding their cases.

Another problem facing States in the implementation of judgments is that the Court, in its judgments, merely states whether or not there has been a violation of the Convention; the judgments are declaratory, they cannot quash domestic decisions, even less can the Court decide the case itself. This has led to misunderstandings on the part of States who were uncertain how to implement the judgments. The Court is aiming at resolving this issue by occasionally giving advice in its judgments as to how a State should best react to it – for example in cases concerning unfair proceedings, to reopen the case. This advice is occasionally quite far-reaching and formulated in clear words – which has led some respondent Governments to complain that the Court lacks the competence to do so.

Finally, the fourth difficulty I currently see for the Court is the mood in European civil society as regards the Court and its judgments. For many years the Court was not on the radar of European media as its work was considered legal and not of general interest. This has changed in the last two decades with the Court being called upon – always on the basis of individual applications – to deal virtually with every aspect of modern society: from biogenetics over euthanasia to satellite transmissions. Whilst the Court aims at protecting human rights, this protection may at times upset other actors who feel they are losing out.

Bear in mind, too, that Europe today is facing an unprecedented wave of immigrants many of whom are sent back to their home states. Here, the Court has intervened and occasionally prevented a State from returning a foreigner – either as the foreigner risks inhuman treatment or torture in his or her home country, or because issues of family life are at stake. While this Strasbourg case-law goes back to the 1950s and 1960s, public opinion has only recently become aware of this. Those political parties in Europe who favour a reduction of immigration do not appreciate this case-law.

There are also particular problems with individual States. Consider the United Kingdom which has difficulties in implement the Court's judgments concerning voting rights of prisoners. Or the Russian Federation which is unhappy with the Court's case-law concerning paternity leave for soldiers in the army.

I come briefly to the tomorrow, to the future. What is awaiting the Court in the next years? I am no prophet; my guess is as good as yours.

To begin with, it will be interesting to see whether and when the 16th Protocol, enabling the Court to give advisory opinions, enters into force. The possibility of highest national courts asking for such advice would considerably strengthen the dialogue between the highest national courts and the Court. The fate of the 16th Protocol will in my view demonstrate how sound is the dialogue between the Court and domestic highest courts.

Next in the future, the relations between the Court and the European Union will be all important. Will the European Union become a Member of the European Convention of Human Rights – and how will this membership affect the application of the Convention, including the Court's case-law and procedures?

Also, there is much talk about the Court eventually taking on the role of a constitutional court of Europe. In some respects the Court is already acting as a constitutional court today, for instance when it examines legislation in the abstract. The difficulty lies therein that in fact the Court was set up to deal with individual applications on a case-by-case basis, somewhat reminiscent of a first instance District Court. The constitutionalisation of the Court would require considerable changes to the Convention.

Ladies and gentlemen, I come to the end. The Greek Philosopher DIOGENES OF LAERTIUS once said: "*of all things in this world, only one thing is certain: that all things will change*".

We have seen that the European Court of Human Rights has completely changed since its foundation in 1950 – though the basic function remains its overriding consideration: the effective protection of human rights. No doubt the Court will change again and again in future years to come.

Will the Court be able to celebrate the Convention's 100th birthday in 2050, i.e. in 36 years? My guess is that much will depend on future European integration. The stronger European integration will be in future, the stronger the role of the Court. If, regrettably, European States were to drift apart, this might weaken the future role of the Court.

Personally, I would bet that the Court will still be around on its 100th birthday, actually I have no doubts about that. The only problem is that I won't be around to collect any money which I would have won with my bet!

Thank you for your attention.