

Dialogue between judges



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Dialogue between judges

Proceedings of the Seminar
25 January 2008

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Jean-Paul Costa

President of the European Court of Human Rights

OPENING WORDS

I am pleased to welcome you to this seminar on the role of consensus in the Convention system.

Indeed, so many of you responded to our invitation – even more than last year – that we have had to change rooms in order to be able to accommodate everyone.

This testifies to the success of the formula launched a few years ago by some of my colleagues, Françoise Tulkens in particular. I am convinced that this year's topic, consensus, will result in fascinating speeches and discussions. I also hope that the topic will not be too consensual, since that would be prejudicial to the liveliness and interest of our discussions! However, I do not have too many fears on that score...

My colleague Anatoly Kovler has taken up the torch in organising this meeting, and was assisted by Roderick Liddell, Director of Common Services.

Before handing over to Judge Kovler, who will introduce the seminar, allow me to welcome the speakers: John Murray, Chief Justice of the Supreme Court of Ireland, Paul Martens, judge of the Constitutional Court of Belgium, and finally Péter Paczolay, Vice-President of the Constitutional Court of Hungary. They will be introduced shortly by my colleagues Renate Jaeger, Dean Spielmann and Lech Garlicki respectively, but on behalf of the Court I should like to thank them for agreeing to take part and, so to speak, for stimulating debate through their speeches. My sincere thanks.

I pass the floor to my friend Anatoly Kovler.



Anatoly Kovler

Judge of the European Court of Human Rights

The proposed topic of discussion, “The role of consensus in the Convention system”, is full of pitfalls for the unwary.

It is tempting to define consensus as general agreement (either tacit or explicit) between the members of *one group*, as we have done in the discussion paper circulated to participants in the debate. But it might be useful to distinguish three groups or three levels of consensus, in order to avoid confusion between them:

- the forty-six judges of the European Court;
- the legal community;
- public opinion in the broad sense (civil society).

Applied in practical terms to the Court’s case-law, this concept could be taken to mean that the judges who deliver a judgment are in agreement on the main points if the judgment is adopted unanimously, but might adopt slightly different stances, reflected in concurring opinions. But what if the judges rule by four votes to three (in a Chamber) or by nine votes to eight (in the Grand Chamber)? Does that mean that consensus has not been achieved and that the European Court is exposing its internal divisions in public, to the delight of its detractors? What is the difference between consensus and unanimity, or between consensus and conformism? We are very eager to hear what John Murray has to say in his talk on “Consensus: concordance, or hegemony of the majority?”.

The Court, as indeed the rest of the world, finds itself facing new issues: artificial procreation, same-sex marriages, adoption by single persons, the right to euthanasia, etc. In many cases, domestic law lags behind reality and offers no answers to questions of this kind, prompting citizens to come knocking on the door of the European Court. The Strasbourg judges are called upon to reach agreement amongst themselves in order to satisfy such aspirations, as the Strasbourg Court is very often perceived by public opinion as the court of final appeal. Will we always be able to take refuge behind conclusions such as the following: “Where ... there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin

[of appreciation to be enjoyed by the State] will be wider” (see *Evans v. the United Kingdom*¹)? I trust that our Hungarian colleague Péter Paczolay will provide us with a detailed

insight into the subject in his talk entitled “Consensus and discretion: evolution or erosion of human rights protection?”. Many observers would like to see the Court abandon its judicial restraint and demonstrate a certain judicial activism, to use the terms of the discussion paper. But are there limits to this activism? I will deliberately complicate the issue by asking another question: Is consensus possible when it comes to reversing a long-established tradition of international law – for example the veneration of State sovereignty – by asserting at some point that jus cogens rules take precedence over State sovereignty (something which a fairly substantial minority sought to do in *Al-Adsani v. the United Kingdom*²)? To ask a slightly different question: Is public opinion, and especially the legal community, ready to follow this kind of innovation? For it is not enough to secure consensus within the Court – we must also gain acceptance for such ideas in the outside world. Paul Martens will provide us with some of the answers in his address entitled “Perplexity of the national judge faced with the vagaries of European consensus”.

A number of other questions might be asked, at the risk of leading us into an impasse. But, as Zen philosophy teaches: “Where there’s an impasse, there’s a solution.”

One of the possible solutions, in my personal opinion, consists in reassessing the notion of consensus in the Convention system by taking it to mean agreement on the main points and on modern – let me stress that – European rules and principles of human rights protection, without precluding differences as to the details and the means of applying those principles and rules, in other words without imposing a mechanistic unanimity.

The founding fathers of the Convention provided us with a model for this kind of consensus. They agreed on a limited but achievable catalogue of rights guaranteed by the Convention, without claiming to cure all the world’s ills in a single document. Fifty years of case-law by the Commission and the Court clearly demonstrate that it is possible to gradually extend the scope of the Convention by interpreting it in what is called an evolutive manner, a principle established in *Tyrer v. the United Kingdom*³. But this process is not possible without on the one hand a more active response to the Court’s judgments at national level, particularly from the courts, and on the other hand a more detailed study of innovative legal practice in the member States (on this last point allow me to remark that in recent years the Court has taken increasing account of the case-law of the national courts in its decisions and judgments). It is therefore a two- way process.

1 [GC], no. 6339/05, § 77, to be reported in ECHR 2007.

2 [GC], no. 35763/97, ECHR 2001-XI.

3 Judgment of 25 April 1978, Series A no. 26.

Let us hope, too, that this consensus is shared not only by specialists and by European elites but also, ideally, by all citizens: universal agreement on the core values of the Convention system is the most effective means of defending it.

The role of consensus in the system of the European Convention on Human Rights⁴

⁴ Discussion paper prepared by the Organising Committee, composed of Anatoly Kovler, Vladimiro Zagrebelsky, Lech Garlicki, Dean Spielmann, Renate Jaeger and Roderick Liddell.

1. INTRODUCTION

Consensus is sometimes defined as general agreement (whether tacit or overt) among the members of a group.

Consensus has always played a role in international law, whether as an element in the development of customary law or as a decision-making technique in international organisations and diplomatic conferences. Consensus is also obviously relevant to the elaboration of treaty-made law.

As such, consensus is potentially both a force for progress at international level and a cause of stalemate. This has been true for the development of the international protection of fundamental rights, as in other areas. Thus, fundamental rights may move forward on the basis of a consensus or may stagnate as a result of a lack of consensus. On the other hand, the existence of consensus cannot be used to justify the erosion of fundamental rights.

Consensus in the context of the European Convention on Human Rights is generally understood as being the basis for the evolution of Convention standards through the case-law of the European Court of Human Rights. This notion was first developed in *Tyrer v. the United Kingdom*, in which, in finding that judicial corporal punishment amounted to degrading treatment within the meaning of Article 3 of the Convention, the Court observed that it could not but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. The Court coined the phrase “living instrument which ... must be interpreted in the light of present-day conditions” to express the inherent dynamism of the Convention⁵. The Preamble to the Convention makes clear that it was adopted with a view to achieving, among other things, the further realisation of human rights and fundamental freedoms. It is clear therefore that the rights and freedoms set out in the Convention are not set in stone with regard to their substantive content, which has to evolve along with developments in law, society and science. This evolutive interpretation makes it possible to adjust the Convention norms to new challenges generated by the complex development of European societies⁶.

Consensus also reflects the delicate balance that must be maintained in the relationship between the Strasbourg system and the national systems, with the European system and the national systems progressing “hand in hand”, to borrow, *mutatis mutandis*, the famous expression from *Handyside*⁷. Consensus legitimises progress and facilitates its reception into domestic law. Consensus drives forward or, on the contrary, restrains the Court’s interpretation of the Convention. Another way of putting this is that, where there is a large degree of consensus, the governments’

margin of appreciation will be severely limited. Conversely, where there is an absence of consensus, the margin of appreciation enjoyed by the national authorities will be correspondingly wide⁸.

While it is true to say that lack of consensus incites the Court to act with judicial restraint⁹, the adoption of innovative solutions despite the absence of consensus may be seen as a sign of judicial activism.

2. EXAMPLES TAKEN FROM THE COURT’S CASE-LAW

There are many examples in the case-law where the Court has invoked consensus to justify a dynamic interpretation of the Convention.

In *Marckx v. Belgium*, the Court noted that it was “true that, at the time when the Convention ... was drafted, it was regarded as permissible and normal in many European countries to draw a distinction ... between the ‘illegitimate’ and the ‘legitimate’ family”. However, the Court was “struck by the fact that the domestic law of the great majority of the member States of the Council of Europe [had] evolved and [was] continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim ‘*mater semper certa est*’ ”¹⁰.

In *Dudgeon v. the United Kingdom*, the Court recorded that, “[a]s compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied”¹¹.

In *Soering v. the United Kingdom*, the Court cited Amnesty International, referring to the “virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice”¹².

In *L. and V. v. Austria*, the Court stated: “In the present case the applicants pointed out, and this has not been contested by the Government, that there is an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations.”¹³

5 See *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31.

6 See D. Popović, “Le droit comparé dans l’accomplissement des tâches de la Cour européenne des droits de l’homme”, *Liber amicorum Luzius Wildhaber*, 2007, pp. 371 et seq. For a recent case concerning the non-recognition of a foreign adoption decision, see *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, to be reported in ECHR 2007; see also, below, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI.

7 See *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49.

8 See L. Wildhaber, “La place et l’avenir de la Convention européenne des droits de l’homme”, speech delivered in Istanbul on 19 May 2004.

9 For instance, in *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, to be reported in ECHR 2007, the Court stated as follows: “Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider ...”

10 See *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 19, § 41.

11 See *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 23-24, § 60.

12 See *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 40, § 102.

13 See *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 50, ECHR 2003-I.

In some cases, the lack of a common legal approach has not prevented the Court from referring to general trends.

In *Christine Goodwin v. the United Kingdom*, the Court cited an earlier judgment¹⁴ in which it had referred to an emerging consensus in the member States of the Council of Europe on providing legal recognition following gender reassignment. The Court continued: "In [that case], the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."¹⁵

In *Hirst v. the United Kingdom (no. 2)*, the Court stated: "As regards the existence or not of any consensus among Contracting States, the Court notes that, although there is some disagreement about the legal position in certain States, it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote. It may also be said that the law in the United Kingdom is less far-reaching than in certain other States. Not only are exceptions made for persons committed to prison for contempt of court or for default in paying fines, but unlike the position in some countries, the legal incapacity to vote is removed as soon as the person ceases to be detained. However, the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote. Even according to the Government's own figures, the number of such States does not exceed thirteen. Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue."¹⁶

In other cases, the Court has cited the lack of a common European approach as an obstacle to imposing a particular solution on the respondent State.

In *T. v. the United Kingdom*, the Court observed as follows: "... [A]t the present time there is not yet a commonly accepted minimum age for the imposition of criminal responsibility in Europe. ... Moreover, no clear tendency can be ascertained from examination of the relevant international texts and instruments ... The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility. ... The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention."¹⁷

In *Fretté v. France*, the Court stated: "It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case therefore touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State ... This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention."¹⁸

In *Odièvre v. France*, the Court noted: "[M]ost of the Contracting States do not have legislation that is comparable to that applicable in France, at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues to keep her identity secret from the child she has brought into the world. However, ... some countries do not impose a duty on natural parents to declare their identities on the birth of their children and ... there have been cases of child abandonment in various other countries that have given rise to renewed debate about the right to give birth anonymously. In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that States must be afforded a margin of appreciation to decide which measures are apt to ensure that the rights guaranteed by the Convention are secured to everyone within their jurisdiction."¹⁹

¹⁴ *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 2021, § 35.

¹⁵ See *Christine Goodwin*, cited above, § 85.

¹⁶ See *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 81, ECHR 2005-IX.

¹⁷ See *T. v. the United Kingdom* [GC], no. 24724/94, §§ 71-72, 16 December 1999.

¹⁸ See *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I.

¹⁹ See *Odièvre v. France* [GC], no. 42326/98, § 47, ECHR 2003-III.

In *Vo v. France*, the Court observed: “At European level, ... there is no consensus on the nature and status of the embryo and/or fetus ..., although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom ... – require protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2.”²⁰

In *Evans v. the United Kingdom*, concerning the destruction of frozen embryos on the withdrawal of consent of one of the partners, the Court considered that, “given the lack of European consensus ..., the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there ha[d] been no violation of Article 8 of the Convention”²¹.

3. THE REASONS FOR THE EXISTENCE OR ABSENCE OF CONSENSUS

The process of determining whether or not a consensus exists will inevitably involve a study of comparative law²².

It may be relatively simple to establish the existence of consensus in the light of legislation, case-law or administrative practices in the Contracting States. The absence of consensus may, however, have very different causes, such as the lack of a uniform practice or divergent approaches, or the fact that no clear position has been adopted in relation to novel issues. In other words, the lack of consensus does not necessarily mean that there is active resistance to a new solution.

4. CONSENSUS AND RECEPTION OF THE COURT’S JUDGMENTS

Finally, the Court’s judgments and decisions have an impact which reaches out beyond the specific case being adjudicated. The question therefore arises as to the reception of the case-law as a source of inspiration or guidance for other courts, be they international or national. In other words, to what extent is the Court able through its case-law to lay the foundations for the creation of a future consensus? Where the Court adopts a novel approach without the basis of an existing consensus, this question is of particular importance. This is in contrast to those cases where

the Court’s case-law can sometimes be considered to be merely illustrative of an international consensus on a given question rather than breaking new ground in relation to the level of human rights protection in Europe.

5. CONCLUSION

It is clear that consensus in the Convention sense does not mean the unanimity that is needed for treaty amendment. It is more an expression of the common ground required for the collective approach underlying the Convention system and the interaction between the European and domestic systems. At the same time its absence does not totally exclude a progressive interpretation. It is worth repeating that the existence of common ground cannot be invoked to weaken the Convention guarantees. It is at all events an entirely appropriate topic for discussion under the heading of “Dialogue between judges”.

²⁰ See *Vo v. France* [GC], no. 53924/00, § 84, ECHR 2004-VIII.

²¹ See *Evans*, cited above, § 92.

²² See on this question, C.L. Rozakis, “The European Judge as Comparatist”, in B. Markesinis and J. Fedke, *Judicial Recourse to Foreign Law. A new source of inspiration*, UCL Press, 2006, pp. 338 et seq.



Renate Jaeger

**Judge of the European Court
of Human Rights**

It is my pleasure to have been chosen to introduce John Murray to those of you who don't know him. He has been Chief Justice of the Supreme Court of Ireland for the past three and a half years and was a judge of the European Court of Justice in Luxembourg in the 1990s, having been Attorney General of Ireland for some five years prior to that. He was called to the Bar in 1967 (forty years ago) and has been a lawyer in private practice and counsel representing Ireland in leading cases before our Court. He is an extremely experienced lawyer in both the national and international arenas.

When the University of Limerick honoured Justice Murray by conferring on him the honorary degree of Doctor of Laws, express mention was made of the fact that he had always been proud of his native city, Limerick, but was also an experienced and active participant in the process of European integration, which is built on consensus. Who, then, could be more suited to speak to us on "Consensus: concordance, or hegemony of the majority"?

Let me add something else to help you understand better why I am so pleased that John Murray is actually here today: as an independent judge at home, he showed greater devotion at times to his favourite sport – rugby – than to a hearing scheduled on a perfect day. He sometimes left the court in pursuit of his sporting passion and entrusted the cases to the wisdom of one of his distinguished colleagues. As a matter of fact, he defended that practice among his fellow judges in Luxembourg: my German colleague Günter Hirsch, now President of the Federal Court of Justice, who was at that time his colleague at the European Court of Justice, was highly impressed by this attitude and never forgot to tell the story.

Thank heavens, John Murray is here with us and didn't pass on his invitation to someone else. He knows, as we all do: judges may be replaceable, but excellent speakers certainly are not.

Let us now listen to Chief Justice Murray.



John L. Murray

Chief Justice d'Irlande

CONSENSUS: CONCORDANCE, OR HEGEMONY OF THE MAJORITY?

The role of consensus within the system of the European Convention on Human Rights is a doctrine which has been described as "one of the Court's favourite, as well as controversial, interpretive tools"¹. It is an apt description, as the consensus doctrine has been used extensively by the Court for the best part of three decades and in that time has become from time to time the focus of divergent views both within and without the Court.

The question "what is the role of consensus within the system of the European Convention on Human Rights?" does not, of course, afford a brief or simple answer. The use of consensus as an interpretive tool is inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the Court, but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy.

How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights? Is resort to consensus consistent with respect for diversity among the democratic and sovereign States which are Contracting Parties to the Convention? Or an undesirable renvoi to national systems whose mechanisms for the protection of human rights may be seen as lacking? Alternatively, is it the only valid reference point in the evaluation of the societies of those States? Such questions go to the very heart of the Convention system, inviting reflection on its history, purpose and ultimate role in safeguarding human rights.

Even if one is to uphold in principle the legitimacy of the use of consensus as a tool of interpretation, its use remains contested. How is consensus to be determined? Upon what indicia should such consensus be based? Should a consensus be well-established or do the shady contours of an emerging trend suffice?

I do not pretend to advance answers to all the questions the notion of consensus as an interpretive device provokes, but I do hope that I will go some distance in usefully contributing to the debate which surrounds it.

In the context of today's discussions, the importance of the European Court's use of the consensus doctrine to national courts is undeniable, as it often constitutes the primary determining factor as to whether a right is one protected by the Convention and as to the breadth of the margin of appreciation to be

extended to the State Party in a dispute before the Court. It therefore constitutes an important means by which the autonomy and independence of Contracting States are circumscribed. Can it be said that consensus *always* allows the Convention system and the national system to progress “hand in hand”, or does the Court have a tendency to break free and run ahead when it so wishes?

Disagreement as to the role of consensus is, of course, experienced in *any* system where it is used as a tool by courts adjudicating on fundamental rights. Indeed, it is notorious that consensus is a particularly fertile source of conflict in the jurisprudence of the United States Supreme Court, and recent case-law has revealed the issue of the role of consensus in cases concerning the death penalty to be the muddiest battlefield of all. The relatively recent cases of *Atkins v. Virginia* and *Roper v. Simmons*, decided in 2002 and 2005 respectively, saw Justice Scalia, joined by other Justices, submit blistering dissents excoriating the majority not only for basing its decisions on what is deemed an insufficient national consensus, but for the sources the Supreme Court uses to determine such consensus and, in particular, its reliance on its own moral judgment in deciding such issues.

United States death penalty case-law may be characterised as an ongoing tug-of-war between two competing theories of adjudication that have a resonance for the Convention system. The theory espoused by one camp accords a high level of deference to State legislatures, strongly favours judicial restraint, and requires an overwhelming degree of convergence, based on domestic indicia, in order to determine a consensus, and that such consensus is well-established rather than of recent origin. According to this theory, overwhelming consensus regarding imposition of the death penalty in a given circumstance, when discerned, will not only inform but *dictate* the court’s decision.

The other theory, in according the court a role as a moral arbiter using its own independent judgment, tempers its deference to State legislatures and also takes a more relaxed approach to consensus, not only with the possibility of a more moderate consensus being utilised to buttress a principled judgment and a more flexible approach to the determination of consensus, with recent international developments of relevance, but also permitting the court to deviate from national consensus when its independent judgment warrants such departure.

While differences regarding consensus are also naturally evident to a certain extent in the Convention jurisprudence, they are manifested in a manner that is less defined, less consistent and less explicit. Accordingly, a brief analysis of United States death penalty jurisprudence, though seemingly a counterintuitive move, may serve to illuminate the issues facing any court in its use of consensus as an aid to adjudication, inviting reflection on the European Court of Human Rights’ approach to these issues.

I. CONSENSUS IN THE CASE-LAW OF THE UNITED STATES SUPREME COURT

The great significance accorded to the role of consensus in United States death penalty cases derives from the fact that such cases necessarily hinge on the Supreme Court’s interpretation of what constitutes “cruel and unusual” punishment

under the Eighth Amendment to the United States Constitution. Where it cannot be argued that a punishment would have been considered “cruel and unusual” at the time the Eighth Amendment was adopted, it must be argued that it is *now* considered as such in light of the “evolving standards of decency that mark the progress of a maturing society”.

Accordingly, consensus has played a central role in a string of decisions starting with the 1977 decision in *Coker v. Georgia*. In a number of key death penalty cases, overwhelming national consensus was determined against the punishment under consideration, leading to its invalidation. Thus, in *Coker* the Supreme Court struck down the death penalty for the rape of an adult woman having found that only one State, Georgia, authorised such punishment; in the *Ford v. Wainwright* decision of 1986, where an offender sentenced to death exhibited signs of a mental disorder subsequent to sentencing, the court supported the common-law proscription of execution of the insane given that not one State permitted such punishment¹; while in *Enmund v. Florida* in 1982 the court invalidated imposition of the death penalty on the applicant for mere participation in a robbery in which an accomplice took a life, on the basis that only eight States permitted imposition of such a penalty.

However, the decisions in these cases were not without controversy. Even in the plurality judgment in *Coker* may be seen a degree of disagreement that foreshadows the more acrimonious dissents of recent years. In the only full dissent to the majority decision, Chief Justice Burger took issue not only with the *objective* manner in which the Supreme Court had determined a national consensus on the issue, but with its interpretation of its role in such cases, notably the role of its own *subjective* moral judgment. Indeed, the Supreme Court’s discernment of a national consensus in the case is debatable but above all, in Chief Justice Burger’s view, it was based on developments too recent to be determinative of a consensus. “It is myopic”, he opined, “to base sweeping constitutional principles upon the narrow experience of the past five years.”

His greatest disquiet, however, stemmed from the fact that the Supreme Court’s decision partly rested on its subjective judgment that death is an excessive punishment for rape because the crime does not, in and of itself, cause the death of the victim. While both the majority decision and Chief Justice Burger had cited precedent to the effect that a decision “should be informed by objective factors to the maximum possible extent”, the court took the view that consensus did not “wholly determine” the question at hand and that, in addressing the question, it could rely on its independent moral judgment. In Chief Justice Burger’s eyes, given that the State legislatures enacted law based on painful and difficult choices, they should rightly be accorded a high degree of deference. Citing Justice Powell in *Furman v. Georgia* to the effect that “[i]t is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency”, he ultimately concluded that the court had overstepped its constitutional bounds by, as he put it, “substituting its policy judgment for that of the State legislature”.

¹ In this case, the offender, who was in no way incompetent at the time of commission of the offence, at trial, or at sentencing, subsequently exhibited signs of a mental disorder on the basis of which two psychiatrists concluded he was not competent to suffer execution.

Twelve years later, in *Stanford v. Kentucky*, a different plurality of the Supreme Court rowed back on *Coker*, breathing life into Chief Justice Burger's dissent. In the majority decision, Justice Scalia rejected outright the notion that the court's own independent judgment was relevant in considering the constitutionality of the imposition of the death penalty on juvenile offenders who were 16 and 17 years of age at the time they committed the crimes to which the punishment attached. The court's role, he emphasised, was simply "to identify the 'evolving standards of decency'; to determine, not what they *should* be but what they *are*"².

In that case Justice Scalia also rejected Justice Brennan's dissenting contention that reference to consensus returned delineation of the contours of the Eighth Amendment to those States whose actions the Eighth Amendment was intended to restrain. He stressed that "evolving standards of decency" could only be determined through objective indicators of State laws or jury determinations in relevant cases which evinced a societal consensus against a given punishment. While proportionality analysis could play a part in adjudicating on a given Eighth Amendment issue, such analysis could only be based on societal standards, not judges' preferences. To hold otherwise would, he said, "replace judges of the law with a committee of philosopher-kings". Finding no national consensus against the punishment in question, the court upheld its constitutionality.

In 2002, the Supreme Court returned to the question in *Atkins v. Virginia*, concerning execution of mentally retarded offenders³. Explicitly overturning *Stanford*, the court returned to its earlier approach in *Coker* and developed its reasoning further. Once again, consensus as determined by objective indicia was deemed to be of great importance, but not automatically determinative of the issue in question. In cases where objective evidence of a national consensus against the death penalty could be found, the court could impart its own judgment to determine whether there might be reason to deviate from that consensus, as contained in the policy choices of State legislatures.

Most significantly, the court embraced its role in not only *divining* but *defining* contemporary standards of decency and reaffirmed the idea that the concept of cruel and unusual punishment is subject to reinterpretation⁴. Based on these considerations, the finding of a slim "consensus" of thirty States and, in a highly controversial move in a United States context, international-law developments, the court invalidated the execution of mentally retarded offenders as a "cruel and unusual" punishment. In the subsequent case of *Roper v. Simmons* in 2005, which revisited the execution of 16 and 17 year olds considered in *Stanford*, the court followed *Atkins* in a judgment very similar in its reasoning.

It is these latter decisions that attracted the considerable ire of Justice Scalia and others, to which I have already alluded. The dissents oppose every aspect of the majority decision in each case, in terms that are not altogether temperate. In reference to *Atkins*, for example, Justice Scalia complained that the decision "does

² Emphasis added.

³ Please note that "mentally retarded" is the term used by the court.

⁴ See Steven J. Wernick, "Constitutional Law: Elimination of the Juvenile Death Penalty – Substituting Moral Judgment for a True National Consensus" *Florida Law Review*, vol. 58, 2006, p. 475.

not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members".

A significant portion of the *Atkins* dissent dealt with the majority's calculations of a consensus, which were also relied on in *Roper*. While I do not wish to analyse this in detail, the extent to which the majority's consensus calculations are subjected to scrutiny is undeniably a striking aspect of these dissents, one that is almost wholly absent in its level of detail from dissents to decisions of the European Court. Ultimately, Justice Scalia concluded, the consensus against the punishment in *Atkins* stood at 47% rather than 60%, more indicative of an *absence* of consensus than anything else.

Not only was the consensus deemed insufficient, but also to be based on developments too recent to be legitimately utilised as evidence of consensus. Noting that previous cases had required "overwhelming opposition to a challenged practice, generally over a long period of time", the dissent holds that such consensus should be "of the same sort as the consensus that adopted the Eighth Amendment ...", and, echoing Chief Justice Burger's dissent in *Coker*, that "reliance upon trends, even those of much longer duration than a mere fourteen years, is a perilous basis for constitutional adjudication ..."

Citing *Gregg v. Georgia*, Justice Scalia stressed that "in democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people ..." and that, by departing from reliance on consensus alone to an approach primarily determined by the Supreme Court's independent moral judgment, it was expanding its constitutional role in an unjustifiable manner. He stated: "On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the nation?"

Special scorn was reserved for the court's reference to international sources and opinion polls. Justice Scalia accused the court in *Roper v. Simmons*, for example, of cherry-picking those sociological studies that supported its position. In his words, all the court had done was "to look over the heads of the crowd and pick out its friends". Through its debatable determination of a national consensus and its reliance on foreign sources in *Roper*, Justice Scalia concluded: "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take centre stage ... To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."

In the *Roper* case Justice Kennedy, writing for the majority, referred to the fact that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty". He concluded by saying: "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and people simply underscores the centrality of those same rights within our own heritage or freedom." The riposte of Justice Scalia to the majority view was: "Because I do not

believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five members of this Court and like-minded foreigners, I dissent.”

The majority nonetheless anchored their finding that the juvenile death penalty was unconstitutional in the text and values of the American Constitution. In citing foreign sources of law, and in some cases judgments of this Court, the majority sought to demonstrate that the interpretation given to the text was not egregious, and corroborated rather than determined the moral value they found as being indigenous to it. The majority in effect denied, contrary to Justice Scalia’s assertion, that they were using foreign law or foreign sources of law as a naked means of importing legal concepts and values into national constitutional law. Of course it was necessary that they should do that as otherwise they would risk undermining the legitimacy of the Supreme Court by attributing meanings and values to the Constitution which did not stem from and were not indigenous to that Constitution itself. They also appeared to reject the notion that a commonality of values on the international level was sufficient in itself to impose conformity for its own sake in the protection of rights.

II. THE ROLE OF CONSENSUS IN THE CONVENTION SYSTEM

It may be asked, what significance does this war of words have for the topic under discussion today? What relevance has the case-law of a court operating in a context that differs in many respects to the Convention system? While useful analogies may be drawn between the federal system of the United States and the system of the Convention, the United States Supreme Court ultimately works in a national setting, containing one *demos* – however heterogeneous its population may be in terms of, say, religious or ethnic origin. It is also tasked with interpreting a federal Constitution which has inherent primacy throughout the federal State.

The same cannot be said of the European Court of Human Rights, which operates in the context of international law, with forty-seven States Parties to the Convention, that is, forty-seven sovereign nations which operate within their own historical, social and political milieus, containing forty-seven distinct *demos*. Interpretation of the Convention is subject to the presumption that the States do not intend to surrender their sovereignty except to the extent made clear in the instrument itself. Consequently, the central role of consensus in the case-law of the United States Supreme Court is arguably much more justifiable than its centrality in the Convention system.

Nevertheless, the United States jurisprudence poses a number of questions of relevance to today’s topic, not least:

- What level of deference should the Court accord to State sovereignty?
- What is the Court’s role? Is it merely to *divine* the objective consensus and base its decisions solely on such consensus when it is clearly in evidence, or is it to *define* consensus based on some notion of trends or “emerging” consensus?

- Should the Court’s independent analysis and judgment come into play? To what extent? Should the Court be capable of departing from the prevailing consensus based on its own principled assessment of a given question?

Regarding the *determination* of consensus, the United States case-law poses questions such as:

- How should consensus be determined? That is, what objective indicia may legitimately be used?
- What level of consensus is sufficient? Should it be overwhelming consensus?
- Should consensus be well-established or is reference to emerging trends justified?

The differing answers to these questions in United States jurisprudence reflect diverging views, not only on the application of the consensus doctrine to individual cases, but on the fundamental question as to what the Supreme Court’s place in the constitutional structure should be. The more flexible approach to consensus, evinced in the more recent United States decisions, displays, albeit implicitly, a view that consensus is perhaps not the most legitimate basis upon which fundamental rights questions should be determined. It is a sceptical approach that accords weight to consensus but does not recognise any obligation to be bound by such consensus.

The approach to consensus in the case-law of the European Court is more difficult to discern. Though in a less overt or defined manner than the opposing theories of adjudication extant in the case-law of the United States Supreme Court, Convention jurisprudence has been characterised as containing a persistent tension between what are perceived as its two major interpretative poles: consensus and “moral truth”⁵. This pull between the two poles is, however, to some extent masked by the seemingly inconsistent application of the consensus doctrine, which renders identification of the European Court’s precise approach to consensus no easy task. On the one hand, in many cases the Court appears to take a sceptical approach to consensus reminiscent of that applied in the United States decisions such as *Roper v. Simmons*, according it weight but using its own independent judgment also. On the other hand, at times consensus is seen as automatically determinative of a given issue, for example, where a State is accorded a wide margin of appreciation due to the mere absence of consensus on a given matter.

There is also the more flexible, if not lax, approach to the objective indicia used to discern consensus. From the inception of the consensus doctrine, the Court has taken a flexible approach, relying not only on specific legislation in the national systems of the Contracting Parties but also looking to other sources such as international conventions. Nor has the Court required that consensus be

⁵ See George Letsas, *op. cit.*, p. 281.

overwhelming or long-established: indeed, it is frequently the case that a decision refers to trends in a given direction rather than concrete consensus based on analysis of national systems.

This ambiguity as to the role of consensus is evident from the very case in which it was first introduced. In a similar manner to the Eighth Amendment to the United States Constitution, the centrality accorded to consensus in the Convention system derives from the concept, introduced in *Tyrer v. the United Kingdom*⁶ in 1978, of the Convention as a “living instrument” requiring an evolutive interpretation “in the light of present-day conditions”. In that case, which concerned the use of birching on the Isle of Man, the Court held that it could not “but be influenced by developments and common standards that are found in the legislation of the member States of the Council of Europe, rather than anywhere else”⁷.

Curiously, however, in *Tyrer* the Court made no attempt to analyse national legislation or any other objective indicia in order to establish a pan-European consensus against the use of corporal punishment. Rather, the Court referred to the *nature* of the punishment, concluding that, as an institutionalised assault on a person’s physical integrity and dignity, birching was in violation of Article 3. The case thus appears to have been decided primarily according to the Court’s assessment of the intrinsic nature of the punishment in issue, and the protection afforded by Article 3 of the Convention. That is, on the basis of a “moral truth” approach, involving principled consideration of the substantive content of the right, rather than one based on consensus.

In *Marckx v. Belgium*⁸ decided the following year, concerning the rights of illegitimate children, the Court’s reference not only to national legislation but to two international conventions, which had not been signed by the majority of Contracting States, emphasised that the Court’s “living instrument” approach would not be based on any specific legislation to be found in a majority of the Contracting Parties, but rather on evidence of an evolving European consensus demonstrated in potentially any number of sources.

Indeed, the vagueness of the standard applied in *Marckx* revealed the elasticity of the consensus doctrine, a laxity which, it might be said, has become ever more marked in the jurisprudence of the Court in the three decades since that decision. While some cases contain analysis of the national legal systems of Contracting Parties, for example *Dudgeon v. the United Kingdom*⁹ and *Lustig-Prean and Beckett v. the United Kingdom*¹⁰, others do not, for example, in *Hirst v. the United Kingdom* (no. 2)¹¹ the Court made only cursory reference to domestic legislation.

Indeed, in *Hirst*, a decision of 2005 which concerned the United Kingdom’s blanket denial of voting rights to prisoners, the sources used to determine consensus attracted considerable disagreement. In that case, Judges Wildhaber, Costa,

6 Judgment of 25 April 1978, Series A no. 26.

7 See George Letsas, *op. cit.*, p. 299.

8 Judgment of 13 June 1979, Series A no. 31.

9 Judgment of 22 October 1981, Series A no. 45.

10 Nos. 31417/96 and 32377/96, 27 September 1999.

11 [GC], no. 74025/01, ECHR 2005-IX.

Lorenzen, Kovler and Jebens in a joint dissenting opinion took issue with a majority decision which referred extensively to two recent judgments of the Supreme Court of Canada and the Constitutional Court of South Africa but which, they noted, “unfortunately contains only summary information concerning the legislation on prisoners’ right to vote in the Contracting States”. Was this simply a case, in Justice Scalia’s words, of the Court looking over the crowd and picking out its friends?

Hirst also provides an example of the Court’s differing approaches to cases where no consensus may be discerned. In that case, the Court held that “... even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue”, ultimately finding that the ban constituted a disproportionate infringement of the right contained in Article 3 of Protocol No. 1.

This may be compared with the case of *Vo v. France*¹², decided the previous year, in which the Grand Chamber held that, as “there is no European consensus on the scientific and legal definition of the beginning of life”, “the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere”.

However, in *Christine Goodwin v. the United Kingdom*¹³ in 2002 regarding transsexuals’ right to marry, the Court found that such a right existed despite the absence of a European consensus on the issue, given the existence of a “continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals”. One might also add that in the *Christine Goodwin* case one finds a rather odd linkage of the social security rights afforded to transsexuals in the United Kingdom and the existence of a right to marry based on the text of the Convention.

Finally, in *Evans v. the United Kingdom*¹⁴, decided last April, the Court’s reliance on an absence of European consensus in its finding that the applicant’s Article 8 right to privacy had not been infringed by national legislation requiring embryos created through in vitro fertilisation, or IVF, to be destroyed upon withdrawal of consent by her partner, was strongly criticised in a dissenting opinion submitted by Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, stating that: “A sensitive case like this cannot be decided on a simplistic, mechanical basis, namely, that there is no consensus in Europe, therefore the Government have a wide margin of appreciation” and that: “The Court should not use the margin of appreciation principle as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review.”¹⁵

These differences in the approach of the Court to the determinative value of consensus and the somewhat lax approach to the objective indicia used to determine consensus, as outlined above, beg a number of questions.

12 [GC], no. 53924/00, ECHR 2004-VIII.

13 [GC], no. 28957/95, ECHR 2002-VI.

14 [GC], no. 6339/05, to be reported in ECHR 2007.

15 Paragraph 12 of the dissenting opinion.

Firstly, is the Court relying on consensus as a determinative factor in many of its decisions or is consensus simply a mask for engaging in the process of a substantive analysis of the matter in issue?

Secondly, if the latter is the case, why is the doctrine of consensus invoked at all? It has been said that Convention case-law “shows that the Court is primarily interested in evolution towards the moral truth of the ECHR rights, not in the evolution towards some commonly accepted standard, regardless of its content”¹⁶.

The Court’s primary approach, which is sceptical of the automatically determinative value of consensus, can be viewed as an effort not to force the will of the majority of Contracting Parties on the minority, whose approaches may differ, through blanket application of the most common approach, but to look to the text of the Convention itself to ascertain, using the Court’s own judgment, what rights are protected, and to what extent. Such an approach is clear, it is claimed, from the fact that the Court does not engage in in-depth analysis of the national systems and aggregate what most States do, but rather that decisions are usually based on substantive considerations of the right in question.

However, there would appear to be some substance in the argument, at least for a significant proportion of the case-law reflecting choices made by the Court, for questioning whether the notion of consensus has been used as a basis for its conclusions rather than resolving issues by a substantive analysis of the value and scope of the right asserted.

A search for the true meaning and ambit of certain of the rights protected by the Convention inevitably involves a search for their moral content if not their moral truth.

We live in a moral universe. The law, and particularly judicial decisions, are not detached from the moral values that guide society. Law is not a set of rules such as would run a railway system. So, in searching for judicial resolution of complex moral or social problems facing society, a court must find those solutions within the ambit of its own societal framework so that they are consistent with and reflect the values and ethos of society.

Resolving such social issues in a judicial context is a difficult challenge for any court. Where can it find that moral value or determine that truth? Judges are no more competent or better trained than the butcher, the baker or the candlestick maker to determine which abstract moral principles should govern society and in which circumstances. “In an open democratic society the people can debate these things, each side trying to persuade the other of its way of thinking. And the people (unlike the courts) can even compromise on these issues, for example, by leaving the issue of abortion to be dealt with in a divergent fashion by sub-units of a federal State, or prohibiting only abortion performed in a particularly brutal fashion, or by permitting abortion in the case of rape or incest.” (Justice Scalia)

¹⁶ See George Letsas, *op. cit.*, p. 302.

National courts also usually have the benefit of written constitutions and national legislation in which certain rights and values and opinions are expressed as the fruit of the democratic process within that society. Thus, the case-law of national courts, and particularly of constitutional courts, will, in its evolution, have had an intimate link with society.

The European Court, in addition to the absence of a single societal context, does not have the advantage of other constitutional institutions such as a legislating parliament or a government and lacks the reference points that exist for judges in the structure of the nation State.

Normally the first point of departure for any court in interpreting law is the text of the law to be interpreted. The only authentic text available to the Court is the Convention and its Protocols. If the ordinary or generally understood meaning of the text is clear, interpretative problems can be readily resolved. But, as we know, many of the provisions of the Convention are general, vague and often uncertain as to their import. In Article 8, what does “respect” mean? Or what does “private life” mean? Who knows? Does any court know?

A court entrusted with the obligation to interpret and apply such general or vague treaty provisions may feel driven to sources outside the text for the purposes of ascertaining their substantive meaning and scope.

Such a recourse may lead to the notion of consensus, but it risks calling into question the legitimacy of binding decisions that are not rooted in the Convention itself.

Consensus, I suppose, has at least the advantage that the concept of truth may be irrelevant to conclusions based on it. As Professor and Judge Posner points out: “To equate truth to consensus would imply that the earth was once flat ...”¹⁷ He pointed out that: “Much of our stock of common sense knowledge and elementary moral beliefs is validated [by consensus] and no other way.”¹⁸ (Although he was referring to “the intergeneration of consensus as being more reliable” – “the longer a widespread belief persists, surviving changes in outlook and culture and advances in knowledge the likelier it is to be correct”.)

If no consensus is found, however consensus is defined or determined, then it may be that the Convention is not intended to extend protection at pan-European level to the right or matter which is the subject of an application. Alternatively, it may not be intended to confer the level or ambit of protection which the applicant seeks, leaving the Contracting State the freedom to decide how it regulates the subject matter in issue or, as the Court usually puts it, leaving it with a sufficient or wide margin of appreciation. That is unless, of course, the Court assumes for itself the moral conscience of Europe and insists that virtually every issue on a matter related even indirectly or notionally to Convention rights must be solved by judges.

¹⁷ See Richard A. Posner, *The Problems of Jurisprudence*, Harvard University Press, 1990, p. 113.

¹⁸ *Ibid.*, p. 112.

The place of the Court's independent judgment in the functioning of the Convention system was recently described by Judge Rozakis in an Article in the *Tulane Law Review*¹⁹. The Court's role, he said, "is not solely to settle disputes between individuals and States but also to construe the law of the Convention in a manner which may apply at a pan-European level. In other words, the role of the ECHR is one of 'integration', in the sense that, through its decisions and judgments, it is attempting to create a coherent body of human rights rules that apply equally and indiscriminately in the sphere of the legal relations of all of the States Parties to the Convention."

Judge Rozakis argues that the determination of a "common denominator" through the comparative study of the national legal systems is an aspect of the European Court of Human Rights' functioning that "contains some features of creating law, particularly if one takes into account the fact that the European judge retains, at the end of the day, the faculty to determine what the common denominator is and to lean towards one or another solution accordingly".

Is not the reference to the Court's role as one of "integration", coupled with the Court's power not only to discern but to *determine* consensus essentially a reference to a power to harmonise the legal systems of the Contracting Parties? And then by reference to some "common denominator" detected by the Court outside the text of the Convention the approach reflects in part the task of the European Court of Justice to harmonise the domestic legislation of member States of the European Union. However, that task is expressly provided for in the text of the founding treaties of the European Communities and required by the defined nature and express objectives of the European Union itself, i.e. to lay the foundations of an ever closer political union among the peoples of Europe within a constitutional framework based on an autonomous and holistic legal order. By contrast, there is no textual basis for such a role in the European Convention on Human Rights. The Convention system is evidently of a different nature from the European Union: it is, for all its positive attributes, a system based on international law and must operate, and was intended to operate, within the constraints of that context. Moreover the Court of Justice of the European Communities is relatively cautious in limiting its determination of rights and obligations of both individuals and States to those which arise within the context of the European Union treaties. It does not seek to be a panacea for all society's perceived shortcomings. Also, for reasons quite distinct from those which seem to have motivated the European Court of Human Rights, and which are cogently set out in the case-law of the Court of Justice, when the Court of Justice seeks inspiration from general principles of law, including those relating to human rights, other than those expressly stated in the treaties themselves, it confines itself to the constitutions of, and the international conventions subscribed to by, the member States. Those sources, and in particular the constitutions rather than national legislation, are a more reliable source of consensus, and well-established consensus at that, than the legislation of member States which may reflect no more than local compromises concerning current trends or developments.

19 See Christos L. Rozakis, "The European Judge as Comparatist", *Tulane Law Review*, vol. 80, 2005, p. 272.

It is true, of course, that international law is capable of evolution, and that such evolution is tied to emerging custom or consensus, as the introductory note for this seminar provided by the Court points out. There is, however, a distinction between the notion of evolving public international law, which governs relationships between sovereign States and their obligations to one another, based on a consensus among them as to the generally recognised principles of international law on the one hand, and the interpretation in an evolutionary manner of texts internal to a discrete international instrument on the other. The erosion or indeed the elimination of the capacity of a State to act by reason of the internal provisions of such an instrument should in principle stem from its express provision if its integrity is to be maintained and respected. Evolving trends at national level can hardly afford a court a licence to promote consensus in areas where no pan-European norm may be discerned. This seems particularly true in cases involving sensitive moral and ethical questions with which every society struggles to some degree or another.

Indeed, it has been noted by one commentator that consensus is portrayed by its proponents as "a sophisticated mechanism to prod nations to update their policies gradually to emerging new standards while still respecting their domestic processes ..."²⁰ In this manner, it is argued, "judges are portrayed as holding firm the compass of morality, guiding the communal ship towards more enlightened standards, yet taking into account the prevailing winds and sea conditions". On this view, it is said, "[t]he consensus rationale ... is but a convenient subterfuge for implementing the court's hidden principled decisions. The rather vague process through which consensus is actually being identified only supports such an explanation"²¹.

Indeed, as an American author has observed: "Historically, the claim of consensus has been the first refuge of the scoundrel; it is a way to avoid debate by claiming that the matter is already settled."²²

These are rather harsh judgments on the notion of consensus, but it is difficult for that notion to escape the question mark which continually hovers over its legitimacy as a device for imposing judicially closer moral standards on societies in areas that pose complex moral and ethical questions for society. As I mentioned earlier, Posner suggested that the most reliable, perhaps the only reliable, consensus is intergenerational consensus where certain principles and values have stood the vicissitudes and test of time in evolving societies. Can recent consensus, emerging consensus, or trends be properly described as true consensus? Is it not simply a majority view? And just a current one at that. If societies are evolving, do they not have the right and freedom to evolve in discretionary areas while respecting well-established core human rights values, according to their own mores, heritage and culture and at their own pace? Or should they be deprived of that freedom only because a majority of other societies in Europe make their own separate free choice and their own distinct compromises on these issues? It is accepted that the Contracting States may, consistent with the Convention, afford a higher level of protection to a human right than that provided in the Convention itself. This

20 See Eyal Benvenisti, "Margin of Appreciation, Consensus and International Standards", *New York University Journal of International Law and Politics*, 1999, p. 851.

21 Ibid., p. 852.

22 Michael Crichton, California Institute of Technology, Michelin Lecture, 17 January 2003.

recognises a dichotomy between the effect of the Convention in protecting core values and how far that protection must go. That option for Contracting States also seems to exclude harmonisation as such as an objective of the Convention. If the substance of any such majority consensus is to be fully comprehended and the nature of the value judgments, with their inherent compromises and possible exceptions, understood, is not an objective analysis of all relevant national measures a necessary element in understanding how far consensus may be said to go? Indeed, is not a majority consensus itself a contradiction in terms?

Should the Court's starting-point be a substantive analysis of the nature and content of the rights inserted in the terms of the Convention before moving to an objective analysis of the laws of Contracting States as an aid to interpretation of the Convention without such analysis being the sole determining factor which extends the meaning and scope of the Convention beyond that which has been previously and generally accepted or understood, even by the Court?

If a State through the democratic process makes difficult ethical and moral choices reflecting issues deeply rooted in the social fabric of its society is it for an international judicial body (or indeed a national one) to negate those difficult choices under the cloak of consensus? Is the Convention intended to protect human rights which are fundamental and necessary for a democratic society founded on the rule of law or just any legal right which a majority of national legislatures have separately and distinctly provided for on a matter related, even if only procedurally, to the Convention?

While there are undoubtedly core and fundamental rights which form part of the European heritage and indeed are universal in their respect for the dignity of the individual, does the Convention mean that any measure touching on those rights which is reflected in some way in the legislation, not just the constitutions, of a majority of member States of the Council of Europe must be imposed on all other States? Is that what the Convention says? National legislative measures often reflect compromises of political policy at national level accompanied by caveats and exceptions or limitations which over time may be amended or qualified or even abandoned. If national legislative measures can be a source for determining a consensus among States, can it be done by mere general reference or should it require a detailed analysis of each legislative measure?

These questions seem to me to indicate that consensus as a tool for chiselling out new meanings for the Convention has inherent frailties.

If it is used too freely or with laxity, is there not a real risk of comparable decisions in diverse societies among a majority of the Contracting Parties to the Convention being harnessed so as to impose a sort of hegemony of the majority, never contemplated by any of those discrete decisions taken in the different States, on the minority? If that path is followed, where is the scope for the democratic ideal of diversity? As indicated earlier, fundamental human rights which are universally recognised (right to life, prohibition of torture, inhuman or degrading treatment, to name but a few) and which are expressly cited in the Convention and other international instruments such as the United Nations Declaration of Human Rights may be universally enforced. But not every *legal* right necessarily falls to be protected at this level. Similarly the scope and reach of the protection afforded to

fundamental rights are not always absolute or unlimited. As the author cited earlier suggests, reliance on consensus should not be an alibi for the absence of an analysis and cogent reasoning as to where a State's responsibility under the terms of the Convention begins and ends.

I should conclude, I think, by making a brief reference to the structure of the Court. The Court, of course, consists of one judge from each member State of the Council of Europe. It is an unwieldy number by virtue of which it is impossible for it to provide a collegiate decision in every case. A problem not unique to this Court. It is also a problem for the European Court of Justice, even if to a lesser extent. The justification for such a large number is of course the desire to ensure that the work of the Court is informed by the professional knowledge and judicial perspective of judges from each country and each legal system within the Council of Europe. Since that cannot be achieved in any individual case, it does suggest that a court, acting in those circumstances, should exercise prudence and restraint in changing its case-law or significantly developing it on the basis of a court-determined consensus or trend. No doubt the Court seeks to do this but one must wonder whether, say, a majority of eleven and a minority of six is a sound launch pad for decisions which may radically change the application of the Convention. In the Court of Justice there was, and perhaps still is, a convention that established jurisprudence would not be overruled on the basis of a bare or narrow majority, even when the full court was sitting.

The task of this Court is not an easy one. I know that I have raised some questions without providing ready answers, but I do hope that it helps animate the debate concerning the role of consensus in the Court's heavy responsibility when interpreting the Convention with a view to protecting fundamental rights in the Contracting States.



Dean Spielmann

Judge of the European Court
of Human Rights

It is a great pleasure and especially a great honour to introduce our next speaker: Professor Paul Martens, judge of the Belgian Constitutional Court.

A Doctor of Laws of the University of Liège and a leading judge, Mr Martens has been a member of the bench at the Liège Commercial Court, a member of the *Conseil d'Etat* and a judge of the Belgian Court of Arbitration, which has now become the Constitutional Court of Belgium.

Paul Martens is no stranger to our Court. He has sat as an ad hoc judge in various Belgian cases and, in this capacity, contributed to the judgments in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*¹ and *Riad and Idiab v. Belgium*².

Mr Martens has combined his career as a senior judge with that of a professor of international standing. Professor of legal sociology at the Free University of Brussels and of legal theory and contemporary legal thought, Paul Martens has also been Visiting Professor at the University of Paris-XII (general theory of law) and occupied the Francqui Chair at the Notre-Dame de la Paix University Faculties, in Namur. His academic career has been marked by the award of a doctorate honoris causa from the University of Limoges.

His impressive list of publications, reproduced in the *Liber amicorum* offered to him last year³, includes several outstanding works. Among these I should like to mention *Théories du droit et pensée juridique contemporaine*⁴, and a recent book – the outcome of the lectures he gave in his capacity as holder of the Francqui Chair at Namur University – entitled *Le droit peut-il se passer de Dieu ?*⁵. There is certainly no “consensus” on this particular question and it is not something with which the courts need occupy themselves unduly. Nonetheless, if we are to believe Mr Martens, European consensus on other less fundamental and existential issues sometimes gives rise to confusion among the domestic courts. Is “European consensus” a source of “confusion”, “disorder”, “trouble” or even “anxiety”, “distress” or “distraction”, as opposed to “order”, “confidence” or “firmness”?

Judge Martens, you have the floor.

1 No. 13178/03, ECHR 2006-XI.

2 Nos. 29787/03 and 29810/03, to be reported in ECHR 2008.

3 *Liber amicorum Paul Martens. L'humanisme dans la résolution des conflits. Utopie ou Réalité ?*, Larcier, Brussels 2007, 1,008 pages.

4 Paul Martens, *Théories du droit et pensée juridique contemporaine* (“Theories of law and contemporary legal thought”), collection de la Faculté de droit de l'Université de Liège, Larcier, Brussels 2003, 337 pages.

5 Paul Martens, *Le droit peut-il se passer de Dieu ? Six leçons sur le désenchantement du droit* (“Can law do without God? Six lessons on the disenchantment of law”), Presses universitaires de Namur, collection “Travaux de la Faculté de droit de Namur”, Namur 2007, 169 pages.



Paul Martens

Judge of the Belgian
Constitutional
Court

PERPLEXITY OF THE NATIONAL JUDGE FACED WITH THE VAGARIES OF EUROPEAN CONSENSUS

In asking national judges to discuss European consensus, the Court is inviting them to address one of the most enigmatic concepts of its case-law.

Sometimes the Court finds that such a consensus exists and approves of it, which might give the impression that its task is simply to endorse the choices made at State level.

At other times it finds that no such consensus exists and respects the right of States to be different, as though abandoning the idea of building a democratic European society.

At other times it seems indifferent to whether there is a consensus or not, being anxious to develop a European public order that transcends national particularities.

The concept, then, is sometimes positive, sometimes negative, sometimes descriptive, sometimes prescriptive, sometimes decisive, sometimes contingent.

This erratic nature perhaps explains why no studies have been found which deal specifically with this phenomenon – although it is frequently alluded to in relation to other subjects – and why it is never mentioned in the glossaries of standard works. Attempting to define it is therefore a perilous enterprise.

I. AN ATTEMPT TO DEFINE EUROPEAN CONSENSUS

1. COMPARISON WITH CONCEPTS IN DOMESTIC LAW

When judges at national level have to apply a rule which the Court has declined to condemn because it has noted the absence or existence of a European consensus, they will wonder about the nature of this concept.

They may first seek to compare it with concepts that are known in their domestic law: does it amount to a kind of *raison d'Etats* – *Etats* in the plural – admitting of no supranational control? Is the concept a “political matter” reaching

beyond the sphere of the law or is it akin to an “act of government” escaping judicial scrutiny¹? Such parallels are not constructive. Indeed, they have no place in a system that proclaims the rule of law².

The judge may then wonder whether the concept does not amount to an objection to jurisdiction or a ground of inadmissibility. This is what has been inferred from a few decisions, such as those in which the Commission declared inadmissible applications that had challenged the compatibility of abortion with the Convention, with the result that it was spared from having to rule on some sensitive issues³. Most of the time, however, the lack of a European consensus has led the Court to give States the benefit of the doubt, thereby tacitly attesting to their compliance with the Convention.

2. A LEGAL OR A SOCIOLOGICAL CONCEPT?

The national judge may then wonder whether the concept is a legal or a sociological one: the Court’s scrutiny may be hindered by the inability of the law to settle all issues, the admission that it must sometimes give way to other regulations and normative systems, essentially morals, which have their own codes, standards and sanctions, with the law restricted to playing a subsidiary role and imposing only a residual system of rules.

This explanation is no better: the Court always carries out its scrutiny on legal foundations. It cannot refer to other sources of authority since, one may assume, the domestic law has already exercised its own authority by the time the dispute is brought before the Court. Although sometimes the wording used appears to refer to the state of morals (“common ground” (*Rees v. the United Kingdom*⁴ and *Fretté v. France*⁵), the “common European approach” (*Sheffield and Horsham v. the United Kingdom*⁶), “increased social acceptance” (*Christine Goodwin v. the United Kingdom*⁷), a “commonly accepted” position (*T. v. the United Kingdom*⁸) or a “common European approach” (*Hirst v. the United Kingdom (no. 2)*⁹)), it would seem that it is in fact referring to the state of morals as expressed through an “examination of ... States’ legislation” (*Rasmussen v. Denmark*¹⁰).

3. COMPARISON WITH CONCEPTS IN EUROPEAN LAW

Can the national judge turn next to concepts in European law?

1 See Elias Kastanas, *Unité et diversité: notions autonomes et marge d’appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l’homme*, Bruylant, Brussels 1996, p. 114.

2 See *Markovic and Others v. Italy* [GC], no. 1398/03, § 97, ECHR 2006-XIV.

3 See Elias Kastanas, *op. cit.*, p. 207.

4 Judgment of 17 October 1986, Series A no. 106.

5 No. 36515/97, ECHR 2002-I.

6 Judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V.

7 [GC], no. 28957/95, ECHR 2002-VI.

8 [GC], no. 24724/94, 16 December 1999.

9 [GC], no. 74025/01, ECHR 2005-IX.

10 Judgment of 28 November 1984, Series A no. 87.

It seems difficult to classify European consensus as an “autonomous concept” since, although such concepts are not incompatible with consensual interpretation¹¹, the characteristic feature of consensus is that it is heteronomous in relation to the Convention.

It would be hard to rank it as a “standard”, since a finding by the Court that no consensus exists is based precisely on the lack of a common standard, a position it alters only when faced with a regressive or negative model of conduct.

Consensus may reflect a concern to respect the “common heritage of political traditions [and] ideals” to which the Preamble to the Convention refers, but should the concept not be seen as a call to develop the potential of this heritage rather than as an invitation to protect a historical level of acquired freedoms?

As to the concept of a “democratic society”, it contains the same ambiguity: sometimes it favours a form of democracy at local level that respects the right of States to be different and refrains from criticising local practices, particularly regarding respect for beliefs; at other times, however, it goes against States’ traditions in imposing a European conception of democracy as something that has to be built rather than upheld. How can a fundamental conception of democracy, derived from rules that transcend existing practices, be reconciled with an existential conception that seeks to respect the pluralism of these diverging practices?

The concept closest to that of a democratic society is the “margin of appreciation”, although this observation does not make matters any clearer for us: the margin of appreciation is the conclusion that can be drawn from the absence of a breach of the Convention. It is not an instrument of the Court’s supervisory jurisdiction, but rather the result of its negative exercise. Furthermore, of all the concepts established through the Court’s case-law, it is probably the one that has attracted the harshest criticism: it has been described as a “writing tic”¹², a “hackneyed expression”, an “unnecessary circumlocution”, and “terminology, as wrong in principle as it is pointless in practice”¹³.

And even in the field of freedom of expression, where it has been most frequently used, the Court seems to be moving “towards an increasing restriction of the national margin of appreciation”¹⁴, as is indicated by a recent judgment in which Austria was denied a margin of appreciation¹⁵ – relating to restrictions on artistic freedom – which it had been generously afforded in one of the judgments that has been the least favourably received among legal writers¹⁶.

11 See Frédéric Sudre, “Le recours aux ‘notions autonomes’ ”, in Frédéric Sudre (ed.), *L’interprétation de la Convention européenne des droits de l’homme*, Bruylant, Brussels 1998, p. 121.

12 See Pierre Lambert, “Marge nationale d’appréciation et contrôle de proportionnalité”, in Frédéric Sudre (ed.), *op. cit.*, p. 76.

13 See the partly dissenting opinion of Judge De Meyer in *Z v. Finland*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I.

14 See Patrick Wachsman, “Une certaine marge d’appréciation. Considérations sur les variations du contrôle européen en matière de liberté d’expression”, in *Les droits de l’homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert*, Bruylant, Brussels 2000, p. 1042.

15 See *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, to be reported in ECHR 2007.

16 See *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A.

II. THE WEAKNESS OF EUROPEAN CONSENSUS

The weakness of “consensualist logic”, in the eyes of the national judge, is that it appears to favour the status quo over progress, running the risk of letting States guide the development of a common legal order, of letting their lowest common denominator prevail, on the sole condition that one can be found, without examining the reasons for the consensus, which may relate to conformism, egoism or greed on the part of States – failings whose accumulation is not sufficient to render them legitimate.

By yielding to a consensus whose absence or existence is based on the will or refusal of a majority, are the courts not granting that majority undue rule-making power, given that their role in relation to human rights is precisely to protect members of minorities from the intolerance of the majority¹⁷? The Court itself reiterates in several judgments (for example, *Young, James and Webster v. the United Kingdom*¹⁸) that, in a democracy, “a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”. It is therefore confronted with an aporia: the rules of morality are those promoted by the majority, yet the majority is suspected of abusing its position¹⁹!

Lastly, consensus is an uncertain and changing concept: its existence may be denied by the majority of the Court and supported by a dissenting minority in the same case (see *Fretté*, cited above), only to disappear in a subsequent reversal of the Court’s position (see *E.B. v. France*²⁰); the very essence of the consensus may be turned on its head in the space of a few years with regard to the same issue (cases concerning transsexuals); it is sometimes required that the consensus be “sufficiently concrete”, which can also result in differing assessments by the majority and the minority (see *Chapman v. the United Kingdom*²¹); legal experts have wondered whether a consensus on the principles is sufficient or whether it needs to extend to all practical applications²² and whether it should be quantitative or qualitative, in other words whether it refers to the majority of member States or to “an ideal norm exemplified by the legislation or practice of a number of the Council of Europe’s most advanced States”²³. Lastly, since it lacks the scientific tools to identify and interpret values, is the Court not at risk of relying more on stereotypes than on the actual state of society²⁴?

17 See François Rigaux, *La liberté d’expression et ses limites*, RTDH, 1995, p. 411.

18 Judgment of 13 August 1981, Series A no. 44.

19 See Pascal Mbongo, *La Cour européenne des droits de l’homme a-t-elle une philosophie morale ?*, Dalloz, 2008, Chron. p. 100.

20 [GC], no. 43546/02, to be reported in ECHR 2008.

21 [GC], no. 27238/95, ECHR 2001-I.

22 See Sébastien Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme*, Bruylant, FUSL, Brussels 2001, p. 60, no. 58.

23 See François Ost, “Les directives d’interprétation adoptées par la Cour européenne des droits de l’homme : l’esprit plutôt que la lettre?” in François Ost and Michel van de Kerchove, *Entre la lettre et l’esprit: les directives d’interprétation en droit*, Bruylant, Brussels 1989, p. 322.

24 See Pascal Mbongo, op. cit., p. 101.

Were it to rely solely on domestic laws as a source, the Court would inevitably remain “entirely within the gravitational pull of their normative sphere”²⁵, whereas what the Convention instituted is a “special legal system equipped with appropriate bodies”, to which States “have delegated extensive powers”²⁶.

It is probably a mistake to seek to define European consensus in advance and to infer any immutable function from it.

What status should this consensus enjoy? Does it deserve to acquire rule-making power? Should it be taken as a test of the acceptability of a solution that has already been adopted? Or is it an *obiter dictum* adding an interesting yet superfluous sociological consideration to the legal solution? The national judge can only express a modest opinion and cautious hopes on the subject.

III. THE FUTURE OF EUROPEAN CONSENSUS

1. DIFFICULTY IN FORMING A SUBSTANTIVE EUROPEAN PUBLIC ORDER IN ETHICAL AND PHILOSOPHICAL SPHERES

Where European consensus – and more particularly, the finding that it does not exist – appears to play a predominant role is in matters pertaining to people’s most deeply held convictions and beliefs, areas where domestic laws are “insufficiently secularised” and where a uniform concept of European morals remains impossible to find²⁷.

In any matters relating to life at its beginning and end – that is to say, conception, birth and death – how can it be legitimate for judges who are anxious to respect ethnic pluralism to impose a particular preference where European society remains divided (see *Vo v. France*²⁸ and *Odièvre v. France*²⁹)? And does this not also apply to other ethical issues such as those pertaining to sexual identity and orientation (transsexuality, homosexuality)? How is it possible to resolve the clash between rules that are deeply rooted in collective beliefs and rights that are built on individual freedoms? A similar conflict arises wherever individual freedom of expression is confronted with other individual rights (private life, reputation).

Judges at national level are happy to find allusions to the “essence” or “hard core” of a right in certain judgments, as this may help them in their own weighing up of the values or interests at stake. However, they may also be concerned that this fundamental essence might be altered by a variable consensus. For example, they may be surprised to read in the same case that such a consensus does or does not exist, depending on whether they read the judgment or the dissenting opinion (as in *Odièvre*, cited above). They may also be disconcerted to see the consensus being reversed over the years (as in the cases concerning transsexuals). However, at

25 See Petr Muzny, “Standards jurisprudentiels de la CourEDH et droit comparé: une question de rationalité”, in *Annales de droit de Louvain*, 2003, p. 38.

26 See François Rigaux, “Interprétation consensuelle et interprétation évolutive”, in Frédéric Sudre (ed.), op. cit., p. 42.

27 See François Rigaux, “Interprétation consensuelle et interprétation évolutive”, in Frédéric Sudre (ed.), op. cit., p. 46.

28 [GC], no. 53924/00, ECHR 2004-VIII.

29 [GC], no. 42326/98, ECHR 2003-III.

the same time they may interpret such variations as an invitation to accept that, in a pluralistic society, truths are not immutable and that the role of the courts today is not to rely on clear laws or intangible precedents but rather to question, in a state of permanent uncertainty, whether their assessments remain correct and up to date. The Court derives its legitimacy from the fact that, among its own members, it listens to and expresses internal divergences that form part of its culture by virtue of its operating method³⁰. National courts can only envy its capacity to express itself through a plurality of voices and to engage in active repentance. This is a good lesson in relativity for judges across the continent who belong to legal systems in which the supreme courts taught until recently that it was preferable, in the name of legal certainty, to opt for maintaining an obsolete judicial precedent rather than to venture to depart from it, even where this was justifiable.

Where the national courts are not persuaded by the Court's judgment – for example, where the Court holds that, in the absence of a common standard, the age of ten as the threshold for criminal responsibility cannot be said to be so young as to be disproportionate (see *T. v. the United Kingdom*³¹) – they may read in dissenting opinions “signs indicating the relative foreseeability of departures from precedent”, while being aware that such reversals of the Court's position “cannot systematically be seen as a traumatic event”³². Furthermore, they remain free, under Article 53 of the Convention, to prefer their own solution if they consider that it protects human rights to a greater extent than the Court's own judgments³³. They may accordingly assist in demolishing or building a European consensus, or indeed in inspiring a departure from the Court's case-law, since the law today is developed through this dialogue between judges in which we are currently engaging.

2. THE DEVELOPMENT OF A PROCEDURAL EUROPEAN PUBLIC ORDER

European consensus does not appear to have played such an important role in the Court's development of a procedural public order on the basis of Articles 5, 6 and 7 of the Convention³⁴. In the past, our procedural rules were often characterised by rigidity and formalism. They were already guided by the right to a fair hearing, but no express provision was made for the right to a court. Moreover, the rules were often interpreted as allowing the courts to dismiss any applications that did not observe them to the letter. The Court's case-law has compelled us to overturn the teleology of our interpretations. The judgments in *Golder v. the United Kingdom*³⁵ and *Airey v. Ireland*³⁶ have taught national judges that the right to a fair trial entails in the first place the right of access to a court. Although the Court has

30 See Katia Lucas-Alberni, “La possible contribution du revirement de jurisprudence de la Cour européenne des droits de l'homme à la sécurité juridique”, in *Cahiers de droit européen*, 2007, p. 479.

31 [GC], no. 24724/94, 16 December 1999.

32 See Katia Lucas-Alberni, op. cit., p. 485.

33 The Belgian Constitutional Court explicitly cited Article 53 in adopting a solution entailing greater protection or a more liberal approach in its judgments nos. 159/2004 and 202/2004.

34 On the distinction between substantive and procedural European public order, see Marina Eudes, *La pratique judiciaire interne de la Cour européenne des droits de l'homme*, Pédone, Paris 2005, pp. 465-69.

35 21 February 1975, Series A no. 18.

36 9 October 1979, Series A no. 32.

emphasised that, in this sphere too, States enjoy “a certain margin of appreciation”³⁷, it has called on judges and legislatures to develop a new procedural right in order to attain the standard required at European level, going beyond, and frequently against, their previous common traditions. Moreover, when the Court observes, regarding the applicability of Article 6 to the right to welfare benefits, that “there exists great diversity in ... the member States of the Council of Europe”, this lack of a consensus has not prevented it from bringing social rights within the scope of that Article³⁸. It has subsequently extended this creative and daring approach by making them part of the substantive public order through Protocol No. 1. It is inconceivable that a consensus which played no part in this progress could reverse it and renounce principles that are now incorporated into the ethical codes applied by the national courts.

3. EUROPEAN CONSENSUS AND INTANGIBLE RIGHTS

However, it is in relation to intangible rights that European consensus is most suspect.

The Court's case-law features certain centrifugal concepts which, if applied to intangible rights, would ruin their effectiveness; one example is the subsidiarity principle, which forms the basis for the margin of appreciation enjoyed by States, confers discretionary powers on them and curbs European supervision in the name of “judicial restraint”³⁹.

If such interpretation techniques are applied even to the “hard core” of human rights, the outlook for intangible rights is bleak.

The margin-of-appreciation doctrine emerged in cases where Article 15 of the Convention was invoked in the context of terrorist attacks⁴⁰. European States faced with the threat of terrorism risk having to contend with a “public emergency threatening the life of the nation”, justifying the taking of measures derogating from the Convention in accordance with Article 15.

If European consensus became the yardstick for supervising such measures, there could be cause to fear the collapse of the majority of fundamental rights, for two reasons.

Firstly, by means of a process resembling the principle of congruent forms, a European consensus could dismantle the very rights and freedoms it has built up. The Convention would lose the rule-making power which has enabled a European judicial democracy to form. The Court's case-law is the sole rampart which the domestic courts may put up against the authorities of their State without fearing that they will be thwarted by a legislative amendment. Thus, even though derogations from the rules of a fair trial had been adopted to combat terrorism and organised crime, it was on the basis of European case-law that the Constitutional Court to

37 See *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57.

38 See *Feldbrugge v. the Netherlands*, judgment of 29 May 1986, Series A no. 99, p. 13, § 29.

39 See Frédéric Sudre, *Droit international et droit européen des droits de l'homme*, PUF, Paris 2003, p. 211.

40 See Pierre Lambert, “Marge nationale d'appréciation et contrôle de proportionnalité”, in Frédéric Sudre (ed.), op. cit., pp. 63 et seq.

which I belong was able to strike them down. Without such case-law, it is not certain that it would have dared to do so and it is even doubtful that the majority of the court would have taken such a bold step (judgment no. 202/2004).

It would be good to be able to say that, when the European Court referred to European consensus in its judgments condemning corporal punishment (see *Tyrer v. the United Kingdom*⁴¹) or the death penalty (see *Soering v. the United Kingdom*⁴²), it did so merely as a subsidiary argument. If, after all, it condemned these practices on the basis of consensus, it would be open to States, by consensus, to reintroduce these infringements of intangible rights, or indeed to bring back torture or trial by ordeal. We would like it to be reaffirmed that, where torture and inhuman or degrading treatment are concerned, “there is no place for a ‘margin of appreciation’ of the kind the Court accords the national authorities” when they apply Articles 8 or 10 of the Convention⁴³.

The second reason is that, as European integration progresses, these issues will increasingly be dealt with by European rules. Constitutional courts in Europe have recently had to contend with a new phenomenon: cases have been brought before them challenging legislative provisions on terrorism, the European arrest warrant and money laundering which resulted quite simply from the transposition of European Union directives or framework decisions⁴⁴. Yet a particular feature of Community norms is that they are supposed to derive from a European consensus, although we are not talking about the same Europe. If such a consensus acquired rule-making power, this would be tantamount to abandoning all scrutiny of whether rules resulting from Community norms are compatible with fundamental rights. The question of the European Union’s accession to the European Convention on Human Rights would become academic, since the consensus which guided the adoption of these norms would create a presumption of their compliance with the Convention.



What judges at national level might wish after examining the concept of European consensus is that it should retain its current value – in other words, that it should be one yardstick among others in matters where ethical or philosophical conceptions are concerned or where freedoms of an equivalent level are at stake, provided that the consensus argument does not serve to legitimise a discriminatory infringement of a right safeguarded by the Convention or the impairment of the essence of such a right.

41 Judgment of 25 April 1978, Series A no. 26.

42 Judgment of 7 July 1989, Series A no. 161.

43 See Johan Callewaert, “L’Article 3 de la Convention européenne des droits de l’homme : une norme relativement absolue ou absolument relative ?”, in *Liber amicorum Marc-André Eissen*, Bruylant and LGDJ, Brussels/Paris 1995, p. 13.

44 With regard to money laundering, the Belgian Constitutional Court delivered a judgment on 23 January 2008 finding that the reply by the Court of Justice of the European Communities (CJEC) to the question which the Constitutional Court had referred to it for a preliminary ruling did not curtail its scrutiny in relation to fundamental rights: see judgment no. 126/2005 referring the question to the CJEC for a ruling, the CJEC’s judgment of 26 June 2007 in reply, and judgment no. 10/2008 of the Constitutional Court extending its scrutiny beyond what the CJEC had held to be necessary.

However, with regard to the rules of a fair trial, national judges might like the Court to continue to give States guidance through the judicial democracy that it has built up alongside their consensus, often going against their traditions and routines.

Lastly, where intangible rights are concerned, the presence or absence of a consensus may be a subsidiary argument, a test of acceptability or a factor in legitimising a solution that has already been justified by its conformity with the Convention, but should not be a primary component of the Court’s scrutiny. In such matters, the rule of the majority, and even of unanimity, cannot become a decisive factor, unless statistics are to become the sole transcendental value of disillusioned times. Beyond consensualism, a provision or practice affecting the very essence of intangible rights cannot be justified by a finding of common acceptance among European States. When faced with infringements of the right to respect for life, the prohibition of torture or slavery, the principle that the criminal law is not to be applied retrospectively or the *non bis in idem* rule in criminal cases, we cannot simply legitimise them through the finding of a “community of similarity”⁴⁵. If, in the name of European consensus, the Court were to reverse the progress made through its decisions in such matters, that would signal not only a change in case-law but a change in civilisation.

45 See Petr Muzny, op. cit., p. 44.



Lech Garlicki

**Judge of the European Court
of Human Rights**

Ladies and gentlemen,

It is a particular pleasure and honour to introduce the next speaker, Professor Péter Paczolay. I first met him a very long time ago, when we were still active in university life and were sharing the first experiences of the transformation process in our countries. Since the inception of the Hungarian Constitutional Court, Mr Paczolay has been with that institution – first as Chief Counsellor, later as Secretary General and, finally, from 2006 as a judge of the Constitutional Court and, since 2007, as its Vice-President. His eighteen years within the court have provided him with a unique knowledge of both its case-law and its *modus operandi*.

It should also be mentioned that the Hungarian Constitutional Court has always been one of the best developed constitutional courts in the region. Let me simply recall its early judgment concerning the unconstitutionality of capital punishment as well as several interesting – even if sometimes controversial – decisions on economic and social reforms. In short, this is a court with particular experience in the field we are discussing tonight and Mr Paczolay is a person who is particularly qualified to present that court to us.

Dear friend and colleague, the floor is yours.



Péter Paczolay

**Vice-President of the
Hungarian Constitutional Court**

CONSENSUS AND DISCRETION: EVOLUTION OR EROSION OF HUMAN RIGHTS PROTECTION?

1. INTRODUCTION

The European Court of Human Rights exercises judicial supervision over the States Parties to the Convention. Under Article 46, the decisions of the Court are binding on the States. The European Convention on Human Rights and its Protocols are agreements under public international law; their observance and the protection of fundamental rights are primarily the tasks of the domestic legal mechanisms and national judicial systems. This is reflected in the Convention system's so-called "subsidiary" character (although the use of this notion might not be quite appropriate): the European Court of Human Rights exercises its jurisdiction of review only after the exhaustion of domestic remedies. The effectiveness of the Court is dependent on the willingness of the Contracting States to follow its case-law, and it takes into consideration the differing political, social, cultural and legal traditions of the States. The Convention governs no fewer than forty-seven States, a number which may well rise. There is no doubt that the entire legal framework of the Europe-wide protection of human rights – to quote R.St.J. Macdonald, former judge of the European Court of Human Rights – "rests on the fragile foundations of the consent of the Contracting Parties"¹.

Not only does the text of the Convention rest on the consent of the Contracting States, but the principles and standards applied by the Strasbourg Court also rely on a judge-made doctrine: the consensus doctrine. This doctrine means that, in the case of consensus among the States, less discretion is left to the States; or, conversely, the less consensus there is, the wider the margin of appreciation left to the States.

¹ R.St.J. Macdonald, "The margin of appreciation", in Macdonald, Matscher, Petzold (eds.), *The European system for the protection of human rights*, Martinus Nijhoff Publishers, Dordrecht 1993, p. 123.

2. CONSENSUS VERSUS NATIONAL DISCRETION

Margin of appreciation has also been referred to as power of appreciation, discretion, and latitude. The fields of latitude allowed to the States under the margin-of-appreciation doctrine can be classified in two main groups, depending on their justifications.

Firstly, differing local circumstances may justify it. The Court first dealt in detail with the subject of the margin of appreciation in *Ireland v. the United Kingdom*. The main argument was that “national authorities are in principle in a better position than the international judge to decide both on the presence of [a public emergency threatening the life of the nation] and on the nature and scope of derogations necessary to avert it”². National security, the care of children, and town and country planning cases belong to this category.

Secondly, lack of European consensus, especially in matters of morals, questions related to sex and blasphemy, enlarges the sphere of action of the States. In the landmark *Handyside* case, the Court pointed out that “it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals”³. Similarly, in *Müller and Others v. Switzerland*, the Court stated: “The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject.”⁴

It became a consistently used doctrine in the jurisprudence of the Strasbourg Court that the Convention leaves a power of appreciation to the Contracting States.

The doctrine has a territorial and a temporal scope; both are well illustrated by the reasoning in *Dudgeon v. the United Kingdom*.

Under the “territorial” scope, the Court allows room for a margin of appreciation because of the territorial relativity of public morals.

In *Dudgeon* the Government drew attention to the profound differences of attitude and public opinion in Northern Ireland and Great Britain in relation to questions of morality. Northern Irish society was said to be more conservative and to place greater emphasis on religious factors, as was illustrated by more restrictive laws even in the field of heterosexual conduct. The Court acknowledged that such differences did exist to a certain extent and were a relevant factor. The fact that similar measures were not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe did not mean that they might not be necessary in Northern Ireland. “Where there are disparate cultural communities residing within the same State, it may well be that different requirements, both moral and social, will face the governing authorities.”⁵

Under the “temporal” scope of the doctrine, the Court recognised the significance of legislative evolution within the States, similar to the changing attitudes of the States towards questions of morals. In *Marckx v. Belgium*, the Court observed that it could not “but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments”⁶. In *Dudgeon* the Court remarked that it could not “overlook the marked changes which have occurred in this regard in the domestic law of the member States”⁷.

The margin of appreciation is complementary to consensus; this is demonstrated by the fact that their boundaries move together: the extent of the margin of appreciation fluctuates from “slight” and “certain” to “wide”. Complementarily, the range of consensus might shift to the extent of being “broad”⁸.

3. CONSENSUS – AT WHAT PRICE?

Recognition of the territorial and temporal scope of the margin of appreciation – and accordingly of the consensus doctrine – illustrates the fact that the Convention and the Court’s jurisprudence are based on a relativist approach. I agree that the conceptualisation of human rights cannot be independent from cultural traditions and is determined by the given historical context. Even the concept of man is changing in time. As stated by the Hungarian Constitutional Court in its decision on abortion: “Given the plurality of equally prevalent moral views in society, we cannot even discuss a generally accepted moral concept of man.”⁹

The internationalisation of human rights as expressed in international documents, and in the Convention itself, is a result of compromises and a certain amount of consent. The important and indispensable mission fulfilled by the European Court of Human Rights for nearly five decades now has been the supervision of domestic legal systems, even judicial decisions, and the effective enforcement of human rights. In order to maintain a balance between the European supervision of domestic human rights violations and respect for State sovereignty, the Strasbourg Court has developed the consensus doctrine.

A methodological consideration arises: how can the Court find out whether or not there is a consensus, and how far it extends? The autonomous interpretation of the Convention by the European Court of Human Rights means that Convention concepts are to be regarded as parts of a self-governing legal system that must be interpreted independently from the legal systems of the Contracting States. Consensus should not necessarily mean the consent of all the parties affected. In the context of the Convention, it means rather “common ground” or “common denominator”.

² See *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 78-79, § 207.

³ See *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48.

⁴ See *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, p. 22, § 35.

⁵ See *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 22, § 56.

⁶ See *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, pp. 19-20, § 41.

⁷ See *Dudgeon*, cited above, pp. 23-24, § 60.

⁸ See *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 129, to be reported in ECHR 2007.

⁹ Hungarian Constitutional Court decision no. 64/1991. Reproduced in English in László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy*, University of Michigan Press, Ann Arbor 2000, p. 186.

Growth of uniform international standards including human rights is a clear trend in present-day legal development. The European Court of Human Rights makes possible encounter and exchange among different legal cultures, elevating them to a higher-level normativeness based on legal convergence. A continuous interaction has developed between the Strasbourg Court and the national legal systems and domestic courts.

Being familiar with the pros and contras of the discussion on the consensus and margin-of-appreciation doctrines, and being aware of the related arguments, I would like to draw your attention to two risks connected with the interlinked doctrines.

Risk no. 1: minimalism. International law and international judicial organs based on the consent of the Contracting States determine the minimum level of human rights protection. This applies to the European Court of Human Rights too. Lack of a European consensus and the consequent discretion or margin-of-appreciation doctrine open the way for the minimum-level approach. However, well-established democracies have also failed on a number of occasions to comply with these “minimum-level standards”. The problem to be discussed here is how a “minimal standard” Strasbourg jurisprudence influences the national courts, including constitutional courts.

Risk no. 2: relativism. The question that lies beyond the balancing of European standards and domestic particularities is whether the protection of human rights may vary from country to country as public morals vary? How far does the influence of cultural relativism and the shifting nature of what we call contemporary values stretch?

In *Rasmussen v. Denmark*, the Court showed its flexibility regarding application of this doctrine: “The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.”¹⁰ Although the standards used by courts necessarily vary when decisions are taken on the ground of differing circumstances, the excessive flexibility of those standards undermines the credibility of judicial decisions. This might be the case when, at the interplay of consensus and discretion, the common-ground and margin-of-appreciation criteria are both flexible and both varying.

4. THE UNINTENTIONAL EFFECTS OF THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE LESSONS OF THE REKVÉNYI CASE

There is an obvious interaction between national and international protection of human rights. Even if international courts do not supervise national courts, their jurisprudence serves as a source of inspiration for national judges. On the other hand, the high level of protection by the States (“common constitutional heritage”)

¹⁰ See *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87, p. 15, § 40.

sets an elevated international standard. To formulate it in other words: consensus among States on the protection of human rights guarantees a high standard, while the lack of consensus opens up a greater area for discretion or, in the language used by the European Court of Human Rights, margin of appreciation.

The margin doctrine sits halfway between the uniform application of the Convention and domestic protection of human rights. In other words: European supervision is combined with the national margin of appreciation. When the Court respects the power of appreciation of the States, it exercises judicial self-restraint in that it does not use to the full extent its powers of supervision or review.

Thus, the influence of an international human rights court is basically inspirational for the national courts. This can be well exemplified by the impact of the European Court of Human Rights on the then newly founded Hungarian Constitutional Court.

The Convention influenced constitutional review and the interpretation of the Constitution in Hungary. The Constitutional Court referred to the Convention even before its ratification by Hungary. “In the first, formative period of constitutional jurisdiction in Hungary, however, referring to a given provision of the Convention was much more a demonstration of considering and searching for ‘European standards’, it was aimed more at linking up Hungarian legal thinking to ‘European norms’ than to use this international instrument in its proper role in the course of constitutional review.”¹¹

For the contrary effect of permissive Court decisions, one can refer to cases such as *Rekvényi v. Hungary*¹². In *Rekvényi*, the Court “showed understanding for the transitional period of consolidation of democracy” – as President Wildhaber stated in a comment on the judgment¹³. Unfortunately, the case did not have an evolving but an erosive effect on the jurisdiction of the Hungarian Constitutional Court. In the following years, the Constitutional Court, referring to the judgment of the European Court of Human Rights in a number of consecutive decisions, definitely relaxed the domestic constitutional standards.

This went against the original philosophy of the Hungarian Constitutional Court regarding transition. It had firmly stated in that connection that the unique historical circumstances of the transition and the given historical situation could be taken into consideration, but that “the basic guarantees of the rule of law [could not] be set aside by reference to historical situations ... A State under the rule of law [could not] be created by undermining the rule of law”¹⁴.

¹¹ See László Sólyom, “The interaction between the case-law of the European Court of Human Rights and the protection of freedom of speech in Hungary”, in *Studies in memory of Rolv Ryssdal*, Carl Heymanns Verlag, Cologne 2000, p. 1317f.

¹² [GC], no. 25390/94, ECHR 1999-III.

¹³ “Speech given by Mr Luzius Wildhaber on the occasion of the opening of the judicial year, 20 January 2006”, in *Dialogue between judges* 2006, p. 96.

¹⁴ Hungarian Constitutional Court decision no. 11/1992. Reproduced in English in László Sólyom and Georg Brunner, op. cit., p. 221.

The Hungarian Constitutional Court, departing from its earlier interpretation in 2000, set the limits of freedom of expression¹⁵ and freedom of assembly according to *Rekvényi*¹⁶: “The Court determined the social causes justifying the restriction by taking into account the particular features of Hungarian history, as did the European Court in *Rekvényi v. Hungary*.”¹⁷

In its earlier decisions, the Constitutional Court had consistently assessed the historical circumstances (most often the change in the political regime taken as a fact) by acknowledging that such circumstances might necessitate some restriction on fundamental rights, but it had never accepted any derogation from the requirements of constitutionality on the basis of the mere fact that the political regime had changed. Legislation justified by the change in the political regime and the restrictions contained in such laws had to remain within the limits of the Constitution in force. In the decision in question, the Constitutional Court adopted the terms used by the European Court of Human Rights in *Rekvényi*: “Regard being had to the margin of appreciation left to the national authorities in this area, the Court finds that, especially against this historical background, the relevant measures taken in Hungary in order to protect the police force from the direct influence of party politics can be seen as answering a ‘pressing social need’ in a democratic society.”¹⁸

Thus the decision of the European Court of Human Rights – unintentionally – had an impact that lowered the standards the Constitutional Court had previously applied.

In *Bukta and Others v. Hungary*, the Strasbourg Court rightly found “that the dispersal of the applicants’ peaceful assembly [could not] be regarded as having been necessary in a democratic society in order to achieve the aims pursued”¹⁹. Paradoxically, the Court in that judgment reviewed the decision of the Budapest Regional Court that referred to the case-law of the Strasbourg Court and to a decision of the Constitutional Court citing the *Rekvényi* judgment.

5. CONCLUSIONS

I would, therefore, suggest a caveat, a warning on the use of international standards: while respect for national or other communities’ distinct legal traditions on the part of a European court should be welcomed as an instance of judicial self-restraint, reducing the level of protection afforded by domestic courts on the ground of lower minimum standards in the absence of consensus is not acceptable.

There is another danger of the double-edged consensus concept to be mentioned. It is doubtful whether consensus means unanimity or a practice accepted by a large majority of the States. As mentioned earlier, in the context of

15 Hungarian Constitutional Court decisions nos. 13/2000 and 14/2000 (the latter extensively citing the *Rekvényi* judgment).

16 Hungarian Constitutional Court decision no. 55/2001.

17 Hungarian Constitutional Court decision no. 13/2000.

18 Hungarian Constitutional Court decision no. 14/2000. The cited part of *Rekvényi* is paragraph 48.

19 See *Bukta and Others v. Hungary*, no. 25691/04, § 38, to be reported in ECHR 2007.

the Convention it means rather “common ground” or “common denominator”. Even if application of the Convention does not require acceptance of the universal character of the human rights protected therein, a certain “hard core” of human rights should be defended even against the majority or the consensus – like the unalterable basic rights (*unabdingbarer Grundrechtsstandard*) in Germany. As rightly said by Judge Jackson of the United States Supreme Court: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly ... may not be submitted to vote; they depend on the outcome of no elections.”²⁰

Freedom of expression (even in commercial speech) was an overriding value also for the nine minority judges in a ten-to-nine split decision of the European Court of Human Rights in the *markt intern* case: “We find the reasoning set out therein with regard to the ‘margin of appreciation’ of States a cause for serious concern. As is shown by the result to which it leads in this case, it has the effect in practice of considerably restricting the freedom of expression in commercial matters.”²¹

In some cases the Court did not consider the lack of a European consensus decisive. In *Hirst v. the United Kingdom* (no. 2), the Court itself observed: “As regards the existence or not of any consensus among Contracting States, the Court notes that ... even if no common European approach to the problem can be discerned, this cannot of itself be determinative of the issue.”²²

The German Constitutional Court offered a viable solution to the relation between international and domestic standards in its *Solange II*, *Maastricht*, and *Görgülü* cases. As that court said in the latter judgment, concerning the relationship between the Convention and the Basic Law: “The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of the protection of the individual’s fundamental rights under the Basic Law – something which the Convention does not intend.”²³

The transnational rule of law should leave no discretion in the “hard core” human rights cases, and requires caution in other cases to avoid the tyranny of the majority and to protect even those communities that are the most vulnerable – the minorities within the States.

20 See *West Virginia State Board of Education v. Barnette*, 319 US (1943) 624, 638

21 See the joint dissenting opinion of Judges Gölcüklü, Pettiti, Russo, Spielmann, De Meyer, Carrillo Salcedo and Valticos in *markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, criticising the margin-of-appreciation doctrine as referred to by the majority in paragraphs 33 and 37.

22 See *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 81, ECHR 2005-IX.

23 BVerfGE 111, 307 (2004), HRLJ 25 (2004) p. 103.

SOLEMN HEARING OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR



Jean-Paul Costa

**President of the European
Court of Human Rights**

SPEECH GIVEN ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR, 25 JANUARY 2008

When I see the number and quality of our guests who have come again this year to attend the solemn hearing to mark the beginning of the Court's judicial year, it is a pleasant duty for me to thank you all for your presence in this room. And since, in accordance with a custom which is not perhaps a general principle of law but which is generally recognised, the period for good wishes only closes at the end of January, please allow me, on behalf of my colleagues and myself, to wish you a happy new year in 2008, to you and to those you hold dear.

I am also very pleased to be able to welcome Mrs Louise Arbour, United Nations High Commissioner for Human Rights, who kindly accepted our invitation and to whom, in a few minutes, I will give the floor. After a brilliant national and international career, Mrs Arbour now holds a post which symbolises the universality of human rights and their protection by the international community as a whole. Her presence is particularly gratifying at the beginning of a year which will mark the 60th anniversary of the Universal Declaration of Human Rights. Without the proclamation of the Universal Declaration, without the dynamic which it set in motion, we would not be here this evening because there would not have been regional conventions like the European Convention, or at any rate not so early and not in the same circumstances.

Ladies and gentlemen, the start of the 2007 judicial year coincided with the departure of my predecessor and friend, President Luzius Wildhaber, and with the beginning of my term of office. It is therefore natural for me to take stock of the Court's activity. But I would first like to return to the concept of human rights, which is at the very heart of our work.

The human rights situation in the world is one of great contrasts. In Europe, which in some respects is privileged in relation to other regions, the situation can vary from country to country, though it is subject to common dangers. Globalisation affects more than just the economy; it has an impact on all areas of international life. Terrorism, for example, has not spared Europe in recent years, and it remains a constant threat, forcing States to make the difficult effort to reconcile the requirements of security with the preservation of fundamental freedoms. Similarly, immigration is both an opportunity and a challenge for our continent, which has to take in the

victims of persecution and protect immigrants' private and family lives, but which at the same time cannot disregard the inevitable need for regulation, provided that this is done humanely and with respect for the dignity of each individual. The increase in private violence obliges criminal justice to deter unlawful acts and punish those responsible while upholding the rights of their victims; but that obligation does not dispense judges from respecting due process and proportionate sentences and prison authorities from guaranteeing prisoners' rights and sparing them inhuman or degrading treatment.

Our Court finds itself at the intersection of these tensions – I might even say these contradictions. And what can be said of the obvious correlation between internal and international conflicts and the aggravation of risks for human rights, other than that Europe is not a happy island, sheltered from wars and crises? Certainly, *pax europeana* holds good overall, but there are many dangerous pockets of tension, in the Balkans, in the Caucasus and at Europe's margins; after all, the conflict in the former Yugoslavia ended scarcely more than ten years ago. In short, our Court does not have only peaceful situations to deal with. In any event the human rights situation is fragile everywhere, it can deteriorate under the pressure of particular circumstances, and human rights always have to be won all over again. This very precariousness of fundamental rights was the reason our Court was set up and remains its permanent justification. It is true that the founder members of the Council of Europe and the drafters of the Convention expected a gradual improvement, based on the three linked pillars of human rights, the rule of law and democracy. Those three principles can only make progress together. If when taking stock we go back as far as the 1950^s, there is no doubt that, despite ups and downs, that is what has happened. The European system has surely helped to consolidate fundamental rights, but it has also added to their number, in a movement which is both creative and forward-moving.

For us the year 2007 brought certain disappointments, of a kind which are symptomatic of an already long-standing crisis, but which are fortunately counterbalanced by more encouraging prospects. The figures show that the trends noted in recent years have only become stronger. In 2006, 39,000 new applications were registered with a view to a judicial decision. In 2007 the corresponding number rose to 41,000, an increase of 5%. The total number of judgments and decisions fell slightly (by 4%) to around the 29,000 mark. The logical result is that the number of pending cases has risen from 90,000 to 103,000 (including 80,000 allocated to a decision body) – an increase of about 15%. Just over 1,500 judgments on the merits were given. The proportion of applications declared inadmissible or struck out of the list remains considerable at 94%. That figure reveals an anomaly. It is not the vocation of a Court set up to protect respect for human rights to devote most of its time to dismissing inadmissible complaints, and their excessive number shows at the very least that what the Court is here to do is not properly understood.

To flesh out this statistical information I will make two further remarks. Firstly, the efforts of judges and Registry staff have not slackened in the slightest in 2007. In fact, they have stepped up their efforts even further, and I wish to pay tribute to them for rising to the challenge. Additional but important tasks have increased their workload. For example, there have never been so many requests for interim

measures: in 2007 more than a thousand were received and 262 were allowed, usually in sensitive cases concerning the rights of aliens and the right of asylum, which require a great deal of work, usually in great haste.

In fact, the gap between applications received and applications dealt with is essentially attributable to the rise in the number of new applications, but also to the implementation of a new policy. We have decided to concentrate our efforts more on well-founded applications, particularly in complex cases. That explains the slight fall in applications rejected, particularly by three-judge committees. We are also thinking about ways to develop the pilot-judgment procedure (as recommended by the Group of Wise Persons, of which I will say more later) and have begun to elaborate a more systematic definition of priority cases. Secondly, the accumulated backlog is very unevenly distributed, since applications against five States make up nearly 60% of the total of pending cases: the Russian Federation alone accounts for nearly a quarter of the total "stock" of applications before the Court.

I must also point out that this situation, alarming though it is, has not prevented the Court from giving important judgments, of which I will mention a few examples in a moment. I can also vouch for the fact that the authority and prestige of the Court remain intact, as I have been able to observe during my visits to Contracting States and top-level meetings in Strasbourg. Visits to the Court have indeed become an essential part of any journey to Strasbourg, and some of our visitors come from other continents to find out about our Court and what it is doing. Our judgments are better known and, on the whole, better executed, even though there is still work to be done. Here I would like to take the opportunity to thank the Committee of Ministers, which is responsible for overseeing execution of the Court's judgments. In addition, the numerous meetings with national and international courts and the increasing participation by the Court in training programmes for judges and legal officers provide a way of improving knowledge of the Convention and our case-law. Considerable progress has been made in the area of data-processing and modern techniques to facilitate access to information from the Registry (including access to applications at the stage of their communication to Governments), and to open up access to hearings before the Court, which can be viewed on our website by Internet users in any part of the world. I thank the Government of Ireland for the invaluable assistance they gave the Court to make that possible.

I would now like to give a few examples – striking in their diversity – of the Court's recent case-law.

The *Behrami v. France and Saramati v. France, Germany and Norway* cases¹ concerned events in Kosovo. I will not discuss them in detail, since Mrs Arbour is better placed than I to analyse the relevant decisions, given in the context of United Nations peace-keeping operations in Kosovo conducted by KFOR and UNMIK. I will simply say that the Court held that the actions and omissions of the Contracting Parties were not subject to its supervision and declared the applications inadmissible.

¹ (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007.

Once again, the Court has had to record findings of torture on account of treatment inflicted on detained persons and hold that there had been a two-fold violation of the Convention, firstly on account of the ill-treatment itself and secondly, from the procedural point of view, in that there had been no effective investigation into the allegations of torture, despite medical reports. For example, in *Mammadov v. Azerbaijan*², an opposition party leader was subjected while in police custody to the practice of *falaka*, meaning that he was beaten on the soles of the feet. Another example was *Chitayev v. Russia*³, in which two Russian brothers of Chechen origin endured particularly serious and cruel suffering.

In the *Gebremedhin [Gaberamadhien] v. France*⁴ judgment, the Court looked into the procedure known as “asylum at the border”, in which the asylum-seeker is placed in a holding area at the airport and refused admission to the territory. In the Court’s view, where such asylum-seekers ran a serious risk of torture or ill-treatment in their country of origin, Article 13 of the Convention required them to have access to a remedy with automatically suspensive effect. No such remedy had been available in that case. Here I would like to point out that the legislature did introduce one a few months after our judgment and in order to comply with it.

The *Evans v. the United Kingdom*⁵ case raised very sensitive ethical questions. It concerned the extraction of eggs from the applicant’s ovaries for in vitro fertilisation. The applicant complained that under domestic law her former partner could withdraw his consent to the storage and use of the embryos, thus preventing her from having a child with whom she would have a genetic link. The Court accepted that “private life” encompassed the right to respect for the decision to become or not to become a parent. It therefore held that the legal obligation to obtain the father’s consent to the storage and implantation of the embryos was not contrary to Article 8 of the Convention. On the other hand, in *Dickson v. the United Kingdom*⁶, it took the view that there had been a violation of Article 8 on account of the refusal to allow a request for artificial insemination treatment by a prisoner whose wife was at liberty, since a fair balance had not been struck between the conflicting public and private interests.

Lastly, in two important cases the Court found violations of the right to education, guaranteed by Article 2 of Protocol No. 1. The first, *Folgerø and Others v. Norway*⁷, concerned the refusal to grant pupils in public primary and lower secondary schools full exemption from participation in Christianity, religion and philosophy lessons. By a very narrow majority the Court held that the respondent State had not done enough to ensure that the information and knowledge the syllabus required to be taught in these lessons were put across in a sufficiently objective, critical and pluralistic manner. In the second case, *D.H. and Others v. the Czech Republic*⁸, it held to be discriminatory and contrary to Article 14 of the Convention a practice

2 No. 34445/04, 11 January 2007.

3 No. 59334/00, 18 January 2007.

4 No. 25389/05, 26 April 2007.

5 [GC], no. 6339/05, 10 April 2007.

6 [GC], no. 44362/04, 4 December 2007.

7 [GC], no. 15472/02, 29 June 2007.

8 [GC], no. 57325/00, 13 November 2007.

of placing Roma children in special schools intended for children suffering from a mental disability. It held that Roma, as a disadvantaged and vulnerable minority, were in need of special protection extending to the sphere of education.

As you can see, these few cases show the variety, difficulty and, frequently, the gravity of the problems submitted to the Court.

Let me turn now to the present situation and the future. The main source of disappointment for the Court, and the word is not adequate to do justice to what we feel, is that Protocol No. 14 has not yet come into force. At the San Marino colloquy in March last year I solemnly called on the Russian Federation to ratify this instrument, the procedural provisions of which, as everyone is aware, give the Court the means to improve its efficiency considerably. My appeal, which was backed by the different organs of the Council of Europe, was the subject of a number of favourable comments among the highest Russian courts. But it is a fact that it has still not produced the desired result – a fact which I deeply regret. As regards the reasons for this attitude, I do not expect to uncover every detail, since a certain mystery still surrounds them. On the other hand, I have read reports of allegations that the Court has become political or sometimes gives decisions on non-legal grounds. If such things have been said, that is unacceptable. This Court is no more infallible than any other, but it is not guided by any – I repeat any – political consideration. You all know this, but it is as well for me to confirm it. I still hope that reason and good faith will prevail and that, in the coming weeks, that great country, the main supplier of cases to Strasbourg, will reconsider its decision, or rather the lack of a decision, which weakens us and undermines the whole process of European cooperation. I therefore retain that hope, but as Albert Camus wrote: “hope, contrary to popular belief, is tantamount to resignation. And living means not being resigned.”

Either it will be possible to apply Protocol No. 14 and, looking beyond its immediately beneficial effects, to plan rationally for the future by studying on the basis of Protocol No. 14 the report of the Group of Wise Persons, set up by the Council of Europe at its 3rd Summit in Warsaw in May 2005, and adopting some of its proposals concerning the long-term effectiveness of supervision under the Convention. Or, on the contrary, ratification will not take place in the near future, and the system must not be allowed to get bogged down by a continuous flow of applications, the majority of which have no serious prospect of success.

Individual petition is a major feature of the European system, and it is a unique feature, established with great difficulty and finally generalised less than ten years ago. I have repeatedly declared that it is quite simply inconceivable to abandon the right of individual petition deliberately, and I note in passing that to abolish it the Convention would need to be amended by a Protocol – which is no easy matter, as experience has shown! But it seems to me that no supreme court, be it national or international, can do without procedures whereby it can refuse to accept cases, or reject them summarily – in short a filtering mechanism. What the Court must now do, and in this I am sure it will be supported by the Committee of Ministers, is to introduce on its own initiative procedures which, without contravening the Convention, enable it to achieve a different balance. That is to say, it must be able to rule more rapidly and with a greater concentration of its resources on those

applications which raise real problems, and to deal more summarily with those which, even when applicants are acting in good faith, are objectively unmeritorious or which concern situations that in themselves cause applicants no real prejudice. The policy I have already mentioned, of defining priorities more precisely, forms part of this shifting of the balance between applications, or in other words this differentiated treatment, which is both fair and inevitable. In short, the aim would be, if we cannot immediately apply the letter of Protocol No. 14, to remain as faithful as possible to its spirit, not forgetting that it was the States which drafted it and that all have signed it. We will not drive straight into the wall. If the obstacle remains in place we will try to find a way round it.

There are still, however, grounds for concern. For various reasons, but in particular the fact that Protocol No. 14 and its provisions on judges' terms of office have not come into force, the Court will lose many of its judges all at once in the first half of this year. Such a sweeping renewal cannot fail to raise problems of continuity and experience. Of course, we extend a warm welcome to the new judges, confident that they will blend in at the Court and bring it their own energy and their own qualities. But I wish to thank the judges who must leave us for everything they have brought to the Court. And without wishing to interfere in the member States' affairs, I sincerely hope that they will be employed at a level commensurate with their worth and their experience in the service of a high international court. It is in the best interests of them, the image of our Court, and the contribution which in view of their qualities they can make to their national systems.

I would add that judges who leave Strasbourg receive no pension, unlike those at other international courts.

That is why the Court has fought and continues to fight for the introduction of a social protection scheme worthy of the name for judges, including a pension scheme, thus ending an anomaly which can only be explained by historical reasons relating to the failure to define a real status for our judges. The report of the Group of Wise Persons mentions the vital importance of setting up a social security scheme including pension rights. We are currently engaged in discussions on that point with the Secretary General, as we soon will be with the Committee of Ministers.

Ladies and gentlemen, I told you that the situation holds out encouraging prospects. Some of them are to be found within our institutional system and some outside it.

The Steering Committee for Human Rights has been asked by the Committee of Ministers to examine the Wise Persons' recommendations. In any event, it will therefore have to propose what the response to these various recommendations should be – after ascertaining the Court's opinion, naturally.

The Committee of Ministers itself will have to raise once more the question of the means to be employed, both from a procedural point of view and in budgetary terms, to enable the system to function and survive, even if ratification of Protocol No. 14 is not forthcoming.

There are therefore possibilities – if the political will is there. It would be better for that will to be expressed by forty-seven States than by forty-six, but if it is expressed only by forty-six, that will already be an achievement.

There are also a number of reasons outside our system itself why we should not be discouraged.

First of all, experience shows that national courts, and especially supreme and constitutional courts, are increasingly incorporating the European Convention into their domestic law – are in a sense taking ownership of it through their rulings. National legislatures are moving in the same direction, for example when they introduce domestic remedies which must be exhausted on pain of having applications to Strasbourg declared inadmissible, or when they speedily draw the consequences of the Court's judgments in the tangible form of laws or regulations. The approach based on subsidiarity, or as I would prefer to say on solidarity between national systems and European supervision, is in my view likely to be a fruitful one. In the medium term it will reduce the flow of new applications. All the contact I have been able to have with national authorities has shown me that there is a growing awareness among executive, legislative and judicial authorities of the need for States to forestall human rights violations and to remedy those it has not been possible to avoid.

Nor should one underestimate the Court's cooperation with the organs and institutions of the Council of Europe, and I am gratified by the interest they show in our work and the assistance they endeavour to give us.

Recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly, reports of the Human Rights Commissioner and various committees working under the aegis of the Secretary General often serve as a source of inspiration for our judgments. But these texts may also play a role in preventing violations, thus removing causes for a complaint to the Court. In the same spirit we may expect, as the Wise Persons observed in their report, a beneficial effect from the work of national ombudsmen and mediators.

Lastly, I place great hopes in the European Union's accession to the Convention. That was delayed by the vicissitudes we are aware of; the Lisbon Treaty has made it possible once more, even though the necessary technical adjustments may take some time. The accession will strengthen the indispensable convergence between the rulings of the two great European Courts, the Court of Justice of the European Communities and our own, which are moreover by no means rivals but strongly complementary, and which are already cooperating in the best spirit. Above and beyond that rather technical benefit, accession can be expected to bring a synergy and a tightening of bonds between the two Europes, and to strengthen our Court's cooperation in the construction of a single European judicial space of fundamental rights. That will be in the interest of all Europeans, or in any event of those whose rights and freedoms have been infringed.

Ladies and gentlemen, it is time for me to conclude, before giving the floor to High Commissioner Louise Arbour.

At the end of my first year in office, I cannot hide, and have not hidden from you, the fact that our Court is running into difficulties. Perhaps one can say without exaggeration that the crisis it faces is without precedent in its already long history.

But the authority, the outreach and the prestige of the Court are intact. And above all, the cause of human rights is such a noble one that it forbids us to be discouraged; on the contrary it demands that we continue untiringly in our Sisyphean task of rolling the boulder uphill, in furtherance of that mission, which is the Court's objective and its *raison d'être*. At stake are the applicants' rights, proper recognition for the efforts of those who assist them, whether lawyers or non-governmental organisations, but also the States' own interests. They have freely entered into a covenant which results in their being judged, and they have everything to gain by ensuring that its implementation remains effective if they are not to disown what they willed into being.

In our work we need the assistance of all our member States. Allow me to quote the words of famous figures from two of them. The first is William the Silent, the Stadhouder of Holland, whose proud motto you will have heard: "One need not hope in order to undertake, nor succeed in order to persevere." Secondly, I would remind you of Goethe's words: "Whatever you can do, or dream you can, begin it. Boldness has genius, power and magic in it."

Not to give way to resignation, to undertake. It seems to me that the European Court of Human Rights, today, has no other choice.

Thank you.

Louise Arbour

**United Nations High Commissioner
for Human Rights**



SPEECH GIVEN ON THE OCCASION OF THE OPENING OF THE JUDICIAL YEAR, 25 JANUARY 2008

President Costa, members of the Court, ladies and gentlemen, dear friends and colleagues,

It is an immense honour for me to take part in the ceremony marking the opening of the European Court of Human Rights' judicial year. I have always taken a great interest in the Court's work and the key institutional role it plays in the interpretation and development of international law in the human rights field, not only in my current position as High Commissioner for Human Rights, but also when I was a judge at the Canadian Supreme Court.

Mr President, the European regional human rights protection system often serves as a model for the rest of the world. The protection system established under the Convention for the Protection of Human Rights and Fundamental Freedoms provides clear proof that a regional mechanism can, indeed must, guarantee the protection of human rights where national systems – even the most efficient ones – fall short of their obligations. Europe's experience shows that a regional system can – with time and sustained commitment – develop its own culture of protection, drawing inspiration from the best things the various national legal systems and different cultures have to offer. The validity of this approach has been confirmed both in the Americas, through the Inter-American Court of Human Rights, and in Africa, with the creation of an even more ambitious regional protection mechanism, which now includes a court and involves all States across the African continent.

As High Commissioner for Human Rights, I have long deplored the fact that Asia does not have any system of this kind. Some doubt the viability of such a system in view of the size and diversity of the Asian continent. The example of Africa will perhaps serve to prove the contrary. Recently, there were the first signs of political commitment at sub-regional level: last November the ASEAN States agreed to set up, by virtue of its founding charter, a regional human rights system for the countries belonging to ASEAN. I am convinced that, as this system takes shape, lessons drawn from history and from the experiences of Europe, the Americas and Africa will enable an effective regional protection system to be developed on solid foundations, gaining the trust of the main parties concerned. I hope that one day everyone throughout the world will have access to a regional mechanism of

this kind should the national system prove deficient. Since regional mechanisms are closer to local realities, they will inevitably be called upon in the first instance, while the international protection offered at United Nations level will more usually remain a last resort.

Mr President, some people argue that the European Court of Human Rights has become a victim of its own success, in view of the already high and still increasing number of cases before it. The Court's procedures, which were established some years ago, do not allow it to deal with such a volume of cases within a reasonable time. I therefore find it regrettable that Protocol No. 14, which provides for more effective procedures by amending the Court's control system, has not been ratified by all the States Parties to the Convention. I sincerely hope that this additional instrument will come into force quickly, so that the Court can deal more efficiently with the volume of complaints brought before it.

It remains possible that these reforms will relieve the pressure on the Court only temporarily and that it will ultimately have to move away from the concept of universal individual access towards a system of selective appeals, a practice that is, of course, already common in courts of appeal at national level. This would allow more appropriate use of the Court's limited judicial resources, targeting cases that arouse genuine debate of international law and human rights, and would at the same time provide an opportunity for more thorough consideration of highly complex legal issues with profound implications for society.

Mr President, members of the Court, the system of Grand Chamber review that has already been introduced is, in my opinion, very much proving its worth. A second tier of review, by an expanded chamber, increases overall conceptual clarity and doctrinal rigour in the law. It gives the voluminous body of law emerging from the Sections at first instance a coherence which could not otherwise easily be achieved. The Grand Chamber's decisions over this last year certainly confirm this. In particular, *Vilho Eskelinen and Others v. Finland*¹ has brought fresh conceptual clarity to access to justice issues in the public sector arising under Article 6 of the Convention.

In other cases, the Court has made very thoughtful contributions on issues that are sensitive across the Council of Europe space and on which there is little European consensus. Examples such as *Evans v. the United Kingdom*², on the use of embryos without consent, will guide further discussion on these issues by policy-makers, as well as the general public, and on complex social questions that do not come with easy answers. Other cases – such as *Ramsahai v. the Netherlands*³ and *Lindon and Others v. France*⁴ – have dealt with fact-specific incidents of use of force and defamation that have been very controversial in the countries in which they have arisen, but where the Court's judgment has been important in bringing finality to the discussion. These cases very much demonstrate the varied positive impact of the international judicial function.

1 [GC], no. 63235/00, 19 April 2007.

2 [GC], no. 6339/05, 10 April 2007.

3 [GC], no. 52391/99, 15 May 2007.

4 [GC], nos. 21279/02 and 36448/02, 2 October 2007.

In a review of the Court's jurisprudence from the United Nations human rights perspective, one decision over the last year stands out particularly, and raises both complex and challenging issues. In *Behrami v. France* and its companion case of *Saramati v. France, Germany and Norway*⁵, the Grand Chamber of the Court was called upon to decide the admissibility of cases against those participating member States arising from the activities in Kosovo of the United Nations Mission in Kosovo (UNMIK) and the Kosovo Force security presence (KFOR). In the first case, a child died and another was seriously wounded by a cluster bomblet that, it was alleged, UNMIK and KFOR were responsible for not having removed. The second case concerned the arrest and detention of an individual by UNMIK and KFOR.

Highlighting the degree to which human rights and classic international law have now become closely interwoven, the case required the Court to assess a particularly complex web of international legal materials, ranging from the United Nations Charter to the International Law Commission's Draft Articles on the Responsibility of International Organisations and on State Responsibility, respectively, as well as the Military Technical Agreement, the relevant United Nations Security Council Resolutions, the Regulations on KFOR/UNMIK status, privileges and immunities, KFOR Standard Operating Procedures, and so on. The United Nations Office of Legal Affairs itself submitted a third-party brief to the Court, set out in the judgment, delineating the legal differences between UNMIK and KFOR. It also argued, in respect of the cluster-bomblet accident, that in the absence of necessary location information being passed on from KFOR, "the impugned inaction could not be attributed to UNMIK".

The Grand Chamber unanimously took a different approach, holding that both in respect of KFOR – as an entity exercising lawfully delegated Chapter VII powers of the Security Council – and UNMIK – as a subsidiary organ of the United Nations created under Chapter VII – the impugned acts and failure to act were "in principle, attributable to the United Nations". At another point, the Court stated that the actions in question were "directly attributable to the United Nations". That being said, the Court went on to see whether it was appropriate to identify behind this veil the member States whose forces had actually engaged in the relevant action or failure to act. Perhaps unsurprisingly, the Court found that in light of the United Nations' objectives and the need for effectiveness of its operations, it was without jurisdiction *ratione personae* against individual States. Accordingly, the case was declared inadmissible.

This leaves, of course, many unanswered questions, in particular as to what the consequences are – or should be – for acts or omissions "in principle attributable to the United Nations". If only as a matter of sound policy, I would suggest that the United Nations should ensure that its own operations and processes subscribe to the same standards of rights protection which are applicable to individual States. How to ensure that this is so, and the setting up of appropriate remedial measures in cases of default, would benefit immensely from the input of legal scholars and policy-makers, if not from the jurisprudential insight of the courts. In areas of counterterrorism, notably the United Nations' sanctions regimes, similar problems

5 (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007.

have become apparent, and, in that area, decisions of the European Court of Justice, in particular, have highlighted both the problems and possible solutions. I do look forward to following the contribution that this Court will offer to resolving these jurisprudentially very challenging but vitally important issues.

Mr President, within any system of law, national as well as regional, it can be tempting to confine one's view to the sources of law within the parameters of that system. As a former national judge, I am very much aware of how readily this can occur. That temptation can rise as the internal volume of jurisprudence grows and the perceived need to look elsewhere for guidance and inspiration can wane. In that context, allow me to say how particularly important it is to see the Court's frequent explicit reference to external legal materials, notably – from my point of view – the United Nations human rights treaties, and the concluding observations, general comments and decisions on individual communications emanating from the United Nations treaty-monitoring bodies.

To cite but one recent example of wide reference to such sources, the Grand Chamber's decision in *D.H. and Others v. the Czech Republic*⁶ made extensive reference to provisions of the International Covenant on Civil and Political Rights, of the International Convention on the Elimination of All Forms of Racial Discrimination and of the Convention on the Rights of the Child, as well as citing General Comments by the United Nations Human Rights Committee on non-discrimination and a relevant decision by the Committee on an individual communication against the same State Party. The Court also referred to General Recommendations of the Committee on the Elimination of Racial Discrimination on the definition of discrimination, on racial segregation and apartheid, and on discrimination against Roma. I find this open and generous approach exemplary as it recognises the commonality of rights problems, as well as the interconnectedness of regional and international regimes.

In international law, there is a real risk of unnecessary fragmentation of the law, with different interpretative bodies taking either inconsistent, or worse, flatly contradictory views of the law, without proper acknowledgment of differing views, and proper analysis in support of the stated better position. In the field of human rights, these effects can be particularly damaging, especially when differing views are taken of the scope of the same State's obligations. Given the wide degree of overlap of substantive protection between the European Convention and, in particular, the International Covenant on Civil and Political Rights, the Court's use of United Nations materials diminishes the risk of inconsistent jurisprudence and enhances the likelihood of a better result in both venues.

Of course, there are some variations of substance between certain provisions of the two sets of treaties, and there may on occasion be justified differences in interpretative approach between the two systems on points of law. I would, however, hope that contrasting conclusions of law between the Court and, for example, the Human Rights Committee on essentially the same questions of law would be rare and exceptional. I think it correct in principle, let alone as a matter of prudential use of scarce international judicial resources and comity between international rights institutions, that plaintiffs should have one opportunity to litigate thoroughly

a question of international human rights law before an international forum, rather than routinely engaging different international fora on essentially the same legal issue. To that end, in circumstances where a substantive legal issue comes before an international body that has already been carefully resolved by another, in my view special attention should be paid to the reasoning and adequate reasons should be expressed in support of any contrary views of the other body before a contrary conclusion of law is reached. Ultimately, the systems of law are complementary rather than in competition with each other, and with sensitive interpretation there is plentiful scope for the regimes to work in their own spheres but in a mutually reinforcing fashion. I would certainly welcome opportunities for a number of judges of the Court and treaty body members to meet and share perspectives on some of these legal questions.

Allow me to add how encouraged I have been by the dramatic expansion in the Court's practice of *amicus curiae* third-party briefs, which put before the Court broader views and other legal approaches, and which can be beneficial in giving the Court's interpretations of the Convention the richest possible basis. As High Commissioner for Human Rights, over the last two years I have begun myself to use this tool, putting briefs to the Special Court for Sierra Leone, the International Criminal Court, the Iraqi High Tribunal and the United States Supreme Court, in instances where I have felt that the court might be assisted by my input on a particular point of international human rights law. I am sure that in due course similar opportunities before this Court will present themselves, and I hope to be in a position to make useful contributions to your work in this fashion.

Mr President, a final issue that has long been close to my heart is the effort to bring economic, social and cultural rights back into what should be their natural environment – the courts. The unnatural cleavage that took place decades ago when the full, interconnected span of rights set out in the Universal Declaration of Human Rights were split into supposedly separate collections of civil and political rights on the one hand and economic, social and cultural rights on the other has done great damage in erecting quite false perceptions of hierarchies of rights. In the area of justiciability of rights, particularly, the notion of economic, social and cultural rights as essentially aspirational, in contrast to the "hard law" civil and political rights, has proved especially difficult to undo. At the national level, some judiciaries have been bolder than others in this area, while at the international level, discussions continue to proceed slowly on the elaboration of an Optional Protocol permitting individual complaints for violations of the International Covenant on Economic, Social and Cultural Rights.

Against this background, this Court's jurisprudence has been very constructive in setting the stage for progress on these issues. Although the Convention's articulation of rights is essentially civil and political in character, the Court has not hesitated to draw upon the interconnected nature of all rights to address many economic, social and cultural issues through the lens of – nominally – civil rights. The Court's approach, for example, to health issues through the perspective of the right to security of the person – in the absence of a right to health as such – shows how rights issues can be effectively approached from various perspectives. These

6 [GC], no. 57325/00, 13 November 2007.

techniques are of real value to national judiciaries, whose constitutional documents are also often limited to listings of civil and political rights, which nevertheless seek to address issues of broader community concern in rights-sensitive fashion.

The very first Protocol to the European Convention, of course, does explicitly set out a classic social right, the right to education. As is well known, Article 2 of that Protocol sets out explicitly that: "No person shall be denied the right to education." The Court's jurisprudence in elaborating the contours of this right with judicial rigour is, in my view, particularly important in elaborating how these rights can be subjected to just the same judicial treatment as the more familiar catalogues of civil and political rights. In this respect, I particularly welcomed the recent decision in November last year of the Grand Chamber of the Court in *D.H. and Others v. the Czech Republic*, cited above, which held that the system of Roma schools established in that country breached the right to education, read in conjunction with the prohibition of discrimination. The course marked by the Court in this landmark case will be of great importance to national judiciaries and regional courts increasingly dealing with economic, social and cultural issues.

Mr President, please allow me to conclude my address by congratulating the Court on the vitality and energy of its decisions, and to underline the importance of its work in relation to the more general international human rights protection system with which the European system has so many similarities. Rigorous though the standards already established may be, I believe that it is still possible to refine approaches and to enhance the existing natural complementarities.

I should now like to thank you for giving me the opportunity to speak on this occasion and I wish you a productive judicial year. I can assure you that I shall be following the results of your deliberations with great enthusiasm this year and well beyond.

Thank you.

PHOTOS





PREVIOUS DIALOGUES BETWEEN JUDGES

- Dialogue between judges - 2007
- Dialogue between judges - 2006
- Dialogue between judges - 2005