



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Speech at Zagreb University

**by Jean-Paul COSTA, President of the European Court
of Human Rights**

30 March 2009

Dear Dean, Ladies and Gentlemen, dear colleagues, dear students,

It is a pleasure for me to be here today in this great university, with its renowned Faculty of Law. I am grateful to the organisers of this meeting for giving me and my colleagues from the European Court of Human Rights – Judge Nina Vajić, a former Professor here, and Roderick Liddell – the opportunity to discuss with you some issues of human rights law. The dialogue between Court and Faculty is a fruitful one for both sides. It is certainly very stimulating for me to listen to “Court watchers” who have kept a close eye on the activities of the Strasbourg Court over the years.

In my remarks today I will address two subjects.

(i) The first is more procedural in nature – how the Court seeks to ensure consistency in its case law.

(ii) The second is more substantive – the concept of positive obligations in the Strasbourg case law.

My speech will be relatively brief so as to leave time for comment and discussion afterwards.

(i) Consistency in its case-law

The risk of inconsistency in the Court’s case law is mentioned in the Convention itself. Article 30 provides that, if such a risk arises out of a pending case, the Chamber may relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties objects. One of the intended functions of the Grand Chamber is thus to contain the risk of inconsistency.

There was no such provision in the Convention prior to Protocol No. 11. The only judicial formation expressly referred to was the Chamber of nine judges. It was the Court itself, exercising its regulatory power through the Rules of Court, that created a superior formation composed of all judges – the Plenary Court. The Rules gave

Chambers full discretion to refer important cases to the Plenary. The first judgment delivered by the Plenary Court was in 1968. Relinquishment of jurisdiction over a case was mandatory, however, if there was a possibility of inconsistency with previous case law.

As the Court continued to grow in size, and the Plenary Court became too big to function effectively as a judicial formation, the Rules were changed (1996) to create three degrees of jurisdiction – the nine judge Chamber, the Grand Chamber (with 21 judges), and the Plenary Court. In this set-up, the role of the Plenary was limited to dealing with the most serious cases, or cases that would lead to a significant change in the case law. In actual fact, no case was ever referred to the Plenary during the last 3 years of the old Court's existence. (Under Protocol No. 11, the Plenary Court, which now comprises 47 judges, has no judicial functions.)

Article 30 can therefore be seen as the codification of previous judicial practice, with one significant difference – the parties' veto. The Rules of Court bring a certain discipline to this veto – any objection must be duly reasoned and must be filed within one month. If not, it will be considered invalid. Moreover, the “veto” may be qualified as “suspensive” rather than absolute, insofar as, after the Chamber judgment, the parties may under Article 43 request referral of the case to the Grand Chamber (see for instance the Grand Chamber case in *Öcalan*¹, 2005, after the Chamber judgment, 2003).

In contrast, the other route to the Grand Chamber – referral under Article 43 – was a new and rather controversial device that attracted a good deal of criticism at the time (one commentator described it as *monstrueux*). Nearly 10 years on, this aspect of the procedure has, I think, gained general acceptance. There is no shortage of requests from applicants and/or Governments for referral. But the Panel of 5 judges has been very selective, accepting very few such requests each year (5-6% in average – see my contribution to the *Liber Amicorum Luzius Wildhaber*²). The fear that the procedure would undermine the authority of Chambers proved unfounded; rather it can be said that the authority of the case law is enhanced when judgment is given on an important issue by the Court in its most solemn formation. In two days' time the Court will be holding a hearing in the case of *Oršuš and Others v. Croatia*³, which has been referred to the Grand Chamber.

Article 43 does not explicitly mention departure from previous case law as a ground on which the panel of 5 judges may accept a case. But it is clear that if a Chamber were to take a very dynamic stance in interpreting a provision of the Convention and go significantly further than previous judgments, this could be viewed as “a serious issue affecting the interpretation... of the Convention”. Of course, the contrary is true. If a Chamber gives the impression to be more timid than the established case-law, it offers an opportunity for the Grand Chamber to clarify the situation.

Quite a few instances can be cited in which the Grand Chamber acted to ensure the consistency of the case law of the Court. To take an example of a case that came before it by relinquishment, the *Stec and Others v. UK*⁴ decision (2005) brought to light the ambiguity and divergence in the case law regarding whether entitlement to

1. *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV

2. *Liber Amicorum Luzius Wildhaber*, N.P. Engel, 2007

3. *Oršuš and Others v. Croatia*, no. 15766/03

4. *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X

non-contributory social security benefits came within the scope of Article 1 of Protocol No. 1. The ambiguity lay in the Court's *Gaygusuz v. Austria*⁵ judgment (1996), which the applicants and the Government were each able to cite in favour of their arguments. The Grand Chamber identified "the two distinct lines of authority [that] subsequently emerged in the case-law of the Convention organs". In such a situation, it decided to look at the question afresh. In view of the importance of social security payments for many persons in Europe today, the Grand Chamber chose the more progressive of the two lines of authority. By the way, our Court did in *Stec*⁶ what both it and the Luxembourg Court often do: it derived inspiration from a judgment dealing with the same issue, delivered beforehand by the European Court of Justice, which is explicitly mentioned and quoted in our own judgment.

In the case of *Kopecký v. Slovakia*⁷, in which the applicant complained that he was unable to recover possession of a collection of valuable coins that had been confiscated from his father under the communist regime, the Chamber that decided the case ruled that there had been a violation of Article 1 of Protocol No. 1, basing its reasoning on the concept of a "legitimate expectation" as developed in the case law. That judgment was adopted by 4 votes to 3 – the minority argued that on the facts the applicant had not established that he had a possession. The case was accepted by the Panel and the Grand Chamber gave judgment in 2004. It reviewed in detail the relevant authorities on the meaning of a "legitimate expectation" and corrected the Chamber's reading of those precedents, which was too broad.

Relinquishment and referral are the formal, public means by which the Court can ensure consistency in its case law. What I would like to describe now are the internal means that the Court has chosen to foster consistency. These seek to be preventive, in contrast to the Article 43 procedure, which is "remedial" and adds an average of 12 months to the length of the proceedings at Strasbourg.

With its five Sections deciding cases on a weekly basis, and each Section adopting hundreds of judgments per year, there clearly is a risk of divergent interpretations of the Convention or inconsistent application of the case law to the facts of new cases. The Court has created structures and developed a method to reduce that risk.

The first stage in the process is the scrutiny of the draft judgments and decisions as soon as the weekly file is communicated to the judges. This is done by a group of Registry lawyers. It pays particular attention to drafts that apply the case law to new situations, or propose to develop the case law in a particular direction. The group makes its report each week to the Court's Jurisconsult, one of the most senior posts in the Registry. He in turn prepares a succinct case law update that is sent out as soon as possible to all judges and case lawyers so as to brief them in advance of imminent noteworthy legal developments – a most useful service. Where he considers that there is a potential conflict or divergence on the cards, he will draw this to the attention of the Section(s) concerned.

This is a continuous exercise, which must be completed within a tight deadline – there are usually one or two weeks between the distribution of the file and the Section meeting at which it will be examined.

5. *Gaygusuz v. Austria* – Rep. 1996-IV, fasc. 14

6. *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X

7. *Kopecký v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX

If the intervention of the Jurisconsult does not resolve the matter, he may refer it to the CRB – Conflict Resolution Board. The Sections themselves may seize the CRB of a particular issue. This structure brings together the Court’s most senior judges (President and Section Presidents), assisted by the senior officials of the Registry. Since its creation in 2005, it has met 2 or 3 times per year. At each meeting it typically has a number of points to consider, ranging from substantive law to questions of practice and procedure. Each point is discussed and the CRB will generally issue conclusions and recommendations to guide the Sections in their handling of those issues. I stress the advisory role of the CRB – it is not there to direct the Sections, who retain full responsibility for the cases allocated to them. But, without being binding, the advice is followed in most cases.

Looking back over the last three years, I can say that it is a structure that has proved its usefulness, providing a valuable channel of communication between the Sections.

(ii) Positive obligations

I come now to my second subject – positive obligations.

The concept of affirmative duties incumbent upon the Contracting States is both express and implied in the text of the Convention. Article 1, which is crucial, places States under the general duty to “secure to everyone” the rights that follow in Articles 2 to 14 and in the additional Protocols. This provision was relied on by the Court in the development of its case law on the positive obligations flowing from Articles 2 and 3. These two Articles express the most fundamental values of human civilisation – the right to life and the absolute protection of the physical and mental integrity of the person. It is therefore in these two areas that the case law has gone furthest in clarifying the positive obligations of the State. In contrast to Article 8, for example, where the existence and scope of a positive obligation in a given set of circumstances will be determined by several variables, the case law under Articles 2 and 3 has, in clear and concrete terms, identified the standard and the modalities of State behaviour. Thus, the procedural obligation to investigate the death of a person caused by an agent of the State is a general one, to be performed in accordance with a series of criteria (promptness, thoroughness, independence, involvement of the next of kin) developed and affirmed in a long series of cases since the *McCann*⁸ judgment in the mid-1990s.

The obligations are not only of procedural character. They also may be substantive. In a recent case of 2008, *Renolde v. France*⁹, the Court found that France has breached Article 2; the reason is that the victim was a young man, who was in detention in remand, had clearly shown, even expressed, an intention to commit suicide. The authorities did not take this risk seriously enough, and eventually the young man did kill himself. Therefore, there was a failure in the positive obligation to take preventive measures in order to prevent a violation of the right to life (see also the recent judgment in *Branko Tomašić and Others v. Croatia*¹⁰, January 2009).

The Court’s development of the notion of positive obligations is informed also by its concern for the effectiveness of each of the Convention’s guarantees, which must, as it has so often said, be practical and effective, not theoretical and illusory. This

⁸ *McCann and Others v. the United Kingdom* – Series A no. 324

⁹ *Renolde v. France*, no. 5608/05, ECHR 2008-..

¹⁰ *Branko Tomašić and Others v. Croatia*, no. 46598/06

concern permeates the whole Convention system. There is no *a priori* limit to the contexts in which a positive obligation may be found to arise – concrete examples abound in the case law.

It may be objected that the Court's approach, which has avoided a "general theory of positive obligations which may flow from the Convention" (*Plattform "Ärzte für das Leben"*¹¹), leaves Governments in a situation of relative uncertainty over the scope and nature of their legal responsibilities, especially in relation to Article 8. This provision looms large in any discussion of positive obligations. As the Court pointed out early on, in the *Marckx*¹² case, its very wording, which frames the right in terms of "respect" rather than freedom, implies for the State more than a negative duty of non-interference. Furthermore, the scope of the provision, more specifically of the concept of private life, does not lend itself to exhaustive definition. Given the Court's evolving interpretation of the Convention, which is particularly evident in relation to Article 8, it is indeed not an easy task for Governments to delineate the duty of the State. The Strasbourg judges themselves are divided at times over where that line is to be drawn in a particular situation. But that is inevitable in the context of judicial review of individual cases, whether that review is undertaken by the European Court or by the domestic courts applying analogous constitutional provisions (or the provisions of the Convention itself).

I would stress here the caution of the European Court in finding a positive obligation under Article 8. It takes a differentiated approach to such claims, weighing up the nature and intensity of the interference. In performing this balancing exercise, the Court seeks to locate a fair balance between the competing interests of the individual and those of the community generally. The State is accorded a margin of appreciation that is generally wider than when a negative duty is concerned, where the interference must be shown to be necessary. In particular, the Court is sensitive to the constraints on State action, for example finite public funds for the provision of health care. This is illustrated clearly by an application that came before a Chamber of the Court some years ago, brought on behalf of a young person suffering from a muscular degenerative disease – *Sentges v. Netherlands*¹³. He had asked the health authorities to provide him with a robotic arm so as to give him some measure of autonomy, but the request was denied. He relied on the right to respect for private life under Article 8 and submitted that the State had a positive duty to help him regain a certain quality of life. The Court did accept that there was a direct and immediate link between the measure sought and the boy's private life. When it moved to consider the fair balance it held that the margin of appreciation enjoyed by the Dutch authorities was a wide one – they were in a better position to strike that balance. The boy was receiving the standard level of care and support from the health service. Although a robotic arm would certainly improve his personal autonomy and his ability to establish and develop relationships with others, the Court concluded that the situation did not fall outside the national margin of appreciation.

To sum up, the concept of positive obligations is one that is deeply embedded in the Court's reading of the Convention and epitomises its judicial method. It is deployed to ensure the effectiveness of the different guarantees. At the same time, and especially in relation to Article 8, it is sensitive to the character of the right claimed, the nature and intensity of the interference alleged and to the wider interests of society. The

11. *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, Series A no. 139.

12. *Marckx v. Belgium* – Series A no. 31

13. *Sentges v. the Netherlands*, no. 27677/02

balance between these claims and interests must be struck on the particular facts of each case. Furthermore, the dynamic nature of Convention rights means that, independently of factual differences between cases, the point of equilibrium may shift in time closer to the position of the individual, as the cases on transsexuals' rights show (see *Cossey*¹⁴, 1990, and *Christine Goodwin*¹⁵, 2002).

I will conclude my remarks here, and look forward to discussing with you these points, or others, with you.

Thank you for your attention.

14. *Cossey v. the United Kingdom* – Series A no. 184

15. *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI