

Polish Section of the International Commission of Jurists
Swedish Section of the International Commission of Jurists



NEW EUROPE - MAKING RIGHTS REAL

**Conference of the European Sections
of the International Commission of Jurists**

Warsaw, 30 September - 3 October 1999

**Conference of the European Sections of
the International Commission of Jurists**

**NEW EUROPE
- MAKING RIGHTS REAL**

Editor Zbigniew Lasocik

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**Conference of the European Sections
of the International Commission of Jurists
„New Europe - making rights real“**

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**European Conference
of the International Commission of Jurists
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RECOMMENDATIONS

RECOMMENDATIONS

○ Working group 1

CRIMINAL JUSTICE AND INDIVIDUAL RIGHTS

► Workshop report.

Articles 6 (fair trial), 8 (privacy), 5 (liberty) and 3 (protection from torture or degrading treatment) protect the rights of suspects. The state, however, has an obligation to protect life (Article 2) and prevent Article 3 or Article 8 violations in respect of victims of crime. The workshop opened with reports from several countries on the issues encountered in seeking to investigate and prosecute crime while safeguarding human rights.

In the UK, these Articles are about to become directly applicable in domestic law. There is a widespread training and auditing programme for investigatory and judicial authorities. Other countries, such as Russia and Poland, had also faced the problem of ensuring that existing procedures met human rights safeguards, while coping with a rise in the crime rate. Some common issues and problems were identified.

► Covert policing.

The increased reliance on covert policing methods was recognised in all countries present. Such methods raise numerous issues of human rights compliance, and risk interfering with privacy and fair trial rights. They require statutory authority, and systems for independent monitoring, authorisation and complaints. The use of agents provocateurs and entrapment raise additional issues under Articles 6 and 8.

Recommendation: that the ICJ seek to develop common standards for covert policing applicable throughout Europe.

► International, transnational and bilateral policing.

The globalisation of crime has led to a concomitant increase in cross-border policing, bilateral relations between different police forces, and the development of transnational bodies such as Europol. The working group were concerned at the lack of accountability of such bodies, and the need to ensure that human rights standards were protected in international, as well as national, policing.

Recommendation: that the above standards include mechanisms for ensuring accountability in international and bilateral police operations.

► Police accountability.

Independent and transparent complaints procedures were necessary in order to monitor and provide remedies for police misconduct. In some countries, this was

through an Ombudsman system, in others a Commission. Whatever the mechanism, it should be independent of the executive and the police. Lay involvement in internal police disciplinary proceedings was also suggested.

Recommendation: there should be exchange of information about effective and independent police complaints systems, both internal and external.

► **Protecting the rights of victims, witnesses and law enforcement officers.**

in many countries, there was a public perception that human rights protected suspects, at the expense of victims and the wider society. The group stressed the importance of asserting the state's obligation positively to protect the rights of victims and law enforcement officers. Otherwise, there is a real danger of human rights being discredited in the public's mind. Some countries reported serious intimidation of witnesses and the absence of witness protection schemes; in one country, scores of police officers had been killed.

However, the group was also concerned about moves to involve victims directly in the prosecution process, either by allowing them to halt prosecutions, or to take part as an additional prosecutor. It was important not to confuse victims' rights to be informed and protected with the state's obligation to prosecute offences.

Recommendation: The state's positive obligation to protect victims, witnesses and police, and strenuously to prosecute offences, ought to be stressed. Developments in victims' rights across Europe needed to be monitored, and international standards for witness protection identified.

► **Juvenile justice.**

Many countries fail to distinguish adequately between adults and juveniles. The importance of alternatives to the criminal justice system in relation to juveniles, particularly restorative and diversionary processes, were stressed. These were more in keeping with the principles of the UN Convention on the Rights of the Child, though there needed to be care that they did not offend against procedural fairness.

Recommendation: all countries should have separate procedures for juvenile justice, including restorative and diversionary approaches

► **Delay in pre-trial proceedings.**

Many countries reported severe problems with delays before trial, breaching Articles 5 and 6. Absence of viable bail systems could result in years of pre-trial detention. Delay in itself could diminish the prospect of fair trial, and could be used corruptly to prevent proceedings taking place at all, due to time-bars. The main causes of delay were identified as mismanagement and corruption.

Recommendation: judicial training should include case management and efficient court administration skills, as well as legal training. Pre-trial delays should be closely monitored (to be communicated to Access to Justice and Transparency and Corruption workshops)

► **Independence of the judiciary.**

Two opposite problems were identified: the need to protect judges from political interference or corruption, and the use of judicial independence as an excuse to mask inefficiency or incompetence. Lengthy tenure, adequate remuneration, and dismissal only for gross incompetence, were important. Most members, however, also supported transparent disciplinary proceedings, with a lay element.

Recommendation: security of tenure needed to be balanced with effective disciplinary proceedings, and effective judicial training (to be communicated to Access to Justice workshop)

► **Legal representation.**

Legal advice and representation, where needed, is an essential part of the right of access to courts. In many countries, the low rates of state remuneration for defence lawyers severely undermined this right, and lawyers might be insufficiently motivated, trained or independent. It was essential to provide legal advice at the very beginning of criminal proceedings, prior to charge.

Recommendation: the provision of adequately-funded independent legal aid, at the earliest stage, is essential to ensure right of access to courts; states should be urged to provide this.

RECOMMENDATIONS

◉ Working group 2

HORIZONTAL APPROACH TO THE HUMAN RIGHTS

HORIZONTAL APPLICATION OF HUMAN RIGHTS OBLIGATIONS

Horizontal application of human rights obligations present one of the most challenging areas of international protection in Europe at the end of the millennium. Clapham outlined the questions and issues which arise in a world where the role and nature of the state is changing both rapidly and dramatically. In order to understand the concepts at work, he first began with an explanation of negative versus positive rights in the European Convention on Human Rights. It has long been believed that the European Convention on Human Rights encompasses negative rights, the entitlement of individuals to enjoy freedoms without interference by state action. The scope of the rights was considered to require the restraint of action rather than a duty to take action. This approach has now been challenged by the European Court of Human Rights itself. The Court has held that the Treaty includes positive rights as well in the recent decision of *Osman v. UK*. Here the Court had to consider the situation of the failure of the police in the UK to take action against a man who was threatening a child at school. The lack of action, notwithstanding many warnings from the child's family about the danger the family felt itself to be in from this man, resulted in the end in the man killing the child's father and wounding the child. The Court held that the failure of the authorities to act constituted breach of the duty of the State to protect private life in Article 8 ECHR. Accordingly, when looking at the rights which people have under then European Convention on Human Rights one must consider also the positive rights which have to be protected within their society.

Taking then the scope of the duty as interpreted by the Court to what extent can it devolve on to individuals and do the same considerations apply where the entity required to refrain from taking action or required to act is private rather than State? While there may be general agreement that for instance a company which produces carcinogenic food is committing a human rights violation, there may be less certainty about a bank's culpability when revealing details of a customer. Further where the example of a parent disciplining a child arises there is even less consensus on whether and in what degree of severity a human rights violation may arise.

Turning then to the ways in which human rights obligations take effect, the first mode of application of obligations such as those contained in the European Convention on Human Rights is their vertical effect. This means that the State is responsible for

protection of the individual. The individual is entitled to rely upon the human rights duties which the State has entered into to protect him or herself from the State. This can be extended to a requirement whereby the individual requires the State to protect him or her.

The next type of effect is horizontal. This is the aspect considered in depth in the working group. It requires the protection of the individual against another individual without the intermediary of the State. If the action of one party against another party constitutes a violation of human rights, the parties whose rights are violated may seek redress directly against the other party relying on his or her human rights as guaranteed in international instruments.

This kind of direct protection may arise in some States through ratification of the European Convention of Human Rights itself. The effect may depend on the national legal system which permits a result in effects between private parties. However, in many States some further action is to be taken for international treaty commitments to result in obligations on individuals.

The next type of effect discussed was that of a diagonal or triangular consequence. Here an individual claims a violation of his or her human rights by another individual. The claim cannot be directly against the other individual but is a claim against the State for failure to protect the individual against another individual. Such a position may result by an indirect incorporation of the European Convention on Human Rights such a position may result. This kind of effect whereby the State is responsible for regulating correctly the human rights balance between two individuals is often known by the term *middelbar wirkung*.

Finally a zig zag approach to implementation of human rights obligations between individuals may apply. Here the individual appeals on the basis of a violation of his or her human rights to an international court, for example the European Court of Human Rights, which then requires the national authority to take measures to give effect to the human rights of one individual against another individual. While the appeal could be to the European Court of Human Rights it could also be for instance to a national constitutional court should that court have the power to oblige the State to act.

The reason for the need to consider horizontal application at this time in Europe is because of the changing nature of the State. It was noted that many State activities have been privatised which results in a diminution of human rights protection for the individual if the private body now running an operation formerly run by the State is not equally bound by the same standard and principles as the State was. Another change is the ceding of exclusive competences to supra-national bodies such as the European Union. Where States do this, human rights obligations which applied when the competence was exercised at national level are no longer necessarily directly applicable at the supra-national level. The State puts itself in a position of being potentially unable to fulfil its human rights obligations without committing an offence against its duties to the supra-national body.

Some concern was expressed about the application of horizontal effect to Article 1 of Protocol 1 ECHR, the right to enjoyment of property. This is a point of particular

concern for many Central and Eastern European countries. As yet there has not been sufficient clarity from the European Court of Human Rights on this situation. For instance, what happens when a bank in Bulgaria goes into insolvent liquidation and is unable to repay all depositors. The insurance system reimburses private persons but not associations, NGOs or companies. Is this discrimination in the enjoyment of property? Or for instance in Hungary, people whose property has been taken away from them as a result of a criminal act by the State are entitled to a coupon equal to the value of the property lost. However, this coupon may not be equivalent to the enjoyment which they seek in living in the property. The Hungarian Constitutional Court has held the State practice to be consistent with the constitution but did not consider Article 1 of Protocol 1 ECHR. Problems arise as for instance where the coupon does not give access to a property of a similar usefulness to that of the one lost.

Three models were considered: (1) the Canadian model where the rights give rise to vertical effect only; (2) the European model where rights are mixed and include positive duties; and (3) the South African model where the rights have pure horizontality. It will be a matter for us to consider what kind of application we think is appropriate in Europe or whether perhaps this is an issue which needs to be considered differently in different European countries.

Some provisions of the European Convention on Human Rights appear already to have horizontal effect: Article 2 (the Right to life), Article 3 (the Prohibition on torture, inhuman or degrading treatment), Article 8 (the Right to respect for private and family life) and Article 11 (the Right to peaceful assembly and association).

What then was the situation in the countries represented at the meeting: was there a non court legal remedy? Did the Convention have higher status than national law? Was there the possibility of direct horizontal effect? Was there a triangle effect and was there recognition of positive rights for the zig zag? The results of the discussion are presented in the table on the next page.

Following consideration of the possible effects of human rights obligations in each of the countries represented, the group began to consider the problem of what limits should apply to horizontal effect of human rights obligations. There was a general view that the duty of the State to protect the individual is a higher duty than the duty of individuals between themselves. Clear guidance on the grounds on which exceptions may be made need to be drafted. For example, it was the view of the group that where a group of landlords with substantial properties refused to let properties to non Europeans this should be a breach of human rights obligations with horizontal effect. However, where a man discovers that his fiancée is not the nationality he thought she was and he breaks off the engagement for that reason alone, she should be able to sue him for discrimination on a horizontal application. Another example was an airline which employs only women as stewardesses on the justification that the passengers prefer to be served by women. The economic justification could possibly be applied, however there would be no margin if the State only employed single women as that would be a step too far. This example was not accepted by all members of the group.

Horizontal Effect in Some European States

Country	Non Court Remedies	Higher Status	Direct Horizontal Effect	Triangle Effect	Positive Duties	Zig Zag Effect
Bulgaria		Yes	?	Yes	No	
Estonia	?	Yes	? but probably Yes	Yes		
Hungary	Yes	Yes	Yes, Art. 77 of the Constitution	Yes	Yes	Yes
Latvia	No	Yes	?	Yes		
Lithuania	Yes but limited	No	Only where remedy exists already in law	Only in constitutional issues	Yes	
Poland	Yes	Yes	Yes. Articles 32(2) and 30 of the Constitution	Yes	?	
Sweden	Yes	Only where clear and obvious	Yes	Yes	No	
Ukraine		Yes	?	Yes		
UK	No	No	No	Yes	Yes	

The group proposed three recommendations:

- In view of the evolving role of the State and its activities through the devolution of its traditional responsibilities to private and public agencies and the new international entities such as Europol and NATO and the increasing powers of private bodies (such as internet companies) protection of human rights standards must not depend on the categorisation of activities as State or private but on the protection of the individual from all actors.
- Notwithstanding the individual's right to protection, the State party to the European Convention on Human Rights remains *ultimately responsible for the protection* of all persons within its jurisdiction for the creation of national laws and remedies which include an obligation of protection from individuals, private bodies and public authorities.

■ We recognise that the grounds for exceptions expressed directly in the *European Convention on Human Rights* will also be applicable in the private sphere. It is also recognised that the application of human rights obligations between private parties will in some cases require a balancing act between competing human rights. In this context the group discussed the following questions:

- The level of scrutiny of the intimate sphere.
- How to consider the benefit or harm to the wider community against the safety or potential risk thereto to the individual, including the rights of others.
- The right to enjoyment of property.
- The right to access to work and the limits of intrusions by employers including limits of loyalty and its definition.
- Justifications based on economic grounds.
- The possibility of alternative adequate opportunity.
- The health of the next generation and children taking into account the rights of women before childbirth.
- The fundamental interest of the individual as a determining factor.
- The right to identity.

The above recommendations with an outline of our discussion were presented to the other working groups at the conference, reconsidered by the group and finalised in the current form. These were then presented to the plenary session.

► **Future action.**

The group considered that the question of horizontal effect of human rights was extremely important in the modern world and was an area of increasing jurisprudence in Europe. In order to take forward the work of the group it was agreed that:

- Members of the group would consider horizontal effect of human rights in their country and take note of any developments either in jurisprudence, legal writing or otherwise.
- The Swedish section of the ICJ would make available on its website space for the horizontal effect working group. On this site members of the group and others interested may post information about horizontal effect in their countries and elsewhere to provide a framework for continuing dialogue on the issues.
- The group would like an in depth report on horizontal effect and further consideration of the limiting factors.

RECOMMENDATIONS

◉ Working group 3

ACCESS TO A COURT

Right of access to a court

Article 6 of the European Convention on Human Rights provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

1. National court systems

Four sets of recommendations are made in relation to the national court systems in the countries of Central and Eastern Europe:

► „Everyone is entitled“

- There should be a programme of public education in each country about the content of the rights safeguarded by the European Convention on Human Rights.

NOTE: Helpful guidance, based on authentic texts, should be translated into different languages. This guidance should be made generally available, and there should be a programme, organised in conjunction with governmental and non-governmental organisations, aimed at spreading knowledge and understanding of people's rights throughout each country.

- Effective arrangements must be maintained in each country whereby if a person is deprived of his or her liberty by the police or other executive authority, he or she has access to a court within a short time, so that the legality of the detention can be reviewed by the court in accordance with Article 5.

► „A fair and public hearing“

- There should be a study conducted in each country of the extent to which the provision of legal aid for both criminal and civil cases complies with the minimum requirements of Article 6, as interpreted by the court at Strasbourg.

NOTE: There is much evidence that legal aid is not available at all in civil cases, even in complex cases, and there are often very unsatisfactory arrangements for the payment of assigned lawyers in criminal cases, as well as complaints about the quality of services they render to their clients.

- There should also be a study of the way in which professional bodies representing lawyers in each country can be assisted in their duty of raising the standards of professional competence, professional integrity, and professional

responsibility of members of their profession, and also of their understanding of the requirements of the European Convention on Human Rights, and particularly Article 6. If such bodies do not exist, they should be created for this purpose.

► **„A ... fair hearing within a reasonable time ... by an independent ... tribunal“**

The following five matters need to be addressed in each country:

- Clear, merit-based standards should be introduced and maintained in relation to the recruitment and career development of judges.
- Judges should be paid a proper salary, and appropriate steps should be taken to improve their status.
- Courts should be properly equipped so that the judges are able to administer justice fairly and within a reasonable time.

NOTE: This recommendation involves the provision of adequate court buildings, office space, administrative staff, Information Technology, library facilities, etc.

- Attention must be paid to the need to ensure that judges are properly trained and equipped with the necessary experience to enable them to perform their judicial functions properly.

NOTE: The training should include training in the jurisprudence of the European Convention on Human Rights and knowledge of the ways in which the relevant rights may be effectively implemented.

- The judiciary must enjoy budgetary independence from the executive.
- The judiciary must have access to relevant international texts (such as the European Convention on Human Rights) translated into their own language.

► **„A fair hearing ... by an ... impartial tribunal“**

Appropriate steps must be taken in each country to ensure:

- that the judiciary is free from the suspicion of corruption,
- that a clear explanation, based on Strasbourg and other international and national jurisprudence, is required in each country, of what is meant by the requirement of impartiality.

► **General comment.**

The countries of Central and Eastern Europe wish to comply with international standards, as provided for by Article 6 of the European Convention on Human Rights, but they often lack the necessary know-how, resources, and executive and legislative willpower needed to enable them to comply with their obligations.

The appropriate role of the relevant international bodies - the Council of Europe and the ICJ - should be to identify the main issues clearly, and to set out the ways in which these issues are now being addressed in each country, or the ways in which they could usefully be addressed in future, according to the needs of each country, without unnecessary duplication of effort, and in a sensibly coordinated way.

There is a very valuable role which the judiciary in Western European countries could play in the task of advising on the ways in which the status and know-how of the judiciary in the countries of Central and Eastern Europe could be enhanced.

2. The European Court of Human Rights

There is great anxiety about certain problems now affecting the ability of the Court itself to comply with standards similar to those required by Article 6. Three recommendations are made in this respect:

- That member states of the Council of Europe should be urged to increase their financial contributions to the work of the Court, so that it can employ the numbers of skilled staff who are needed to process the increased volume of cases in an effective way.
- That clear and transparent procedures should be introduced in relation to the choice of judges by each member state; these should enable national non-governmental organizations to play an active role in connection with the choice of judges for the Court.
- That the Court should conduct a study of the new methods now being used by certain national courts, both in Europe and elsewhere, for managing their caseload and speeding the processing of cases through their courts.

NOTE: It is likely that the caseload at Strasbourg would be reduced if every country which possesses a Constitutional Court were to allow individual citizens to have effective access to that court.

RECOMMENDATIONS

◉ Working group 4

CORRUPTION

► Conclusions.

Corruption can be seen as a violation of human rights and of their ethical and anthropological foundations: the principles of reciprocity and equality. Corruption perverts the relation of mutual trust between citizens and institutions; it violates the principle of good faith, the „constitutive“ element of the rule of law; it distorts fair competition; it undermines the legal order and causes discrimination against all subjects not involved in the perverted relation between the corrupter and the corrupted and, as a result, leads to *systemic* violation of human rights and of their fundamental principles of universality and indivisibility.

Corruption is not the same problem everywhere. On the contrary it is much worse in some countries than in others: in many countries it is more or less a root of most evils, the reason why the countries do not develop or develop very slowly. Dictatorship, underdevelopment and a planned economy - these three phenomena usually go together - inevitably involve corruption. The introduction of a market economy into such a system, however, may result in a corruption boom during a transitional period until the legal structures manage to adjust to the new situation.

Organised crime, which is growing more and more international, is to a great extent dependent on corruption.

► Definition.

The concept of corruption is more or less broadly understood. In order to find remedies against corruption, however, it is important to choose a suitable definition, since the same remedies do not necessarily apply to all the phenomena which can be found under the „umbrella designation“ corruption or misuse of public power.

Thus in this report the following definitions of corruption are used: **bribe-giving** - any deliberate action by anyone to give or to offer an advantage to an official or an employee for him - or herself or for any other person or group (including political parties), in order to influence the exercise of his or her functions; **bribe-taking** - any deliberate action of anyone to request or receive an advantage for him - or herself or for any other person or group (including political parties) in order to act or refrain from acting in accordance with his or her duty. The offence of corruption must be available against everyone, including politicians.

► Recommendations.

A basic condition is the existence of appropriate law enforcement authorities of sufficient size and efficiency. Of equal importance is that judges and public officials - particularly prosecutors and police officers - are adequately paid in order to resist the temptation of soliciting and accepting illicit payments.

► **Constitutional law.**

Undisclosed political contributions can be a source of abuse. Governments should regulate the conditions under which political contributions can be made, for instance by limiting the amount of electoral expenses and compelling the identification of donors and the amounts given. Candidates in political elections should be aware of the obligation to reveal a conflict of interest between their private interest and their public duty.

Those convicted of serious offences of financial impropriety should be ineligible for election to political office for a fixed period of time following their conviction.

It should be stressed that the more transparent government decision-making is, the more difficult it is to conceal illicit payments and other corrupt practices involving politicians and public officials. Thus it is important to facilitate the work of free media reporting on the dysfunctions of a democratic society. The concepts of freedom of information and protection of media sources are important safeguards in a democratic society.

► **Penal law.**

Basic criminal statutes of virtually all countries all around the world clearly prohibit - at least on paper - both the giving and the taking of bribes in the public sector. To what extent they are upheld depends not only on having efficient and honest policemen, prosecutors and judges, but also on how the legal provisions are drawn up. In a country governed by the rule of law the prosecutor has to prove, beyond any reasonable doubt, a suspect's guilt. Since corruption is a „hidden“ crime which is very difficult to prove it is an important task for the law makers to decide what facts the prosecutors have to prove in order to have a suspect convicted of corruption.

Inability to prove corruption to the penal standard should not exclude civil measures, such as dismissal from employment, where there is proof of corruption of the civil standard.

Corruption in the private sector should be penalised. Legal entities, such a companies, should also be liable to sufficiently severe sanctions to deter corrupt practices.

There are three recent international conventions which seek to promote consistent anti-corruption criminal laws in Europe: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe's Criminal Law Convention on Corruption, and the EU Convention on the Fight Against Corruption Involving Community or National Officials.

The fight against corruption requires the highest possible degree of co-operation between law enforcement and judicial authorities in different states.

► **Civil law.**

Corruption should affect the validity of a contract, in particular if the advantage offered is shown to have unduly influenced the bribe-taker to an action in breach of trust. The agreement should be considered null and void *ipso jure* as being contrary to public morality and public order. Otherwise, it might be possible to accuse the court of direct complicity in the commission of the crime.

There should be effective recourse to the courts to recover damages suffered as a result of corrupt practices.

► **Fiscal law.**

The practice of allowing sums paid as bribes in the private or public sector to be deducted for taxation purposes should be prohibited. This is in accordance with the standards laid down in the OECD Convention on the Bribery of Foreign Public Officials

► **Public procurement law.**

Statutory provisions should be established providing that a tender may be rejected if the tenderer or any other person acting on his or her behalf has given, promised or offered a bribe in connection with the business to any employee or other person who has had to deal with the contract on the authority's behalf. A principle in public procurement should be the division of responsibilities among different persons so that the same person is never in charge from the beginning of negotiations through to the authorization of payment. The more employees know of each others business the less are the opportunities to cheat.

Companies should not be permitted to tender for public contracts unless they have demonstrated a clear commitment to an anti-corruption ethics policy, such as are already common in many multinational companies.

► **Administrative law.**

Countries should establish procedures for appointment of officials and members of the judiciary, offering stronger guarantees of their independence of political power, and a clear separation between political and official or judicial functions. Countries should ensure that officials and members of the judiciary are aware of the obligation to disclose an interest where a conflict of interests arises. Violations of the obligation should be sanctioned by disciplinary action.

In all administrations there is a risk of an excessive sense of loyalty to colleagues and staff. Thus it is most important that all officials should be aware of the obligation to expose actual or suspected wrongdoing within the public service and such whistleblowers should be given appropriate protection.

► **Financial regulation.**

In the area of banking and financial services, the supervisory authorities should develop the principle of irreproachable activity and apply it to direct or indirect involvement in all business activities whether they take place domestically or abroad.

Countries should institute at the national and local levels audit chambers independent of political power, and equip those financial institutions with special competencies in the area of corruption.

► **Other measures.**

Countries should provide training and education facilities for the prevention and combating of corruption for the benefit of public authorities, businesses, police

forces and the judiciary.

Public authorities and private institutions should ensure that ethical practices are adopted and spread knowledge about the legal provisions concerning corruption.

In order to develop and encourage a culture of opposition to corruption as contrary to human rights values, educational programmes should be developed starting in schools and universities.

Public authorities, private organisations and companies should establish „Codes of Conduct“ concerning their respective fields backed by effective sanctions including dismissal and civil law penalties.

Where appropriate specific bodies charged with investigating corruption and standards in public life should be established.

All requirements for obtaining permissions or licences should be abolished if they serve no useful purpose. Such requirements often breed corrupt practices.

All anti-corruption measures should be consistent with general human rights standards to ensure that the rights of the accused are given appropriate protection.

EDITORIAL NOTES

We commend to our readers the materials of the ICJ European Conference „New Europe - Making Rights Real“ which took place from 30 September to 3 October 1999 in Warsaw. The Conference is a regular event organised by the Standing Committee of the European Sections of the ICJ.

Contained in this volume are official speeches made at the opening session, an inaugural presentation, materials from different working groups including introductory presentations, as well as all sorts of information necessary to provide a clear picture of the Conference's proceedings.



Since the Conference had set itself a very pragmatic goal of key importance to its implementation was a publication of all documents which outline the standard of activities of the ICJ European Section for the future. First of all these are recommendations and an Action Plan. Recommendations are in a sense a record of discussions held in different working groups. They were being compiled as the Conference was in progress. The recommendations not only allow a reader to get a glimpse of which problems were discussed, but also give an opportunity for every reader to see what in the opinion of the participants should be accomplished to guarantee that the rights are made real. Action Plan lists practical measures which the ICJ European Section intends to undertake in the next two years.

Also published are:

- Agenda of the Conference
- Participants of the Conference
- Guests of the Conference

- Standing Committee of the European Section of the ICJ
- Organizing Committee
- Conference staff

Published is also the text of resolution adopted by the Conference in reaction to serious violations of human rights in Belarus.

For the needs of the conference all the introductory speeches were translated into English and Russian. However group discussions and all the recommendations were only in English. Therefore we decided that this is reason enough for the publication to include only English versions of the work materials. This solution allows us to maintain homogeneity of the publication. Of course this does not mean that the materials are not available in Russian. All who are interested are welcome to contact us at the Polish Section of the ICJ office.

All materials published in this book are due to work of individual people and international work groups. They were written in many different countries and their authors are theorist and practicians of law. This materials differ in form, style and the degree of generality. Lingual differences are also vivid. We felt that these works are valuable this way and keeping them unchanged would let our readers feel the creative aura of conference. For this reason editorial changes were minimised.

Editor

PREFACE

The second half of eighteenth century was a very hard time in Polish history. Internal strife, weak power of the king and expansive policies of the neighbours - all united in bringing the country to ruin. Austria, Russia and Prussia lost no time in taking the opportunity and occupying Polish indigenous territories. As the result of three partitions conducted in 1772-1795 Poland disappeared from the map of Europe. The country which had participated in creating Europe's history for seven centuries ceased to exist, whereas the Poles were deprived of their own state and were subjected to foreign rule.

The Poles, however, did not give up their national sovereignty without a fight. Those dedicated to the national course sought remedy in reforming the weak state thus hoping to push aside the danger of the final partition. In 1788 - 1792 they convened what became known as the Great Sejm in an attempt to save the Republic. When this turned out to be insufficient they took arms to defend the reforms by confronting the aggressors.

In 1791 this very Great Sejm adopted a document the significance of which goes far beyond the boundaries of Poland. The Government Act of May 1791 was the world's second (after USA) Constitutional Law which regulated the functioning of state authorities and established the rights and duties of the citizenry. The Constitution of the Third of May, as it came to be called, was a thoroughly modern document. The legislators proceeded from Montesquean concept of a tripartite division of authority and came forward with the system which was built on strong parliament and hereditary monarchy. The constitution gave the state system the character of constitutional monarchy. It also introduced the concept of nation as sovereign and declared that „all power in a human community has its roots in the will of the people“. As regards the matters of confession, the Constitution brought about the concept of the ruling religion at the same time guaranteeing other confessions „peace in their faith and government's protection“, which can be understood as freedom of religious practice. Radically improved were the judiciary and the system of local government. Education was to be one of the main priorities of the state.

Bold reforms put forward by the Great Sejm met with broad response both in the Republic and outside its borders. Inside the country the Constitution received support from nobility and burgers. It was also received positively and with hope by peasants whom the legislators promised that they would be taken „under protection of law and national government“. Abroad, the Government Act of May 3 excited enthusiasm among thinkers and politicians in England, United States and Sweden, as well as among moderate public opinion in France. This Act became a model for constitutional solutions in some European countries.

The constitution also had a lot of enemies. Inside the country it was opposed first of all by conservative magnates who were interested in preserving the status quo. For them all reforms meant less influence and less material gains. They would most will-

ingly have divided the country into autonomous principalities and provinces. The Government Act had also opponents abroad. The states which had occupied Poland, especially Russia and Prussia were reluctant to allow the Polish state to grow stronger and were anxious to keep it under their control. Tsarina Katherine II fearing that the revolutionary ideology would continue to spread from France gave her firm support to Polish magnates in their struggle with the reforms of the Great Sejm. This caused a so-called May 3 Constitution war, in which at one side was the army of the Republic, whereas at the other side were Russian troops who supported the Poles who did not want to have a sovereign and rejuvenated Poland.

The war for May 3 Constitution was lost. One could hardly have expected a different result since this brave attempt to build a modern state was opposed by many Poles, as well as by a group of neighbouring states. Poland was partitioned between Russia, Prussia and Austria and the Constitution was thrown to the rubbish-heap of history and remained there for 130 years. Most of the ideals of the constitutional legal act of 1791 have found their expression in the Constitution of the sovereign and democratic Poland of 1997.

The conclusions which can be drawn from the above events are not just historical or country-specific. The war for the Constitution of May 3 was a war for Polish statehood and a brave attempt to defend new constitutional values like division and mutual control of powers, respect for individual rights, effective state machinery, and tolerance. One had to defend these value then, as well as one had to defend them on various occasions later. The history of a post-war Europe provides innumerable proofs that they were often questioned if not flatly negated. Nazi Germany, communism, general Franco's rule in Spain or the black colonels's junta in Greece - these are only the most vivid examples. The fathers of the world's peace who bargained for spheres of influence after World War II left us a legacy of two worlds divided by the iron curtain of mutual ill will, suspicion and fear. Not only were these two worlds completely different but each of them strove in the direction opposite to the other's. Western Europe had occupied itself with raising the standards of democratic system and constitutional protection of individual rights, whereas Eastern Europe had been busy producing such concepts as socialist democracy or socialist concept of individual rights. The former meant the trampling of national sovereignty and the transfer of all power under the control of a single party. The latter could be reduced to saying that a human person has rights only when he/she fulfils his/her obligations towards the state, and that a human person has as many rights as he/she is given by the public authority. Eastern Europe, however, has managed to shake off the ghost of communism and is working to make up for the distance which divides it from Western Europe. In other words, new democracies are trying to catch up with old democracies.

Neither the former, nor the latter could rest on laurels. New democracies have to solve the old problems of democracy, like balance of powers, free media, respect for property and should not forget that other problems are also to be confronted. Old democracies have to preserve what has been already achieved and at the same time have to solve new problems, such as proper guarantees for the horizontal func-

tioning of human rights or introduction of efficient, supranational regulations guaranteeing full protection of the rights of the individual.

Although Eastern and Western Europe have such different routes to democracy and are divided by other differences, these two parts of our continent have one thing in common - they face the same threats and challenges. These threats either come from within these countries, or confront single countries or groups of countries as external threats. One of the threats to democracy and human rights is religious fundamentalism; there is, however, another big threat, like organised supranational criminal groups. Threatening the rule of law in every country is also a lack of transparency in the functioning of public administration and a threat of corruption. These threats present danger not only for the countries with high national income and efficient state mechanisms, but also for those countries where poverty goes hand in hand with a lack of mature democratic procedures. The rule of law is also threatened by a weak system of legal protection, including first of all the system of judiciary. Delays in court procedures create the same problems in Italy as they do in Poland.

Polish struggle for constitution and its proper role in the legal system is very instructive. Poland is a country which on the one hand gave birth to the first constitution on European continent, and on the other hand had to pay for this brave attempt to reform its legal system the highest possible price - its sovereignty. Poles are the people who, communist oppression notwithstanding, have managed to preserve their dignity and the will to be independent. It is precisely in this part of the world that the love for freedom has sparked a fire which destroyed the totalitarian regimes.

Social and political changes in Eastern Europe were and still are accompanied by a deep interest in the problems of democratic legal order and protection of individual rights on a national, as well as international level. The overwhelming majority of newly democratic states were admitted to Council of Europe, some of them became members of NATO, and still some of these states may become members of European Union. Recent years have seen an increased interest in individual rights, as well as increased interest in problems of constitutionalism and constitutional protection of individual rights. It is noteworthy that these problems are discussed not only by the specialists of those countries where constitutional order has well established traditions, but also by those who are yet learning what constitutionalism is all about. These problems increasingly become subject of analyses and discussions at the forums of the European sections of the ICJ.

Key role in this respect is played by the Standing Committee of the European Sections of the ICJ which co-ordinates supranational activities of individual sections. One of the priorities of the Standing Committee is to organise regular international conferences to discuss problems connected with our organisation's mission. At the Committee's meeting in Strasbourg in April 1997 a decision was made to arrange the next conference in Warsaw and to request Polish Section of the ICJ and Swedish Section of the ICJ to host this conference. The choice of Poland as a host of the conference can be explained among other things by the fact that the head of the Polish Section of the ICJ Mr. Zbigniew Lasocik was elected chairman of the

Standing Committee for 1997-1999. There were also some serious organisational reasons, like the willingness to attract to participate in the conference numerous lawyers from Central and Eastern Europe. The latter consideration was easier to be accomplished in Warsaw than, say, Strasbourg. Finally, one has to note that Polish ICJ Section was the first national section of the organisation which was created in this part of Europe.

In between April 1997 and October 1999 several meetings and consultations were held to discuss the agenda and the means of financing the conference. It is our great satisfaction to be able to say that as a collective organiser of a large international undertaking we have passed the test and proved to be efficient as well as skilful in dealing with delicate, often contradictory, matters. The Standing Committee has undertaken every effort to make the agenda and the formula of the conference answer the requirements of that particular moment in time. We are proud that we were able to harmonise the need for effective action with the requirement to preserve the rule of internal democracy.

The main topic of the conference as well as its agenda were formulated by the members of European Sections of the ICJ. Being under no pressure as far as time is concerned we requested all national sections to point out the problems which they think are important in their everyday work and which should become subject to deliberations. We did not want to limit ourselves just to discussions. According to Standing Committee directives the conference was conceived as a starting point to work out an action plan for European Sections. Thus proposals for topics triggered off new ideas among the members of Standing Committee. The main topic of the conference was formulated as follows: Constitutionalism as one of the pillars of the modern democratic state. The name of the conference: „New Europe - Making Rights Real” expressed the striving of European Sections of the ICJ to build a European community on the basis of ideals of democracy, rule of law and protection of human rights. The proposals that we received from different Sections revolved around four main themes: effectiveness of combating crime in the context of individual rights, the quality of judiciary, corruption and transparency of administration and horizontal effect of law in protecting human rights. The conference organisers came to a conclusion that given the aim of the undertaking and the diversity of interests of European Sections, only the formula of a conference divided into working groups could deliver the anticipated results.

The conference was attended by almost 100 lawyers from 22 European countries from Sweden to Albania and from Great Britain to Russia. Among those were a member of British Chamber of Lords, Supreme Court judges, law professors, data protection minister, top official of the police, attorneys, public prosecutors, etc. Participating in the opening session were Minister of Justice Hanna Suchocka, Secretary General of International Commission of Jurists from Geneva Adam Dieng, Vice-President of this organisation Lenart Groll from Sweden and a member of Executive Committee Lord Goodhart from Great Britain. From Polish side participating in the Conference's opening ceremony were Deputy Prosecutor General Stefan Sniezko, a member of the Constitutional Tribunal Zdzisław Czeszejko-Sochacki, Chairman of

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Supreme Court Criminal Law Division of the Supreme Court Lech Paprzycki, Ph.D., deputy Ombudsman Jerzy Świątkiewicz, Officer in Charge UNDP in Warsaw Jan Kolbowski, representatives of sponsors and key NGO's dealing with human rights, including Chairman of Helsinki Foundation for Human Rights Marek Nowicki.

The conference was sponsored by Swedish Institute from Stockholm, Foreign Office from Great Britain, British Council, Stefan Batory Foundation, private law firm from Warsaw Wardyński and Partners. Participation of many members was sponsored by governments of various countries. The conference took place at the premises of the Ministry of Justice in Popowo.

According to plan the participants worked simultaneously in four working groups. The first group discussed the consequences for human rights produced by the introduction of new means of combating crime. The focus of the second group was the role of state in eliminating discrimination in such spheres of social life as employment, place of residence or education. The third group concentrated on the quality of judiciary and limited access to court. Finally the fourth group undertook the task of defining the priorities in fighting corruption and creating mechanisms guaranteeing transparency of work of all public structures.

The Conference participants have worked out a number of recommendations in all above spheres and adopted action plan for European sections of the ICJ for the next two years. Specific actions to be taken in the future include the following: submitting the adopted recommendations to the authorities of European Union and Council of Europe, submitting the adopted recommendations to the governments of the countries representatives of which participated in the Conference, creating a pressure group to adopt protocol 12 of the European Convention on Human Rights which expands the scope of art. 14 of the Convention and which is about prohibition of discrimination, creation of a network of experts dealing with specific spheres, providing comprehensive data about the effects of the conference by placing information on three internet sites, and evaluation of implementation of the adopted plan at subsequent working sessions the first of which was scheduled for May 2000.

The participants of the Conference motivated by concern over how things develop in Belarus have adopted a resolution addressed to international public opinion and to Alexander Lukashenko, until recently President of this country, and his government, in which they have condemned the violations of human rights, the existence of political prisoners, the disappearances of important personalities of public life, and repressions directed towards lawyers who defend opposition activists. In the adopted resolution European lawyers also demand that Belarus authorities stop violating human rights. The lawyers also expect that international organisations and governments of democratic countries exercise due vigilance in this respect and undertake necessary actions.

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European Conference of the ICJ „New Europe - Making Rights Real“ in Warsaw was declared by its participants a success. One should say that it was doomed to it, since

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in its preparation engaged were the best activists of European structures of the ICJ. The Conference was a result of common effort of a number of persons who had planned it, organised it and finally took part in it. Decisions in matters of substance and main organisational issues were subject of debates and collective decision-making, whereas the program was compiled by the participants themselves. If we add to this Polish hospitality and good weather no wonder we received such positive opinions from the participants.

The Conference was a collective product and its success has multiple fathers. The words of gratitude should be directed first of all to the Standing Committee of the European Sections of the ICJ which showed amazing determination in defining the Conference's formula and despite various difficulties persisted in implementing it. The Standing Committee's best decision was perhaps to entrust the organisation of the Conference to two national sections: Polish and Swedish. Thanks to an exemplary co-operation between our organisations and personal engagement of one of the leaders of Swedish Section Vice-President of the Standing Committee Stellan Garde, the Conference came to effect and can be considered as successful.

We direct our gratitude to Minister of Justice of Poland Ms. Hanna Suchocka who took patronage over preparations and the work of the Conference and who was our host in the Training Centre of Ministry of Justice in Popowo. The very fact that Madame Minister had accepted our invitation to participate in the Conference and had opened the deliberations is perceived by us as an expression of Polish Government's support for the activities of our organisation.

The National Organising Committee created by the Polish Section of the ICJ made considerable contribution to the preparation of the Conference. The members of the Committee have given the organisers a great deal of support and shared with them their opinions and experiences. We extend our deep gratitude for this.

Finally our thanks to members of the staff. Those who took part in the Conference know that the staff was composed of a group of young people lead by Marta Wyszowska. It is due to their efforts that the Conference went on smoothly and there was no shortage of anything.

There was also no shortage of good humour on the part of the participants themselves for which we express them our cordial thanks.

Zbigniew Lasocik, L.L.D.,
President of the Polish Section of the ICJ

**European Conference
of the International Commission of Jurists
„New Europe - Making Rights Real“**

**OPENING
SESSION**

OPENING SESSION

Words of Welcome by Zbigniew Lasocik Chairman of Standing Committee of the International Commission of Jurists

Your Excellency Minister Suchocka, Mr. Secretary General Adama Dieng, Messieurs Presidents, Dear Guests, Ladies and Gentlemen:

I have the honor to welcome you at the International Conference of European Sections of the ICJ held in Poland at so grave a time of political and social transformations that are taking place in Europe. The Conference is an exceptional event for many reasons. If I may, I would like to mention just some of them.

The European Conferences of the ICJ have already become a tradition. It is for the first time, however, that responsibility for organization and progress of a conference lies on a national section from one of so-called new democracies.

Yet the Conference that is starting today is a joint venture of two sections from two different parts of Europe: the Swedish and the Polish one. This is an absolute novelty in the family of European national sections.

This is a wholly working conference in nature, which has a most specific purpose: we intend jointly to develop a plan of action of the ICJ European sections for the next few years.

Finally, the conference is being held in a country where values such as human rights and the rule of law are more than just blank rules. At the same time, Poland is a country where a difficult struggle goes on for high rank and good quality of the law - and frankly, we have to admit that we still lose in many areas.

This conference is also exceptional for the reason that the high patronage over its preparation and progress has been assumed by Minister of Justice of Republic of Poland Hanna Suchocka, whom I would like to thank and to welcome whole-heartedly at today's ceremony. There is quite a material dimension to this patronage as well: we are hosted by a Conference Center of Ministry of Justice.

I have the pleasure to inform you that our invitation has been accepted by Secretary General of the ICJ Mr. Adam Dieng, to whom I hereby extend a heartfelt welcome.

Heads and representatives of the supreme judicial institutions in Poland also attend today's ceremony. I welcome whole-heartedly the President of the Criminal Division of the Supreme Court dr Lech Paprzycki. I also extend a heartfelt welcome to Professor Zdzisław Czeszejko Sochacki Member of the Constitutional Tribunal.

This conference is a joint venture of European Sections of the ICJ. Two sections, however, have been directly responsible for its organization: the Swedish and the Polish one. We would not be here today if it had not been for the immense help the Polish section received from our Swedish colleagues. In this case, the promise

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made over two years ago was by no means an empty declaration. Many thanks to our Swedish friends. I would also like to thank all members of the Standing Committee, who committed themselves to preparation of the conference and rendered us assistance that cannot be overestimated. Thank you for your support and kindness.

A Polish proverb says Never praise a day before sunset. Despite all the respect I have for the wisdom of that saying, please let me state that the fact that we managed to gather in this room a group of outstanding European jurists devoted to the ideals of human rights and the rule of law is an indisputable success.



The success is the greatest considering that the Standing Committee has decided on probably the worst possible variant of organization of the conference. Striving after the maximum of independence, we decided that the national sections, supported with small sums from different sources would finance the conference. Thus it has to be said that the participants themselves agreed to take on a serious financial burden: paying the high attendance fee, they co-financed other costs of the conference. We now wish to thank them all.

Considerable financial support, especially to cover the traveling and accommodation costs of participants from Eastern Europe and the former USSR, came from the Swedish International Development Agency. We feel obliged to mention it today.

Other sponsors of the Conference include the Stefan Batory Foundation, Foreign Office, International Secretariat of the ICJ, British Council and - which I wish to stress with great satisfaction - one of the leading law firms in Poland, Wardyński and Partners. I wish to thank all our sponsors. Speaking of financial support, I am very sorry to mention the total lack of interest in our Conference on the part of the Office

of the Committee for European Integration. Although the Office has considerable funds from the European Union, high state officials who administer those resources found no grounds and possibility to contribute at least a symbolic amount.

Your Excellency Minister Suchocka, Mr. Secretary General, Messieurs Presidents, Dear Guests, Ladies and Gentlemen:

The role of non-governmental organizations in the public life of our part of Europe is definitely growing. We constitute an important group to pressurize the Governments, but we also assist them with our knowledge whenever necessary. Good cooperation between NGOs and the public sector is the key to the optimum legal order. I now have the honor to ask the Minister of Justice of Republic of Poland Hanna Suchocka to take the floor.

ICJ is no doubt among the leading non-governmental organizations of a global range, involved in promotion and protection of human rights and the rule of law. Immediately after the formation of the ICJ Polish Section seven years ago, we took efforts to invite to Poland the organization's Secretary General. Due to other commitments, he could not visit us at that time. He is our guest today. I have the honor to ask the Secretary General of the ICJ Mr. Adam Dieng to take the floor now.

The decision to organize the Conference in Poland was taken at a meeting of the Standing Committee of the European Sections of the ICJ in April 1997. Since then, the Committee met on several occasions to discuss the agenda and organization of the Conference. Besides, there were thousands of messages, requests, pieces of advice and consultations by phone, fax and e-mail. In this respect, organization of the conference was a model of international cooperation and genuine partnership. The Conference, however, would never take place were it not for the decided support and assistance of the Main Board of the Polish Section of the ICJ. On behalf of the Board and the Polish Organizing Committee, President of the Criminal Division of the Supreme Court Justice Lech Paprzycki will now take the floor.

As you may have noticed, topics to be discussed by working groups are rather general even if they define the scope for the discussion. We have assumed that the actual subjects will be made more precise in two ways. First, the discussion within each group will be preceded by an introduction adding focus to the debate. Besides, a general introduction will be made by Professor Andrzej Rzepliński of Warsaw University, member of the Helsinki Committee, expert on human rights, and an authority recognized in Poland and abroad. The introductory lecture is entitled: Do we want a common space for human rights in Europe? New Challenges for the ICJ.

On behalf of Polish Section of the ICJ I wish all the participants fruitful conference and very nice stay in Poland.

Address of Hanna Suchocka Minister of Justice of the Republic of Poland

Ladies and gentleman,

I am very glad that you have gathered here, in Poland to discuss various legal issues connected with constitutionalism as one of the pillars of democratic state. Let me describe a few aspects of court's accessibility and recent reforms of the Polish courts' system.

The first serious debate on jurisdiction began in Poland in the years 1980-1981. The process was then interrupted in the wake of imposition of the martial law in 1981. But it is worth recalling that in 1982, the Tribunal of State and the Constitutional Tribunal were introduced into the Polish system. From the very beginning of the transformation the decisions of the Constitutional Tribunal strove to embed in the Polish legal system the universal standards of the state of the rule of law, safeguarding changes in political system in the form of „revolution in the name of the law and contained within the law“.

Even though the two Amendments of a break-through year 1989 did not explicitly recognize the principle of separation of powers - the principle which most laconically and most distinctively defines the position of the third power within the political system - they introduced considerable changes in Poland's political and social system, affecting also jurisdiction. They included judicial self-government, political non-affiliation of judges, resigning from tenure of the Supreme Court of Justice, and establishment of the National Council of Judiciary.

New constitutional regulations concerning the rights and obligations of the citizens, including the right to a fair and public hearing, the position and competencies of the Constitutional Tribunal were not introduced until the adoption of the new Constitution of the Republic of Poland in 1997.

It should not be forgotten that in changing the structural position of the judiciary, the fundamental reference were European standards. In this respect, the decisive role was played by the right of access to courts, which marked the implementation of Art. 6 of the European Convention of Human Rights and of Art. 14 of the International Covenant of Civic and Political Rights. It can moreover be claimed that the very adoption of this principle had a major significance for the expansion of cognition of courts. In democratic states of law, courts have a wide range of discretionary powers since each citizen should have a safeguarded protection of his rights by way of court's proceedings. There is also a clear tendency to abolish non-judicial organs of legal protection and to transfer to the courts the matters which belong to their sphere of competence. The progress of the market economy also leads to a departure from administrative regulation in favor of a civilian one. This further increases the role of courts.

In 1989 a reform of economic jurisdiction was conducted. Arbitration committees, i.e. institutions which typically served resolution of disputes in the so-called „collectivized business entities“, were abolished. Starting from then, hand in hand with the

change of economic relations, a constant growth in economic cases filed to the courts has been recorded.

In parallel, there has been a rapid growth of cases filed to the common courts in relation to take-over by courts of registers which had been kept by administrative organs before 1990. In view of the growing importance of business entity registers transferred to the courts, the number of registration applications increased 100% within 3 years only. In addition, the courts are taking over cases heard by boards dealing with petty offences. So far, the courts have taken over the execution of penalties lawfully awarded by the boards, and also they hear appeals from decisions taken by the boards for petty offences. In the next two years the courts shall take over all cases of petty offences.

Moreover, following the privatization of public notaries, the courts have taken over land and mortgage registers. Also application of preliminary custody has been transferred unto the courts. The most recent example is Fiscal Penal Code, adopted by Sejm last week. Of course it will secure the fiscal interests of the state, but at the same time, about 200.000 cases would be taken over by the courts. Hopefully, 80% of cases might be solved by voluntary submissions to the fine penalties before court.

I have not mentioned all issues which were ceded to the courts in recent years. But even those indicated above illustrate the immensity of additional tasks vested in the courts. Consequently, this leads to the result opposite to the one desired. Instead of bringing the right of access to the court closer to reality, it has become in a way more distant.

In consequence of such a rapid expansion of the cognition of the courts, though it was founded on the legitimate assumption of the judicial administration of justice, the courts have become almost stonewalled, procedures have been prolonged, and administration of justice has grown ineffective. This, in turn contradicts the overall principle adopted in the Polish Constitution in Article 45, which statutes „Everyone shall have the right to a fair and public hearing of his case, without undue delay before a competent, impartial and independent court“. The speed of procedure is the very core of the right of access to the court, vested in a citizen. At the same time, the legitimate tendency to adopt the judicial administration of justice, as well as granting extensive rights to a party in the proceeding, seem to contradict this fundamental principle of swift and effective procedure. It is, therefore, a challenging problem how to reconcile the two tendencies which are in fact contradictory.

Substantial growth in the number of cases and their increasing complexity is the basic reason for sluggish proceedings, and makes the constitutional principle of accessibility illusory and theoretical.

After having made such an analysis, a question must be posed: how can we without undermining undoubted achievements in the area of human rights, such as proceedings security, etc., rationalize their application, so that they do not serve merely to prolong the proceedings and are not detrimental to the effectiveness of administration of justice by the courts. This is why consideration is given to possible introduction of simplified procedures, or even to the adoption of the principle of opportunism, and to certain forms of dejurisdiction.

In July 1998 the Government accepted a so-called legislation package of the Ministry of Justice, which includes about 30 projects of new bills, prepared by the Ministry. Let me refer only to the most important ones.

In relation to the take-over by the courts of registration issues, a National Center of Court Registers has been set up. This institution responds to contemporary challenges arising as a result of economic transformation. It will handle the register, as well as the register of liens, and the register of land and mortgage registers. Introduction of this system produces the following advantages:

- simplification of the registration procedure
- elimination of outstanding work in departments dealing with land and mortgage registers

National Court Register bill was passed in 1997 (with 4 years of *vacatio legis*). That Register will consist of three already existing registers: register of contractors, register of foundations, associations, other social and professional organizations and public medical care institutions as well as register of insolvent debtors. The new computer system will gather on a central level scattered information, important for economic relations, such as unsettled custom duties of the firms, tax arrears, social insurance arrears, etc. Making it accessible and public will help to eliminate „Grey zone“, the rule of *public fides* of the court register will apply to all the participants of the economic relations. It should be also easier to register firms and enterprises without undue delay. Since such a project requires a considerable financial support it is still on a project phase.

Simplified civil procedure is a new legislative tool which may solve some of the problems with additional tasks vested by courts. It is an institution which allows to fasten proceedings of the cases which are the most common in the courts, for example rent cases or cases concerning consumer rights protection.

The bill project covers pecuniary and non pecuniary cases up to the value of 5000 PLN. Project provides that many of the pleadings required by court might be written on the already prepared patterns, to make this part of proceeding easier and quicker. Very similar solution is being used in Germany with positive effects. Some simplification would also apply to the second instance of courts. As regards cassation, the new regulations are going to make it an exceptional measure instead of appeal to the Supreme Court as the third instance.

The main goal of cassation would be not only to solve a particular case by the highest judicial instance, but also to preserve the unity of jurisdiction and solving the precedent cases.

All new responsibilities require higher employment. Moreover many experienced judges shifted to other, better paid jobs. At this point, evidently a question will arise, to what reasonable extent the number of judges can be increased so as not to cause depreciation of the profession. To what extent these tasks can be performed by lawyers without judicial qualifications, such as court officials or even judge's trainees. A new act which provides legal basis for creating a professional staff of clerks in courts and public prosecutor's offices was passed through the Parliament last year. The remuneration of their work was provided for in the state budget.

Fundamental project of a bill regulating the organization of courts was first discussed in different departments and then sent to the Council of Ministers. It envisages more effective and adequate, 3-level structure of courts, including so-called municipal departments, created to settle petty civil and penal cases, using simplified procedures, which are also being prepared. The project strengthens the position of courts' presidents giving them more influence in administration issues, without violating their independence. It is also assumed that way of reaching the post of a judge would be different (more „serious“ age of 35 years, professional experience or high academic achievements would be required).

Worth mentioning is the new project of public prosecutor's office bill, now being consulted with the experts and prosecutors' representatives. The main goal is to concentrate means and forces on the most serious crimes, especially detrimental for public order and state security, to combat more quickly and in a more effective way criminality which threatens ordinary citizens. The aim is going to be achieved by:

- simplifying the organizational structure
- minimalizing the supervision by the highest authority
- eliminating bureaucracy
- reinforcing the co-operation between public prosecutor's office and police
- supplementing the principle of independence of prosecutors with the principle of responsibility
- increasing the role of the local chiefs, including increased responsibility for their subordinates
- introducing the manager staff for administrating the public prosecutor's offices
- correlating the earnings of the prosecutors with the effects of their work

The process of introducing the elements of reform will last up to the end of year 2000. First effects we may already observe in the increased number of investments in the field of judiciary. Only in 1999 about 53.000 m² (square meters) of new surface for courts is going to be obtained, and about 600 permanent posts in judiciary. But for the long-term results we should wait. The process of reforms and changes need time and stable financial guarantees in the budget, which allow to overcome years of stagnation and negligence.

We hope that after adopting all the projects of the bills prepared in by Ministry of Justice the constitutional principle of accessibility becomes practical one, and Polish courts will settle all the cases without undue delay.

Thank you for your attention.

Opening address by Mr. Adama Dieng Secretary-General of the International Commission of Jurists

Ladies and Gentlemen,

It is an immense pleasure for me to make this speech for the opening of this new Congress of the European Sections of the ICJ in Warsaw. The location and the theme chosen by the European Sections of the ICJ are very meaningful. They aptly illustrate the commitment of the ICJ to contribute to the promotion of human rights throughout Europe and to the building of a democratic society in countries of Eastern and Central Europe.

It should be remembered that the group of jurists who, in 1952, founded the ICJ in what was then West Berlin, was at that time mainly concerned with the legacy of Yalta and the deficiencies of justice in Central and Eastern Europe. The group set forth with the motto: "The Rule of Law in a Free Society", never forgetting the plight of their unfortunate colleagues who suffered under the yoke of totalitarianism. Later the ICJ endeavoured to build bridges between East and West and South and North, always bearing in mind the same concern.

Over the past ten years, the membership of the Council of Europe has been enlarged to include Eastern and Central European States, and republics of the CIS. I am glad that this congress includes participants from so many of these States, including from Georgia which has recently become the 41st member of the Council of Europe. The Council of Europe has long been a world leader in the field of human rights protection. The standardsetting activities of the Council have a considerable impact on the promotion of and respect for human rights in the region, and that is particularly the case for the European Convention on Human Rights and for the European Social Charter.

The principle of the Rule of Law is acquiring a vivid dimension in the States of Eastern and Central Europe. The democratisation process is well underway in most of them. Initial positive steps have been taken to eradicate the human rights violations which used to be common place. The task is clearly enormous and will take some time to be completed. A new legal culture based on principles of respect for democracy, human rights and the Rule of Law has to be invented from scratch. Beyond laws and institutions, many habits must be drastically changed.

There can be no real democracy without strong constitutional foundations based upon human rights and the Rule of Law. Very early on, the ICJ in its various congresses has considered such problems as how to balance the freedom of the various State powers to act effectively with the protection of the rights of the individual.

The International Secretariat of the ICJ welcomes the choice of the themes of the various workshops to be held in the course of this meeting. As for the issue of Constitutionalism and methods of criminal justice, it should be stressed that democracy depends, inter alia, upon the effective functioning of a criminal justice system. Ever since its creation, the ICJ has always insisted that this system should not, however,

violate the rights of the individual and fundamental principles of criminal law such as the right to be considered innocent until proven guilty, and the right to due process. The rights of the accused in criminal trials and criminal investigations, however elaborately safeguarded on paper, may be ineffective in practice unless the exercise of the discretion, whether in law or in practice, enjoyed in particular by the prosecution authorities and the police, is limited. At the time when the key word to all issues is globalisation, it is also necessary to consider this issue at the supranational level.

The theme of the horizontal approach to rights which will be debated in the second workshop is also of great interest and relevance to the work of the ICJ. The protection of victims from all human rights abuses, and not only those emanating from state organs, is clearly essential, and we welcome and support the fact that international human rights law is moving towards the recognition and prohibition of private action which violates human rights.

Access to court and the reform of the judicial system is of crucial concern to many States in Eastern and Central Europe, and constitutes an issue which is at the core of the ICJ mandate. The independence and impartiality of the judiciary are those building blocks necessary for the achievement of more equitable societies. This fundamental constitutional value of a democratic State is one of the most frequently threatened yet *human rights* can only be protected where the judiciary and the legal profession are free from interference. Victims look to judges for justice and remedies; only an adequate judicial system with proper resources and independence, free from corruption, can turn human rights protection into a reality. The ICJ and its Centre for the Independence of judges and lawyers set up in 1978 seek to develop practical mechanisms to promote and protect judicial and legal independence.

The issue of corruption is also a major priority for the ICJ. In the Cape Town commitment adopted by the ICJ in July 1998 at its last triennial meeting, the linkage between corruption and the enjoyment of economic, social and cultural rights led the Conference to conclude that fighting corruption ought to be part of the fight for human rights and the rule of law which is central to the ICJ mandate. The ICJ is linking up with other organisations to begin a campaign against corruption and the impunity of its perpetrators by developing normative strategies at the national, regional and universal levels. Corruption in the judiciary is a primary concern for the ICJ; it is a serious impediment to the success of any anti-corruption strategy. Both at the international and at the national levels, it is necessary to ensure the accountability of judges and to clean up corrupt judicial services within the framework of the constitutional guarantees of judicial independence.

Ladies and gentlemen,

The Western European sections of the ICJ should be commended for their concern and the assistance that several of them provide through their involvement in programmes directed to Eastern and Central European States. Over the past two years, contacts with jurists in Eastern and Central Europe have led to the creation and the application for the creation of new sections and affiliates in several countries among which are the Russian Federation, Bulgaria and Slovenia. This is a development to

be warmly welcomed and I know it will be followed by many others in the near future both in Western and in Eastern Europe. My view is, however, that the creation of new sections and affiliates should be done without haste, ensuring that the ICJ accepts in its family new members who do not only acquire its name, but who are fully committed and have the means and ability to contribute actively and effectively to promoting human rights and the Rule of Law. New sections and affiliates should ensure that they have among their members not only senior jurists of high standing and reputation but also young members with perhaps less experience but whose enthusiasm, dynamism and youth also brings new blood and representativeness of the new generation.

The International Secretariat of the ICJ has a full programme of activities in the region and helps to promote the creation of new national sections and affiliates. Our programme includes seminars and workshops on the domestic implementation of international and European human rights law in Eastern and Central Europe and the CIS, as well as studies and trial observations.

Among its numerous activities, the International Secretariat of the ICJ follows closely all developments related to human rights at the Council of Europe. It is one of only three NGOs that have observer status with the Steering Committee on Human Rights (CDDH). The ICJ is the only NGO to send a representative to the meetings of the Committee of experts on Developments in Human Rights (DH-DEV) of the Council of Europe. Participation in these meetings has allowed the ICJ to play a crucial role for the past three years in lobbying for the adoption and contributing to the drafting of an additional Protocol to Article 14 of the ECHR on equality and the prohibition of discrimination on all grounds. The work related to the draft protocol is done in close cooperation between the International Secretariat and the European sections of the ICJ, which issued a common statement calling for the adoption of the additional protocol.

The ICJ attaches great importance to the adoption of this protocol and I take this opportunity to call upon all of you to continue lobbying for the protocol in your respective countries. It is urgent that the Council of Europe reinforce on the European level the international protection of victims of discrimination rather than fall short of contemporary international standards, particularly in the light of the tragic events in Bosnia and Kosovo. The ICJ is also part of a group of seven NGOs currently preparing the NGO forum to precede the European Conference against Racism and the NGO input in this governmental conference which will take place in 2001.

The ICJ is, more than ever, committed to the principle of indivisibility of civil, political, economic, social and cultural rights; it is committed to playing a leading role in the promotion of economic and social rights as provided in the European Social Charter. The Revised Charter adopted in 1996 and which entered into force on 1 July 1999, affirms 33 economic and social rights shared by European democracies, both old and new, and should become one of the major points of reference for social rights in the 21st century. The adoption in 1995 of an Additional Protocol providing for a system of collective complaints against States in violation of provisions of the

Charter is particularly important. Unfortunately the number of States which have ratified the Revised Charter and the 1995 protocol is still very limited and I call upon you to lobby for signature and ratification of these instruments in your respective countries, and to call upon States to make the declaration that will allow national NGOs to submit collective complaints.

The ICJ was the first international NGO to use the collective complaint mechanism by lodging a complaint against Portugal only a few weeks after the 1995 Additional Protocol entered into force in July 1998. The European Committee of Social Rights ruled on the merits of the case on 9 September, and its report was, in respect of the procedure, confidentially transmitted to the Committee of Ministers. The ICJ is currently preparing to submit complaints against other countries.

In 1998, the ICJ started a cooperation programme with the Council of Europe to promote the European Social Charter in Eastern and Central Europe. This programme has already led to the organisation of several multilateral and national seminars gathering advocates and human rights defenders from eastern and central Europe. Through these seminars, the ICJ endeavours to redress the balance between the attention devoted to civil and political rights and the one devoted to economic and social rights, as both international and national NGOs working in eastern and central Europe have, over the past ten years, focused nearly exclusively on civil and political rights.

Ladies and Gentlemen,

Last but not least, I express my admiration and my gratitude for the remarkable work and dynamism of the European National Sections of the ICJ, the Steering Committee, and particularly the Polish section and the Swedish section which have devoted considerable time and energy to the organisation of this congress over the past two years. I wish to commend their commitment and determination to make of this congress more than just a pleasant social gathering during which we would listen to some speeches, however brilliant, and then all go home. I commend and fully support their view that it should provide a working forum in which a new impetus is given to fruitful and effective cooperation between the European sections, with, to the extent possible, the full support of the International Secretariat. I hope that the new and refreshing approach of the Polish and Swedish section will lead to many other initiatives and endeavours of the same kind to promote a fruitful discussion between European jurists and, beyond discussion, plans of action to be implemented by each section at the national level and by the sections together at the European level, whenever appropriate.

I sincerely hope that this meeting provides a stimulus for the work of jurists throughout Europe, from Reykjavik to Baku, towards the consolidation of democracy and the Rule of Law, for the reinforcement of the existing national sections in the region and the emergence of new ones.

I wish you a successful congress.

**Opening Address by dr. Lech Paprzycki
President of the Criminal Division
of the Supreme Court**

Your Excellency Minister Suchocka, Messieurs Presidents, Mr. Secretary General, Dear Guests, Ladies and Gentlemen:

Main Board of the International Commission of Jurists - Polish Section was immensely pleased to hear that the ICJ European Conference of 1999 was to be organized by the Polish section in cooperation with the Swedish section. To organize an event of this rank and scale was an obvious challenge for us - one that we accepted without a moment of hesitation, though. From the very onset of the preparation process, the ICJ Main Board treated proper organization of the conference as its obligation vis a vis the European jurists' community. Among our other ventures, preparation of the conference has always been the absolute priority. Basing on members of the Polish Section of the ICJ and invited experts, we established the Organizing Committee as a local body to support those directly involved in organization, among them Ms. Marta Wyszowska and Mr. Zbigniew Lasocik.

What posed a challenge for the organizers was that the conference was designed as a dialogue forum for European jurists from different countries and very much different legal cultures. This latter fact, however, proved of secondary importance, the conference being devoted to such universal issues as the right to court or corruption. What is more, it could be expected that the more differentiated the legal systems represented by participants, the more interesting the exchange of experiences might be and the more creative its conclusions.

On the other hand, though, it was really difficult to develop a formula of the conference that would make it possible to achieve the meeting's basic aim, that is development of the ICJ's plan of activities for the next few years. To achieve this aim, we had to resign the rather traditional model of conference that bases on the assumption that a few know more than the rest and they do all the talking while the rest merely listen, and to decide on genuine dialogue instead. This was only possible through division of participants into working groups holding separate sessions, and presentation of the conclusions they develop at a plenary session. We hope that this model of conference will prove fruitful in our case.

And now, one last matter. It is a good thing to have this conference held at the hospitable Popowo Center of Ministry of Justice. There are three reasons to feel happy about it. First, we treat this fact as an excellent example of cooperation between non-governmental organizations and the structures of State; second - as evidence of the interest the Polish Department of Justice takes in matters of the jurists' community not only in Poland but also in the whole of Europe. Third, distant from the noise and temptations of a big city, in no other but our own company, we will have the opportunity during the next two days to get to know one another better and to focus on the topics under discussion. May this be a pleasant experience to all of us. Thank you for your attention.

**Keynote Speech by Andrzej Rzepliński
Member of Helsinki Committee,
Professor of Warsaw University**

DO WE WANT A COMMON SPACE FOR HUMAN RIGHTS IN EUROPE?

New Challenges for the International Commission of Jurists

Ladies and Gentlemen:

I. New Challenges

The opportunity to deliver the introductory lecture is a great honour to me. It is also a great honour to the Polish Section of the International Commission of Jurists (ICJ) to be hosting a conference of the Commission's European division. The ICJ's past and present role in the area of jurists' defence of the fundamental values of the free world - the rule of law, human rights, and market economy - can hardly be overestimated.

This is a very special moment in the history of Europe. All special moments tend to pose a challenge to jurists. Quite naturally, too: a well-organised society can hardly be expected to find rational answers to special challenges if it is not assisted by jurists. But let me expand on the formulation I have just used: the „very special moment in history“. Some might perhaps consider it a specific abuse. Striving to stress the weight of our words, we often use such formulations to give emphasis to a crisis affecting one sphere of life or another. I believe, though, that what I said is justified, especially in the context of our conference.

Ten years have passed since the fundamental changes in the central and eastern regions of our continent. The changes embraced all branches of the law, and gave rise to a huge demand for jurists, specialists in private as well as public law. What is among the indices of those changes, and also among their most noticeable effects, is the creation of constitutional courts and the fact that common courts were statutorily given their due role of a truly independent third power. Nearly all of the countries concerned here became members of the Council of Europe, having ratified the European Convention on Human Rights (ECHR) and the European Convention on the Prevention of Torture. This way, almost overnight, legal systems of the new democracies dived right into the wide and deep river of achievements of the agencies that guard the fundamental rights and freedoms. The frontiers of those countries opened to all citizens of the new democracies, even if the actual freedom of entering other countries was only granted to the Central-Europeans.

Also entirely new problems arose in the eastern part of the continent, which clearly influence the law and us jurists in that law's service. Over the last decade, the welfare and supervisory function of state was subject to a more or less rapid limitation. The state no longer usurps the power of deciding for and taking care of its each and every citizen from the cradle to the grave. Having grown up in a world where the

freedom to seek happiness was replaced with the duty to accept models of happiness imposed by the Communist Party, many people now suffer from a sense of unbearable responsibility for the free choice of their own conduct. Ten years is much too short a stretch for the values of free society fully to become part of its culture. As I see it, for the opinion to be justified that all ties with the legal system of Realsozialismus have been severed, the offices of judges and other legal professions have to be taken by jurists educated by school and university teachers without a personal experience of that system. This, however, will take at least two generations, or some 40 years. But we should not remain passive, waiting for this to happen. The values of free society have to be incessantly cultivated in the new democracies, so that those countries are transformed gradually and - first and foremost - permanently into mature democracies.

Another phenomenon to which there is a good as well as a bad side is the emergence in Europe of new states. Some of them regained independence, while some other ones appeared for the first time in history on the political map of today's Europe. Many people who used to be close to one another geographically now belong to opposing camps. Fences have been raised, dividing the space that was once common ground. What used to be obvious is by no means obvious now. The new states had to articulate with resolve their dissimilarity not only from their former metropolis but also from their neighbours; to create their own legal language, from scratch in many cases including in particular international and economic law; and to prepare jurists specialising in those branches. Within the territories of all new states, there are invariably some national minority groups. Some of them have found themselves in a new and unprecedented position of tolerated minorities.

Breakdown of the centrally controlled economy; economic crisis; a widespread habit of petty corruption practices; the fatalist belief that those in power always go unpunished; and unfamiliar freedom of the press - all of these create the atmosphere of a direct threat of crime. This gives rise to a popular conviction as to helplessness of the law. In this context, even those opposed to Realsozialismus ask themselves the question, was it worthwhile to give up the former feeling of safety and to get the present freedom instead? In none of the new democracies is the economy, ruined by the communist rule, capable of generating the adequate means that would make it possible at least not to lag too far behind Western Europe, in terms of the standards of legal protection among other aspects. At the same time, what amazes us jurists is the persisting influence of Communism despite its indisputable hostility towards the principles of human rights and the rule of law. Let us consider the territory of former East Germany by way of example. Over EUR 600 milliard of taxpayers' money coming from West Germany and from other member states of the European Union was invested in the economy and structures of the new eastern Lands. The structures of state, courts and schools of those new Lands were purged of active functionaries of the „socialist state and nation of the German Democratic Republic“ at all levels. And yet in many such new Lands, every fifth citizen continues to vote for parties that declare their devotion to the practices of Realsozialismus. Every fifteenth voter, instead, supports the extreme right wing. Indeed, individual freedom and the princi-

ples of the rule of law are never given to us for nothing. They have incessantly to be cultivated.

A number of entirely new challenges are also faced by the old democracies. To revert to what I have been saying, those states not only had but also wanted to open themselves to the problems of the countries liberated from Realsozialismus. We can hardly underestimate the technical legal assistance of the nineties, rendered in the period of drafting new constitutions and codes, and of training jurists, functionaries of state and local administration, police officers and the prison staff.

At the same time, Western Europe faces a number of legal challenges. Some of them are characteristic of those countries only. This is no doubt the case of the ever broader debate on the optimum mechanism for human rights protection within the European Union. Let us remember that the first suggestion that the Common Market ratify the European Convention of Human Rights was formulated in 1978. The coexistence of domestic supreme and constitutional courts on the one hand with the European Court of Human Rights in Strasbourg and European Court of Justice in Luxembourg - the latter two independently interpreting one and the same European Convention - on the other must necessarily bring about conflicting judgements in highly similar situations, which in turn weakens the European mechanism for protection of human rights and fundamental freedoms. At present, there are three different options for solving this problem. Advocates of the first solution would like the Fifteen to adopt a Bill of Rights separate from the European Convention; the Bill would be either the sole or an optional human rights convention binding upon the European Union. Advocates of the second solution opt for a simple ratification of the European Convention by the European Union. Thus the Strasbourg Court of Human Rights would in a way review the consistency of judgements of the Luxembourg Court of Justice with contents of the European Convention. The problem is the Community's lack of competency to join the Convention. Required here would be amendments to the Rome Treaty - not an insurmountable obstacle. The Community would thus be subjected to the same review mechanism as each of its member states. Finally, the third solution which I consider the most expensive politically but also the most rational from the viewpoint of the Union's citizens would be ratification of the European Convention by the Union accompanied by exclusion of the Strasbourg Court's competence; the Luxembourg Court would be the sole organ competent to apply and interpret the Convention within the Union. The European Convention of Human Rights would then become part of the Union's constitutional structure.

Political costs involved in a separate system of human rights protection introduced by the European Union would be related to restoration of a specific Iron Curtain separating Western Europe and probably some Central-European countries from Eastern Europe and the Balkans. Playing the part of such curtain would be the standard of human rights protection offered in those areas. A great many Eastern Europeans would again feel like children of the inferior God. Yet is it not true that even now, we have double standards of human rights protection in different countries of our continent? The process of this prompt admission of new members to the Council of Europe had a noble justification: opening of lawful channels for influencing the

manner of human rights protection in the new democracies. The past tense is hardly proper here for that matter. At least five further states are at the gates to the Council of Europe, even if their actual distance from those gates differs; they include Azerbaijan and Armenia, affected by long and non-extinguished wars. Frankly, fascination with the idea of an ever bigger membership resulted also from the need for a greater import of the Council of Europe itself. The interests of its structures and the emerging doubts as to the reason of the European Court of Human Rights in view of the operation of the European Court of Justice were hardly the least important in that hasty process of admitting new members.

There are three aspects to the bigger membership of the Council of Europe, increased from 26 to 41 members states over the 1990-1999 decade. Prompt admission to the Council of Europe of relatively - let me stress: relatively - well-prepared states of the so called Vishegrad Group (Hungary, Czechoslovakia, and Poland) led to a pressure towards „equal treatment“ on part of the remaining countries of the region. On the whole, what sufficed afterwards was a mere absence of the most severe violations of free elections, launching of the constitutional reform, and the Government's declared intention to respect its commitments under the Convention. The intention shaped much better before the country's admission - Poland may serve as an example here. Immediately after the admission, the most necessary public law reforms tended to slow down significantly. The Governments were convinced that they were already members of the exclusive company of civilised nations. Second, the former member states - including especially some of their delegates to the Parliamentary Assembly of the Council of Europe and many human rights defenders, also members of the ICJ - wanted and still want to be sure that Governments of the newly admitted states will permanently respect their commitments in practice. Thus the youngest member of the Council - Georgia - is expected straight away to secure implementation of provisions of the European Convention and judgements of the European Court of Human Right at the same level as the old democracies such as, say, Ireland. The expectations are unrealistic, though, and being jurists, we should not blink the facts. Third, we have to be satisfied that jurists from new member states of the Council of Europe, elected or appointed to the Council's organs, will interpret the Convention's provisions at precisely the same level as jurists from the old democracies. In this latter context, suffice it to bring to mind the controversies voiced by some British observers in the autumn of 1995, after the European Court's judgement in *McCann v. the United Kingdom*. The observers criticised the moral qualification of some historically entangled judges from the new member states to pass judgements in cases that concerned struggle against terrorism, pursued by a state ruled by law.

It is therefore quite probable that well-reasoned internal needs of the European Union's member states and the rather obvious differences in the human rights protection standards may eventually lead to a division of states of our continent by the degree of protection they offer. In my opinion, we as the ICJ have to take this trend into account. We should not put up with its consequences, though. If the universal nature of rights of each and every individual, irrespective of his or her citizenship, is

to be an everyday experience instead of a mere postulate, the programs of our organisation must necessarily be updated. The possible directions of the ICJ's activity include, on the one hand, its involvement in modernisation of the European human rights protection system, and on the other hand - its contribution to consolidation of the elements of civil society and of the rule of law in the new democracies.

It is the mission of the ICJ to promote the understanding and observance of the rule of law. The rule of law is defined within our organisation as: „the principles, institutions and procedures have shown to be important to protect the individual from arbitrary government and to able him to enjoy the dignity of human being. The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic background, have shown to be important to protect the individual from arbitrary government and to able him to enjoy the dignity of man.“

Another challenge faced both by European societies and by us jurists is to do with other problems that require a sound consideration and a rather prompt resolution. Some of those problems have been selected to become topics of the present Conference, and I will expand on them shortly. Let me however just mention some other ones.

A number of issues of fundamental importance for human rights and the rule of law result from emergence of the „information society“. It will require effort to enhance democracy through appropriate uses of information technology. This technology, if adequately integrated into the legal structure, can contribute to the shaping of a more democratic society; to dispersion of power, and to consolidation of local communities. At the price of abundant, cheap, well-organised and pleasant consumption, a great many of us agree to have as much information about them as possible gathered by those who supply the allegedly best-quality products at the lowest prices. State agencies, the police and fiscal authorities in particular as well as banks and trade corporations, can today purchase personal data with the ease and at a price that is beyond all comparison to the situation of, say, 15 years ago. Also the possibilities of processing such data have grown immensely. This reduces the costs involved in marketing, which in turn enhances our consumption potential and transparency to the magnates. Can we ever repay the political and economic tycoons with a comparable possibility of discovering their secrets? In most cases, we cannot. Public authorities often take cover behind the need for keeping secret all information that is potentially sensitive for national security. Corporations, instead, quote their right to protect trade secrets. Thus the flood of and the subsequent easiness of access to information also leads to threats to human rights and the rule of law.

The emergence of information society gives rise to other problems as well: those related to the growing possibilities of monitoring and intercepting private communications by the police and security services. It is indisputable that these institutions should have appropriate freedom of action in this sphere in view of the new trends in organised crime as well as terrorism. Yet a failure to balance the police powers

with adequate and accurate protective instruments is bound to shake the very foundation of a democratic society. What I consider an effective instrument is all persons' right of access to information secretly gathered about them once the proceedings end and no indictment is made. Due especially to mobile phones and the Internet, the extent and density of communications make it possible for the police to gather information on dozens of persons with but chance and non-criminal ties to the individual under actual surveillance. It not everywhere and not in all cases the gathering of information in such cases requires a court order. Another method of building databases, usually concerning several thousand persons authorised in each country to gain access to secret and top secret information, is the security clearance procedure. The data, voluntarily provided by the person under the clearance proceedings and concerning that person as well as his or her family and friend, are subsequently checked. The data thus acquired may greatly affect the fates of those who apply for access to state secret, and this impact may last for many years if not the person's lifetime. It is perfectly natural that the Government agencies strive to keep the information they gather for future use. The fact is of course praiseworthy that some legal systems contain provisions that require immediate destruction of data gathered but not used in judicial proceedings or useless from the viewpoint of national security. Yet a better protection is provided by the person's access to information thus gathered, oversight of any corrections, and right to demand the deletion of data. This can only be effective if the right to have disputes settled by a valid judicial decision is guaranteed. The weight of this issue in Europe is demonstrated by the growing number of precedents among judgements of the European Court of Human Rights in Strasbourg in cases concerning the right to privacy in connection with interception of communications of persons. Priceless contribution to the shaping of that case law was made by a French judge, Prof. Louis-Edmond Pettiti. In his concurring opinion in the Lambert case (judgement of 24 August 1998), he wrote:

„Intercepting telephone conversations is one of the most serious temptations for State authorities and one of the most harmful for democracies. Originally, the reasons of State or national security were put forward in the attempt to justify interceptions, particularly in the sphere of so-called administrative telephone tapping that is sometimes used to evade the rules governing judicial telephone tapping. Abuses, however, are becoming more and more unacceptable, taking the form of monitoring wholly private conversations on the pretext of spying on political entourages. In several member states the supervision systems set up to control the monitors have proved inadequate and defective. Will it be necessary in the future, in order to protect privacy, to require people to get into „bubbles“, in imitation of the practice of some embassies, in order to preclude any indiscretions? That would be to give in to Big Brother“.

A number of fundamental legal issues also result from the progress of biotechnologies. The now approaching ratification by the Council of Europe member states of the Convention on Human Rights and Biomedicine, which is of fundamental importance for human rights at the threshold of the next century, is but the first of many

steps that have to be made. This is demonstrated by the agenda of the Steering Committee on Bioethics of the Council of Europe. At present, the Committee is working on seven draft recommendations of the Council of Europe that extend the protection of individuals vis a vis the progress in biotechnologies, involving hopes as great as threats. The important questions that genetics, theology, ethics, and the public address to jurists concern admissibility of patenting of living organisms. To get a patent you have to invent something. Can humans claim to have invented a genetically modified animal or plant just because they added one or two genes to it? One of the hottest question is: patents are not allowed on human body and parts. Should we allow patents on human genes? The questions are so grave for human rights as to make necessary a duly prepared standpoint of our organisation. It would be most advisable in my opinion to have the ICJ represented at the half-yearly meetings of the Steering Committee on Bioethics of the Council of Europe.

II. Horizontal Approach to Rights

The public opinion as to the threat of crime is among the most important indices of a given society's quality of life. The media, politicians, as well as the police and law enforcement agencies attach great importance to the findings of opinion surveys concerning the current state of those beliefs. Rather paradoxically, those who largely shape those beliefs, in their own well-conceived interest, eventually revert to such findings. (See Hans Joachim Schneider, *Das Geschaeff mit dem Verbrechen: Massmedien und Kriminalitaet*. Polish edition: Warsaw 1992, Wydawnictwo Naukowe PWN). Appropriately shaped, the public opinion never tires being critical towards the effects of crime control. In this respect, it is much similar to the opinion of the heads of state institutions who bear joint responsibility for the extent of crime. I have examined the New Year's Eve's speeches of the consecutive heads of Polish prison administration since 1970. What the succession of seven bosses had to tell their subordinates and those appraising the functioning and budget of prisons the same every year was that the „condition of the prison population“ deteriorated significantly during the preceding year. Were this true, nobody but monster robots should be kept in Polish prisons for a long time now, while petty common offenders still prevail among the inmates. This is so not only in Poland but also elsewhere.

Comparative research is what may add some humility to our attitude towards the criminal reality. It appears that crime - although definitely not a static phenomenon - is not one that shows the upwards trend irrespective of the time and place. Even in neighbouring and culturally similar countries, the statistics of the same offences for the same period of time may tend in the opposite directories. The crime that is shown in statistics fluctuates in a pendulum movement, depending on the actual number of offences, the methods of their registration, changes in penal law, the labour market situation, budget expenditure on the police and law enforcement agencies, or the people's trust in and willingness to assist those agencies. Each of these factors may simultaneously trend in different directions, and differently influence the statistics of persons prosecuted for offences. (See V.V. Luniev, *Prestupnost' XX vieka. Mirovye, regionalnye i rossiyskoye tendentsyi*. Moscow 1997, Izd. Norma). At exceptional moments in the life of a given society, other factors con-

tribute here as well. The systemic transformation that has been taking place in the nineties in the eastern part of the continent necessarily has had an impact on the extent and shape of crime.

The opening of frontiers offered freedom of movement not only to East-European tourists, businessmen, students, or persons seeking lawful employment, but also to criminals such as car thieves visiting Germany or the Netherlands. The Balkan or Caucasus wars contributed to criminalisation of a considerable proportion of young men who treat the war and its accompanying robberies, rapes and arsons, as well as the smuggling of firearms and drugs, as the opportunity for self-fulfilment and success in life. On the other hand, constitutionalisation of government resulted in disappearance or drastic reduction of political crime and prosecution of political opponents under sham criminal charges. Constitutionalisation also led to at least a formal limitation (which is however also important) of the former omnipotence of the police and prosecutors. Intensified protection of the individual's right to personal freedom and safety and to *due process* limited the powers of criminal police to remove unwanted persons from the force's area of activity. In the long run, the restraints imposed by legal provisions on law enforcement agencies will be to the police's own advantage: eliminated gradually from the force will be primitive individuals prone to violence and incapable of intelligent gathering of evidence.

I have already mentioned the information revolution. Criminals avail themselves to the same extent as others of the technological achievements. Owing to those achievements, the criminals can not only get in touch and transfer money easier and quicker, but also try to organise counterintelligence within the police itself to be able to anticipate the force's next moves. Large-scale money laundering has been going on; in some countries (e.g. Russia, Ukraine), top politicians are openly accused of involvement in such practices. The cancer of corruption has affected institutions of crucial importance for the future of Europe (such as for example some agencies of the European Commission). The great speed of computerisation as well as globalisation of the economy and trade quite naturally brings about an entirely unprecedented scale of crime. Such new scale has also been reached by the recent acts of terrorism.

The law could not remain indifferent to these trends. Law enforcement agencies have been equipped with new instruments for crime control. As in many other spheres, imported here are mostly American solutions. The instruments include the adoption in many countries of the institutions of anonymous witness, crown witness, and controlled purchase, as well as a noticeably easier access to information about bank accounts granted to the law enforcement agencies. New supranational institutions for crime control and detection have been formed, such as e.g. the Europol or agreements within the Schengen Treaty or the Echelon program.

Yet all new ventures give rise to new problems. The first such problem is related to the fact that they involve only the west of Europe, the Fifteen as a rule. Law enforcement agencies from without that area are only used as associates in some fragmentary operations, aimed first of all at consolidating the safety of citizens in the

European Union. Critics call this trend the creation of Fortress Europe. As I see it, though, this seems a political rather than a legal problem, and there are good prospects for extension of the advantages resulting from the implementation of programs under such agreements also to the east and south of the European Union. Another problem is a purely legal one only; it is important to jurists and to us members of the ICJ in particular. Thus the use by law enforcement agencies of the new institutions for the gathering of evidence not infrequently gives rise to threats to the principle of equality of arms in criminal proceedings. In such proceedings, it is most difficult to gather evidence against a criminal group that is well-managed, so to say, and internally consistent. It sometimes happens, therefore, that the only strong evidence is provided by an anonymous witness or a penitent member of the criminal organisation. In such trials, the public are nearly always on the prosecution's side. The court operates under a public pressure. This situation leaves but a small chance for the defence to challenge the credibility of prosecution's case, and creates a direct threat to the principle of presumption of innocence. It is therefore fortunate that the European Court of Human Rights works to stem such threats: for example in the Doorson case (judgement of 26 March 1998), in a case that concerned the weight of an anonymous witness's testimony, the Court stated that:

„It is true that Article 6 (Art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention (Art. 8). Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.“ (para. 70)

„However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 para. 1 taken together with Article 6 para. 3 (d) of the Convention (Art. 6-1+6-3-d) requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities“. (para 72).

„(...) it should be recalled that a conviction should not be based either solely or to a decisive extent on anonymous statements“. (para. 76).

One year later, in a similar van Mechelen case (judgement of 23 April 1997), the Court stated:

„(...) all the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe on the rights of the

defence; as a general rule, paragraphs 1 and 3 (d) of Article 6 (Art. 6-1, Art. 6-3-d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (para 51)".

III. Horizontal Human Rights

NATO's military operation in Kosova in the spring of 1999 (or the war in Kosova, as some others prefer to call it) is said to have been the first war in defence of human rights. The operation was carried out in defence of native Albanian population, brutally pushed away from their native land. This was therefore the first materialisation of the principle, adopted in September 1991 in the OSCE Moscow document, of limited sovereignty of states guilty of large-scale violations of the rights and freedoms guaranteed in the Universal Declaration of Human Rights. Let us hope that the international community will demonstrate sufficient resolve and bring the appropriate pressure to bear on other states violating human rights. The humanitarian operation now in progress in East Timor consolidates such hopes.

The power of states violating the human rights of their citizens is reduced, and that of the international community is increased instead. Also growing is the role of supranational organisations. Is this to say that the vertical arrangement of human rights, between the individual and the agencies of public authority, is now weakened? Or is it perhaps extended to include the supranational agencies as well? These questions are addressed not only to the citizens of countries where the Government violates the rule of law. Also citizens of the European Union ask themselves the question about the essence of their relations with the Union's organs. Just as important are questions about the nature of our relations with the huge and nearly always supranational manufacturing or financial corporations. On the list of the 500 greatest economic structures of the world, many big corporations rank higher than entire states, not at all the poorest ones. Does a big company violate my right to life if it manufactures and sells carcinogenic food? Does a bank violate my right to privacy if it hands my personal data over to its dependent companies in different countries for commercial use? Faced with the power of such companies, we may tend to answer in affirmative.

Another most important issue is the nature of children-parents relations. In theoretical discussions, but also in the provisions of some Constitutions (e.g. the Polish one of 1997: Art. 48.1. „Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions“), the opinion is formulated that such relations resemble those between the individual and state. Interestingly, though, there is a parallel tendency to remove from family law terms such as „parental authority“ and to replace them with „parental rights“ or „parental care“. Therefore, does the parent exercise public authority with respect to his child? Does the bank manager exercise public authority with respect to his customer? I believe that the answer has to be no if the term „public authority“ is to preserve its original meaning. The extension of norms characteristic of the human rights

law to include legal relations other than those strictly under public law would impair the function of guarantor now performed by human rights. The success of mechanisms for human rights protection cannot possibly be a cure-all for other problems.

The solutions have to be sought in improvement of the mechanisms that are characteristic of resolution of legal disputes within different branches of private law. The victims of illegal practices of corporations are by no means defenceless. The proper action here would be to consolidate the protective instruments under consumer law. Similar point can be made with respect to children's rights. As I see it, an attempt at turning the children's relations with their parents into public law relations would be a dangerous experiment with the good experience of over 200 human generations. I am writing this from the perspective of a person who lived for several decades in a country affected by the great experiment of making people happy with omnipotent state law among other things. It will be much better for our children if the occasional cases of pathological conduct on the part of the parents are dealt with under provisions of the family and possibly also the penal code.

Also the employer-employee relations might be considered in the light of the above. Modern societies have established appropriate agencies of public authority to detect any discriminative practices in this sphere. Those agencies' passive attitude towards the employees' complaints about discrimination leads to a situation where one might speak of a violation of the right to non-discrimination or of freedom from degrading treatment. Besides, the employee has two other remedies as well. He may apply for protection to the trade union, or directly to a civil court. Additional protection under conventions of personal and political rights would provide additional shield here.

Yet still another question might be asked here. Does a mass murderer, who is not holder of any public function, nevertheless violate human rights through his acts, including especially the right to life and the freedom from torture? Here, in my opinion, the answer depends on the specific case concerned. It will certainly be „no“ in the case of a person who kills even several dozen persons firing at them from the roof of a school building, whether that person has been incapable of controlling his or her conduct, or motivated by extreme political views. Similar would be the situation in the case of a person who plants a bomb in a car or even an apartment house for criminal purposes. Under the law, such persons are multiple or serial killers and have to be duly punished after a fair trial. This pattern, however, cannot be applied to the case of a political terrorist who does not hold any official post but is at least tolerated if not supported by public authorities of a given territory. This seems to be the case of individuals such as Bassayev or bin Laden. In this situation, though, the essence of human rights is not extended to horizontal relations, as the point of reference is provided by institutions that exercise public authority in a given territory and with respect to a given population. If the terror is intense enough, one might even speak of responsibilities of the authorities in charge of that territory for a crime against the humanity. The international community's right to curtail such practices is quite another question, though. If a state's institutions or citizens are the main target of political terrorist assaults, and that state has the adequate forces at its disposal, is it entitled to apply all adequate measures, including the launching of more or less

„intelligent“ missiles that have not yet learned to tell the terrorists, their associates and supporters from the innocent? Quite a question, that. Also for our organisation, I would say.

III. Access to Court

As any other human right, the right of access to court must above all be effective. To this aim, it requires a variety of policies that would empower individuals to exercise the judicially enforceable rights given to them. Ignorance, lack of resources, ineffective representation, inadequate legal standing and deficient remedies all have the capacity to render judicially enforceable rights illusory. [Philip Alston, J.H.H. Weiler, *The European Union and Human Rights. Final Project Report on an Agenda for the Year 2000*. Florence 1998, European University Institute, para. 26].

Effective access to court means in the first place access to good and prompt administration of justice before a first instance, that is usually a local court. Effectiveness means here a relatively dense network of such courts, their appropriate architecture and equipment. In this area, the differences between the old and new democracies in the sphere of securing the right to justice are the greatest. Taking the bird's eye view of the architecture of courts, not only the local ones for that matter, we see the clear and still persisting line running along the eastern frontier of Germany and former Austro-Hungary. East of that frontier, the biggest public buildings in provincial towns were the seats of the police, army, and governors. The differences are particularly noticeable in the territory of Poland. In territories under the Russian administration in those days, courts used to have small buildings, often in disrepair and inconsistent with the majesty of justice. They failed to offer the proper conditions of work to judges and clerks, and practically excluded the openness of sessions in the face of their insufficient number and size of courtrooms. Thus courts were quite intentionally ignored in the budget. It has to be added, though, that the outcome of World War II was tantamount to a shift of that border line between the good and the bad working conditions of courts to the Elbe river and Sudeten mountain range. Under Realsozialismus, if a new building of a district or provincial court was raised, it was never more imposing than the local Communist Party building or headquarters of the Civic Militia. Besides, the more stately court buildings raised before 1939 were often handed over to other authorities, the Militia included. The miserable court architecture inherited by the new democracies is matched by just as miserable an equipment. In a vast majority of courts in Eastern Europe, the basic office equipment still includes a typewriter and an abacus. There is no use considering a program for document transmission via the e-mail to speed up the exchange between parties and the court if courts have no computers, and most court clerks are equipped with nothing but a ballpoint pen. The quality of access to court, particularly important for the destitute persons who cannot afford a lawyer, is additionally lowered by the low professional standards of the office staff. Court offices have young and inexperienced staff who are badly underpaid. As soon as they learn some skills, they quit to get a job with law firms and business companies. Finally, a vast majority of courts have neither a legal library nor even copies of the Journal of Laws.

Another bottleneck in the sphere of access to justice is in many countries an insufficient number and low quality of services of lawyers. The year 1990 demonstrated well enough how effective the measures had been that were applied by Realsozialismus in a struggle against the Bar in countries such as the Soviet Union and Albania. After 1989, persons who had trained in that most difficult profession at various courses, many of them retired officers of the criminal or political police, often proved unable to cope with the requirements of the high professional and ethical qualifications. By no means isolated are also cases of lawyers' connections with organised crime.

In the pauperised societies of the new democracies, unclear provisions regulating the appointment of ex officio counsels can be found. In some countries, e.g. Bulgaria, the provisions greatly limit the possibility of providing ex officio legal aid, also in serious cases. Elsewhere, e.g. in Poland, the provisions are relatively kind to the poor. In over 80% of criminal cases in Poland, the defence counsel is appointed ex officio. This, however, is not too seldom translated into an appropriate quality of legal aid. Not only the defendants but also the judges complain about the counsels being insufficiently prepared to conduct ex officio defence. The counsels, for their part, do not try to deny such accusations but put the blame on the relatively low official fees for this type of defence. The fact remains, though, that ex officio defence accounts for quite a serious proportion of the income of many lawyers, especially those from smaller towns. It is also a fact that there are some lawyers who represent the same level of quality whether they appear ex officio or have been hired by a party to proceedings. Moreover, there is among the lawyers in the new democracies no tradition of conducting even one in a hundred cases pro publico bono. In this situation, it would be most advisable for the ICJ to draw up a draft amendment securing more effective legal aid to the poor. In the long run, this cannot be achieved through financial support for small human rights organisations offering such aid. Structural changes are needed here. One such change might consist in adoption of provisions making it possible for local governments to establish legal aid offices; another one might be introduction in each country on the national scale of obligatory ex officio legal aid rendered to parties whose case is pending before a provincial court in the first instance. Still another measure would be to encourage university faculties of law to establish law clinics where legal aid would be rendered by students in the final years of study.

The unequal access to justice of destitute persons is intensified in some countries by the amount of court fees, higher than in the rich societies. Governments refuse to accept the argument that courts are financed from taxpayers' money. A citizen forced to pay a high court fee is in fact made to pay twice, so to say. Combined with the above-mentioned problems such persons have getting effective legal aid, this leads to a situation where - in civil law cases in particular - the party to a dispute that is stronger in terms of money, an agency of state or local authority included, often actually walks over.

IV. Transparency of Public Administration and Corruption

During the last five years, as expert of the Council of Europe, I assisted three different countries in their preparation for membership of that organisation. In two of them, the administration was fully transparent. They were small countries, and one might say that everybody knew everything about everybody else there. At the same time, those societies had a next to full corruption transparency. What I mean by this is a situation where each and every citizen knows the rules of bribing a commune clerk, a police officer, a judge and any other official. There are fixed rates of how much should be given to whom for what, and how. Besides, lower-ranking officials knew that a proportion of the bribes had to be turned over to their superior. In such countries, the Treasury tends to be empty. The people who accept transparent corruption are not too indignant at not being paid their salaries or pensions for many months. They accept the existing situation with a rather fatalistic belief that even if Mercedes cars are manufactured elsewhere, one can do with what one has in their country, too. In the third country, many times bigger than the other two, the situation shaped somewhat differently. The police are less impudent demanding bribes; not all students have to bribe the professor to pass the exam; and with some luck, one can even register a business venture without a bribe. Also, the failure to pay taxes is not universal there, the salaries are paid on more regular basis and the taxes are deduced automatically, to mention just one possible reason. Also the administration is less transparent there. The authorities execute the most detailed provisions protecting official and state secrets. The press is free but printing houses are inspected by the President's men. Television is public, but from one electoral campaign to another, the President is nothing but praised and receives much greater a coverage compared to all his rivals taken together. I do not know, however, whether the corruption in that country is different in terms of scale only or perhaps in terms of quality.

The picture is not too encouraging. The people in the new democracies have lost their one and only political party that used to do all the thinking for them; their one and only trade union that supplied their factory or office with articles which could not be bought anywhere else and offered them a cheap package holiday once a year; their one and only employer that paid them enough to support the entire family; and their one and only newspaper that defined the social reality. Today, those people have several parties, several trade unions, several possible employers, and several newspapers. In most cases, though, they have that all in theory only. They do not care about political parties; they do not belong to trade unions; many are unemployed; and they cannot afford the newspapers. Nor does the law provide any support as it is unclear and frequently amended. What remains are the good old corruption mechanisms, developed further in the new conditions. Under the former regime, they helped to tame the sinister administration. Today, they help to purchase that administration's services. Mechanisms developed in societies where corruption is unknown and transparency of the administration is an established norm are of little use for the honesty of public life. What, therefore, is the program of correction or assistance that the ICJ might offer to such countries? Is there any such program at

all? I believe there is. In some areas, we cannot act as the substitute of appropriate institutions. In the area of socialisation, nothing can substitute a good family, school, and church. Here, changes for the better in a society that has been subjected to moral devastation for several generations running can only be expected in a few generations. This is just like the English lawn: several dozen years of fertilising, mowing, weeding and watering, and you get a beautiful lawn. Then, of course, you have to take good care of it all the time. Nothing is given to us once and for all. I believe that there are some anti-corruption mechanisms in the public life of such countries, even if they are never actually applied. There are legal norms that penalise corruption, as well as provisions on public order, but no mechanisms for their honest execution can be found. There are provisions on the media that offer to journalists extensive possibilities of demanding access to information on the functioning of public offices. There are the necessary tools, but the field seems out of crop. The reason is the weakness of judicial authority. In my opinion, it would be a great success of the ICJ if the organisation could offer to one of the new democracies a complex program, divided into stages, of building the independent judiciary. Without independent judiciary, there is no rule of law, just the rule of individuals.

To end with, a comment on corruption and transparency of the administration in the old as compared to the new democracies. I often wonder, is the only difference between the old and the new democracies that the former have a smarter version of corruption? Is that difference one between a smart designer product and a miserable imitation? There are, of course, countries with practically no corruption at all, and with a variety of oversight mechanisms that secure the transparency of public authorities. Yet how is corruption possible on as big a scale in various agencies of the European Union or in various sports? Why is it so that the President of the Constitutional Court in a country, publicly accused of corruption, by no means feels like resigning? Is it perhaps a sign that the problem of corruption is much broader in that country? In the old democracies, the repair mechanisms are set in motion with greater ease. What is more, once started, they repair the situation with much greater efficiency. Yet even there, our organisation may strive for adoption of the general rule that each and every reason for a refusal to grant access to public information should be subject to complaint. This means that also in cases where the public authority argues that state secrets are involved, the person concerned would be able to demand that the legality of this reasoning be appraised by a court, in camera if necessary. Working towards this aim, our organisation would act in the spirit of its mission, contributing to consolidation of human rights and the rule of law.

**European Conference
of the International Commission of Jurists
„New Europe - Making Rights Real“**

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FROM
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GROUPS**

WORKING GROUP 1

CRIMINAL JUSTICE AND INDIVIDUAL RIGHTS

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INTRODUCTORY PRESENTATION

Police powers and the European Convention on Human Rights

Keir Starmer (barrister)

► Introduction.

The investigation and prosecution of crime, and thus the exercise of police powers, raise a number of interesting, albeit complicated, issues under the European Convention on Human Rights (the Convention). That is because the dual functions of the police - the protection of victims (or potential victims) of crime and safeguarding the rights of suspects - inevitably engage Convention rights, often apparently conflicting Convention rights.

So far as the protection of victims is concerned, the Convention rights usually in play are Articles 2 (the right to life), 3 (the prohibition on ill-treatment) and 8 (respect for privacy and physical integrity). For suspects, the Convention rights usually in play are Article 8 (in relation to investigation of crime), Articles 3 and 5 (in relation to arrest and treatment in custody, including questioning) and Article 6 (the right to a fair trial). However, for both groups, other Convention rights are also important. For example, it is now well-established that one of the positive obligations arising under the Convention is a duty on the police to ensure that individuals can enjoy their Convention rights, such as the right of peaceful assembly (*Christians Against Racism and Fascism v UK*).

This paper examines the Convention duties and responsibilities of the police and, in particular, how the balance is to be struck as between victims and suspects. The duty to safeguard the life and physical integrity of individuals known to be at risk is dealt with first, then the investigation of crime (including covert surveillance, search and seizure and the collection and retention of personal data), arrest and detention, and finally police accountability under the Convention.

► Safeguarding life and physical integrity.

The positive obligation on the police to safeguard life and physical integrity arises under Articles 2, 3 and 8. Although the nature of the obligation differs from Article to Article, in each case the duty on the state to put in place an appropriate legal framework capable of protecting life and physical integrity is supplemented by a duty on the police (and other law enforcement agencies) to enforce the law effectively.

Although the obligation to take appropriate measures to protect life is well-established, its scope was examined in the recent case of *Osman v UK*. There the applicants complained that the police had failed to take reasonable preventative measures against the second applicant's former teacher who ultimately killed the first applicant's husband (the second applicant's father) and wounded the second applicant. Although the European Court of Human Rights found no breach of Article 2 on the facts, it adopted the following important principles:

- The state's obligation under Article 2 extends beyond a duty to put in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.
- It also implies, in certain well-defined circumstances, a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.
- Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which doesn't impose an impossible or disproportionate burden on the authorities.
- It must also be interpreted in a way which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.
- What must be shown, therefore, is that the authorities failed to do all that could reasonably be expected of them to avoid a „real and immediate“ risk to life which they knew about or ought to have known about.

On that basis, the Court rejected the UK government's argument that to breach Article 2, the failure to perceive the risk to life or take preventative measures must be tantamount to gross negligence or wilful disregard of the duty to protect life.

In a number of previous cases, the European Commission of Human Rights had examined the scope of the obligation to take appropriate measures to protect life in the context of paramilitary attacks in Northern Ireland. It accepted that police/security force protection might be needed in some cases - up to a point - but emphasised that „a positive obligation to exclude any possible violence“ could not be read into Article 2 (*W v UK*).

Some of the most dynamic case-law on positive obligations has been developed in the context of protecting physical integrity under Article 8. And, in addition to their claim under Article 2, the applicants in *Osman v UK* advanced an argument under Article 8 on the basis that the failure of the police to bring to an end the campaign of harassment, vandalism and victimisation, which the second applicant's teacher waged against their property constituted a breach of this provision. The Court rejected this. In its view the police had done all they could reasonably have been expected to do: initially there was no real evidence that the teacher was responsible for the acts complained of, and when further evidence became available, the police had attempted to arrest him.

Clearly, therefore, what steps the police need to take to comply with their Convention obligations under Article 8 will depend on the facts of each case. However, the implication from *Osman v. UK* is that, if there had been evidence that the teacher was responsible for the campaign of harassment, vandalism and victimisation and, having been alerted to this evidence, the police had done nothing, a breach of Article 8 might well have been established.

► **Investigation and prosecution.**

It is now clearly-established that where an individual's fundamental rights under Articles 2 and 3 are breached, there must be „some form of effective official investigation“. This obligation is particularly strict where state officials have (or might have) been involved.

In a series of cases from Turkey, the Court has found that wherever an individual dies in suspicious circumstances, disappears or an allegation of torture is „arguable“, Article 13 of the Convention (the right to an effective remedy) requires, without prejudice to the availability of any other remedy, a „thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure“ (Aksoy v. Turkey).

Examples where the Court has found a breach of this duty of effective investigation include:

- failing to ascertain possible eye-witnesses;
- failing to question suspects at an early stage;
- failing to search for corroborating evidence;
- the adoption of an over-deferential attitude to those in authority;
- failing to follow up proper complaints;
- ignoring obvious evidence;
- failing to carry out a proper autopsy; and
- failing to test gunpowder traces.

(Aksoy v. Turkey, Aydin v. Turkey, Kurt v. Turkey and Kaya v. Turkey)

On the other hand, the investigation of crime must respect the Convention rights of suspects or potential suspects. That means that there are strict limits on investigative techniques such as covert surveillance, the use of *agents provocateurs* and the collection and retention of personal data.

► **Covert surveillance.**

Covert surveillance covers a wide range of activities, including telephone tapping, interception of communications, the use of covert listening devices and visual surveillance equipment. Most of these activities interfere with the right to privacy protected by Article 8. That does not mean that they are prohibited under the Convention: the prevention of crime and the protection of the rights of others are legitimate grounds for interfering with Article 8 rights.

However it does mean that all forms of police surveillance must be justified in accordance with Article 8(2) of the Convention: i.e.:

- The activity in question must be „prescribed by law“. This means that the applicable legal rules must be accessible (unpublished internal guidelines are not sufficient) and formulated with sufficient precision to enable citizens to foresee - if need be with appropriate advice - the consequences of their actions.
- The activity in question must be necessary and proportionate. This means that police surveillance should be restricted to that which is strictly necessary to

achieve the required objective. What is legitimate for the prevention and detection of serious crime may not be legitimate for less serious crime. And, broadly speaking, intrusive surveillance should not be used where less-intrusive measures are capable of achieving the same or similar results.

- There must be proper methods of accountability over both the authorisation and the use of police surveillance and other information gathering activities.

- There must be remedies for those whose privacy has been wrongly invaded.

These requirements have been developed over a long series of cases before the Court and it is clear that they are becoming stricter, not looser. In *Huvig v. France*, where a judge authorised a senior police officer to have the applicants' business and private telephone lines tapped and the resultant information was then used against him in criminal proceedings for attempted armed robbery and abetting a murder, the Court found a breach of Article 8 for a combination of the following reasons:

- The categories of people liable to have their telephones tapped was not defined.
- The categories of offence for which telephone tapping could be authorised was not defined.
- There were no limits on the duration of telephone tapping.
- No rules existed about disclosure of records created in the course of telephone tapping, in particular, disclosure to the defence.
- No rules existed to govern the destruction of information obtained by telephone tapping, in particular where proceedings against a suspect were not pursued and/or she/he was acquitted on criminal charges.

Moreover, the Court recognises that as technology advances it is increasingly easy for the police and other public authorities to abuse their powers of surveillance. Recently it has maintained that having clear rules covering the issues outlined in *Huvig v. France* is only the starting point. The rules must also establish how, in practice, they are to be carried into effect.

In *Kopp v. Switzerland* the applicant was a lawyer, whose telephone communications were intercepted even though he himself was not a suspect but because he was a „third party“ with whom it was believed those suspected would be in contact. The Swiss court ordered that 13 telephone lines be monitored, including the applicant's private and professional lines. Although order expressly mentioned, in accordance with Swiss law on legal professional privilege, that „the lawyers“ conversations [were] not to be taken into account, the Court found a breach of Article 8 because the law did not make it clear how legal professional privilege was to be protected in practice.

The Court's view was that since telephone tapping (and other forms of communication interception) constitutes a „serious interference“ with private life, particularly in light of increasingly sophisticated technology, it must be based on „law“ that is particularly precise. It is essential to have clear, detailed rules on the subject. Although Swiss law provided a number of safeguards, including the provision intended to protect legal professional privilege, the Court discerned:

... a contradiction between the clear text of legislation which protects legal professional privilege when a lawyer is being monitored as a third party and the practice followed in the present case. Even though the case law has established the principle ... that legal professional privilege covers only the relationship between a lawyer and his clients, the law does not clearly state how, under what conditions and by whom the distinction is to be drawn between matters specifically connected with a lawyer's work under instructions from a party to proceedings and those relating to activity other than that of counsel.

In this regard, the Court found it „astonishing“ that the task of distinguishing between privileged and non-privileged matters should be left, under Swiss law, to an official of the Post Office's legal department, without supervision by an independent judge. On that basis it found that Swiss law did not indicate with sufficient clarity the scope and manner of exercise of the power to intercept telephone conversations.

► **Undercover agents and agents provocateurs.**

Increasingly, in the investigation of serious crime, police forces use informers and undercover agents. Their use in criminal cases raises two issues under the Convention: fair trial and privacy. So far as the first is concerned, the Court's case law has established that, subject to two qualifications, the use of undercover agents in the investigation of crime is not incompatible with Article 6. The first qualification is that the use of undercover agents must be restricted and adequate safeguards must be observed to prevent abuse. The second is that the actions of undercover agents must not exceed passive surveillance: prosecution for an offence incited by an undercover agent will breach Article 6.

In the recent case of *Teixeira de Castro v. Portugal* two undercover agents, posing as drug addicts, visited the applicant at home and asked him to supply them with heroin. The applicant had no heroin at his house and so the two agents directed him to another address where he purchased heroin for them. He was then arrested, prosecuted and convicted.

Relying on Article 6, the applicant argued that he had not had a fair trial because he had been incited to commit an offence, which, but for the intervention of the undercover agents, he would never have committed. The Court agreed. In its view:

... the two police officers did not confine themselves to investigating [the applicant's] criminal activities in an essentially passive manner, but exercised an influence such as to incite the commission of the offence.

Even the obvious public interest in fighting drug-trafficking could not justify using evidence obtained as a result of police incitement.

The Court in *Teixeira de Castro* was partly influenced by the lack of safeguards. In particular, it noted that the activities of the undercover agents had not been ordered and supervised by a judge. To the Court's mind, this indicated that the applicant was not suspected of any crime before he came into contact with them and weakened the Government's argument that he was predisposed to committing offences.

Even where safeguards against abuse are in place and the role of undercover

agents does not exceed that of passive surveillance, Article 6 issues can arise if the agents are not called to give evidence at trial. In *Ludi v. Switzerland* the authorities sought to justify reliance on the hearsay evidence of an undercover agent on the basis that if his identity was revealed in the course of his evidence, he would be unable to continue his work as an undercover agent and unable to protect the identity of his informers. In light of the applicant's argument that he wanted to clarify the extent to which he had been influenced by the agent, the Court found a breach of Article 6. The agent was a police officer and even if his true identity was not known, the applicant knew his physical appearance.

The Court also considered the Article 8 (privacy) implications of using undercover agents in *Ludi v. Switzerland*. The applicant argued that the undercover agent in question had abused his relationship of trust to gain access to the applicant's home and private life. Although the Commission thought this an interference with the applicant's Article 8 rights, the Court disagreed. In its view, by engaging in criminal activities such as drug dealing, the applicant must have known that he might encounter undercover agents. In other words, he voluntarily assumed the risk of interference with his private life. Whether Article 8 is violated where undercover agents exceed their role of passive surveillance and incite criminal offences was raised but not resolved in *Teixeira de Castro v. Portugal*.

► **The collection and retention of personal data.**

The taking and retention of personal data, such as fingerprints, photographs and DNA samples, raises a number of issues under Article 8 of the Convention. The case law of the European Court and Commission in this area is developing and there are no landmark judgements. Some guidelines are available from the Commission's case-law, but it has not adopted a clear and consistent approach to these issues.

In a number of early cases, the Commission recognised that measures such as the temporary confiscation of personal papers engages Article 8. And it is now beyond doubt that searches, taking personal details and/or photographs of suspects interferes with their privacy and must be justified under Article 8(2).

The context in which photographs are taken may, however, be important. In *Friedl v. Austria* the Commission rejected as inadmissible a complaint that photographs taken by the police of those participating in a public demonstration breached Article 8. In so far as this decision conflicts with the Court's decision in *Murray v. UK*, the latter is to be preferred. But it may be that a distinction is to be drawn between photographing identifiable suspects, particularly if this is done during the course of a search or arrest, for the purposes of a criminal investigation and photographing those who are participating in a public event for much more general purposes. In *Friedl v. Austria* there was no identification of the persons on the photographs and the photographs were kept in a general administrative file rather than being entered into the data processing system.

In *McVeigh, O'Neill and Evans v. UK* the applicants were detained upon their arrival at Liverpool from Ireland under prevention of terrorism legislation then in force. While detained they were searched, questioned and their fingerprints and photo-

graphs were taken. The Commission accepted that this interfered with their privacy under Article 8, but concluded that it could be justified under Article 8(2) as being necessary for the prevention of crime. In its view the measures were „prescribed by law“ and taken to establish the applicants' identities and to ascertain whether or not they were involved in terrorism activities. Since the Commission had already found that the applicant's detention for this purpose was lawful under the Convention, the result was hardly surprising. However, it is clear from the Commission's decision that, had the measures gone beyond this purpose or been improper in any way, they would not have been justified.

Retention of photographs, fingerprints and other personal data has to be considered separately under the Convention. Collection may be justified on the basis of preventing or detecting crime, but retention may not be. In a very early case, the Commission accepted that:

... the keeping of records including documents, photographs and fingerprints, relating to criminal cases of the past is necessary in a modern democratic society for the prevention of crime and is therefore in the interests of public safety.

The applicant in that case had been tried on a criminal charge in connection with which the relevant records had been compiled, although ultimately his conviction was quashed on appeal.

In *McVeigh, O'Neill and Evans v. UK* the Commission had to confront the issue of retention of personal data where no criminal proceedings were brought. On the facts of that case it accepted that the purpose of retention - the prevention of terrorism - was legitimate. It also accepted that retention was „prescribed by law“. The question therefore was whether retention could be justified as „necessary in a democratic society“. In this regard the Commission was influenced by the fact that the information retained was used for identification purposes only and was kept separate from criminal records in concluding that:

Bearing in mind ... the serious threat to public safety posed by organised terrorism in the United Kingdom, the Commission considers that the retention for the time being of records such as those at issue in the present case can properly be considered necessary in the interests of public safety and for the prevention of crime.

It is implicit in this conclusion that the information could only be kept for as long as it served the legitimate purpose of the prevention of terrorism.

It follows that where personal data such as fingerprints and photographs have been collected in the course of investigating crime, it should be destroyed once the subject is no longer suspected of an offence. The same applies to DNA samples.

► **Arrest and detention.**

There are three pre-conditions to a lawful arrest under Article 5. They are:

- That the arrest and/or detention be „lawful“. This requirement flows from the use of the word „lawful“ in each of the paragraphs 5(1)(a) to 5(1)(f).

■ That the arrest and/or detention be „in accordance with the procedure prescribed by law“. This requirement is found in the second sentence of paragraph 5(1) and means that domestic law must set out the procedure to be followed by those authorised to arrest and/or detain others and that the procedure must be observed in practice.

■ That the grounds for the arrest and/or detention must fall within at least one of the paragraphs 5(1)(a) to (f) of Article 5.

Paragraph 5(1)(c) which provides for arrest and/or detention on reasonable suspicion that the person concerned has committed an offence will usually be relevant where police powers are exercised. However, paragraphs 5(1)(a) to (f) of Article 5 are not mutually exclusive and it is quite conceivable that a person may, at a given time, be deprived of his/her liberty in accordance with more than one of the sub-paragraphs, or that the purpose or character of detention may change so that what was initially justified under one sub-paragraph ceases to be so, but comes to be justified under another one.

The meaning of „reasonable suspicion“ was explored by the Court in *Fox, Campbell and Hartley v. UK* where it held that:

[H]aving a „reasonable suspicion“ presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence in question.

What may be regarded as „reasonable“ will depend on all the circumstances and is to be judged on the facts known at the time of arrest, not afterwards. It is not necessary to show that an offence has been committed. Nor is it necessary to show that, if an offence has been committed, the arrested person is responsible. The honesty and bona fides of a suspicion constitute one indispensable element of its reasonableness, but „honest belief“ alone is not enough; there must be an objective basis justifying arrest and/or detention.

Although the second limb of Article 5(1)(c) authorises detention to prevent the commission of offences, any such detention will always be subject to very close scrutiny. It does not authorise a policy of general prevention directed against an individual or a category of individuals simply on the basis that she/he or they have a propensity to commit crime: it does not more than afford a means of preventing a „concrete and specific offence“. In *Ireland v. UK* the European Court held that internment authorised by domestic law simply „for the preservation of the peace and maintenance of order“ without any need for suspicion of having committed an offence (or belief that it was necessary to prevent a crime being committed) could not be brought within the terms of Article 5(1)(c).

Article 5(2) of the Convention requires that anyone arrested be informed promptly „in a language he understands“ of „the reasons for his arrest and of any charge against him“. What this means is that anyone arrested must be told „in simple, non-technical language“ that she/he can understand „the essential legal and factual grounds for his arrest“ (*Fox, Campbell and Hartley*).

► **Ill-treatment in custody.**

Ill-treatment in police custody can raise issues under Article 3 if it reaches the „minimum level of severity“ required by the Court’s case law. The vulnerability of a person held in police custody has an impact on this threshold criteria.

In *Tomasi v. France*, the applicant claimed that he had been slapped, kicked and punched by police officers during a prolonged period of police detention. Although the medical evidence was not wholly consistent with the applicant’s allegations, it disclosed that he had been subjected to a number of blows of some intensity. In the Court’s view evidence of such injuries was sufficiently serious to render the applicant’s treatment in custody inhuman and degrading within the meaning of Article 3. The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot limit the protection afforded under Article 3 in respect of the physical integrity of individuals.

An even more robust approach was taken in *Ribitsch v. Austria* where, again in the context of allegations that the applicant had been punched and kicked in police custody, causing several areas of bruising, the Court held that:

... in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.

Physical force in this context relates to deliberate assaults; resort to other kinds of force may require more detailed examination.

Where ill-treatment in police custody is proven, its purpose will be relevant. One of the factors that led the Court to conclude that the serious ill-treatment inflicted on the applicant in *Aksoy v. Turkey* amounted to torture (rather than inhuman or degrading treatment) was that it was administered with the aim of obtaining admissions or information from the applicant.

► **Vicarious liability.**

In a number of cases before the Court and Commission, states have sought to escape liability by claiming that the actions of their servants or agents were *ultra vires*. Invariably this argument has been rejected. So, for example, in *Cyprus v. Turkey* where the Commission accepted allegations that a number of detainees had been raped, it held the Turkish Government responsible on the basis that:

The evidence shows that rapes were committed by Turkish soldiers and at least in two cases even by Turkish officers ... It has not been shown that the Turkish authorities took adequate measures to prevent this happening or that they generally took any disciplinary measures following such incidents. The Commission therefore considers that the non-prevention of the said acts is imputable to Turkey under the Convention.

In *Ireland v. UK* in the context of a practice of ill-treatment including five interrogation techniques found to breach Article 3, the Court held that:

It is inconceivable that the higher authorities of a state should be, or at least

should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinate; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.

It is unclear how far this concept of strict liability extends, but it appears to stretch beyond Article 3.

In *A v. France* state liability under Article 8 was triggered where a police officer recorded a telephone conversation without authority and in breach of French law. And in the context of a complaint under Article 10 of the Convention, the Commission in *Wille v. Liechtenstein* adopted the following position of principle:

... the responsibility of a state under the Convention may arise for acts of all its organs and servants. As in connection with international law generally, the acts of persons acting in an official capacity are imputed to the state. In particular, the obligations of a Contracting Party under the Convention can be violated by a person exercising an official function vested in him, even where his acts are performed without express authorisation and even outside or against instructions.

Clearly, this has important ramifications for all aspects of police work.

► **Case references.**

Christians Against Racism and Fascism v. UK (1980) 21 DR 138
Osman v. UK (1998) 1 FLR 198
W v. UK (1983) 32 DR 190
Aksoy v. Turkey (1996) 23 EHRR 553
Aydin v. Turkey (1997) 25 EHRR 251
Kurt v. Turkey (1998) 27 EHRR 373
Kaya v. Turkey 19 February 1998
Huvig v. France (1990) 12 EHRR 528
Kopp v. Switzerland (1998) 27 EHRR 91
Ludi v. Switzerland (1992) 15 EHRR 173
Teixeira de Castro v. Portugal (1999) 28 EHRR 101
Friedl v. Austria (1995) unreported
Murray v. UK (1994) 19 EHRR 193
McVeigh, O'Neill and Evans v. UK (1981) 5 EHRR 71
Fox, Campbell and Hartley v. UK (1990) 13 EHRR 1570
Ireland v. UK (1978) 2 EHRR 25
Tomasi v. France (1992) 15 EHRR 1
Ribitsch v. Austria (1995) 21 EHRR 573
Cyprus v. Turkey (1976) 4 EHRR 482
A v. France (1993) 17 EHRR 462
Wille v. Liechtenstein (1997) 24 EHRR CD 45

Accountability mechanisms: Courts and structures¹

As both police and criminal methods become more sophisticated, and more international, questions are raised about the mechanisms that need to be in place to ensure that the proper balances are being observed. One of those methods is the supervision of courts and tribunals, when criminal cases come before them. The other is internal and external structures of accountability, which need to be transparent and democratic.

► Courts.

The courts' role in supervising criminal investigations is to ensure that Article 6 (fair trial) rights are observed. The trial process itself must be fair (for example, the provision of legal advice and representation, if necessary free; the protection against self-incrimination and the presumption of innocence). But the court, as guardian of the criminal process, may also be required to rule upon whether the way in which evidence has been obtained, or is used, would render the proceedings as a whole unfair and unsafe. This raises issues of the admissibility of evidence obtained improperly, or in breach of human rights standards; and the disclosure of evidence which is held to be so sensitive that it is not in the public interest to make it available to the defence.

The European Court of Human Rights has given a wide margin of appreciation to domestic courts in applying the requirements of Article 6, so long as they offer minimum safeguards. It looks at the process as a whole:

„The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted in evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.“

Doorson v. Netherlands

So, the role of the ECtHR is essentially supervisory.

This implies that the domestic courts themselves need to be vigilant in ensuring that Convention standards are properly applied. Many jurisdictions have their own codes to regulate police practice and domestic courts have discretion to exclude evidence which was obtained unfairly in breach of those codes.

Exclusion of evidence

Courts in Europe have been reluctant to develop an exclusionary rule in relation to all unlawfully obtained evidence, though in some European countries (such as Germany) there is a very strong presumption that evidence obtained unconstitutionally will be excluded. In the UK, by contrast, the courts have tended to use their exclusionary power sparingly, where the breach is significant and substantial: they are

¹ This material has been prepared by Justice (UK), based on material submitted by Monica den Boer (the Netherlands)

particularly likely to do so where there has been coercion, or improper use of undercover or covert methods, to obtain a confession. The European Court of Human Rights lends support to this approach: in *Schenk v. Switzerland* the ECtHR held that Article 6 does not require such evidence automatically to be excluded. In that case, however, the court placed considerable weight on the fact that the intercept evidence, which had been unlawfully obtained, was not the only evidence upon which the conviction rested. The ECtHR will return to this question in the case of *Khan v. UK*, where it will be argued that the UK courts were wrong to refuse to exclude evidence obtained by illegal telephone tapping, in clear breach of Article 8.

Like the domestic courts, however, the ECtHR is particularly vigilant in cases which touch on self-incrimination or entrapment (see *Teixeira and Castro v. Portugal* and *Barbera, Messegue and Jabardo v. Spain*). Indeed, confession evidence obtained improperly, by maltreatment, is an exception to the general rule about unlawfully obtained evidence, as the ECtHR stated in *Austria v. Italy*.

Courts in other countries, such as Canada and New Zealand, have taken a different view: in the words of the New Zealand Supreme Court „the Courts will not be party to breaches, but will insist on preserving the integrity of the administration of justice“; or as the Canadian Supreme Court put it: „Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law“.

In relation to the protection against self-incrimination, the ECtHR has held that it is a breach of Article 6 to obtain a confession under powers of compulsion and subsequently use that evidence to secure a criminal conviction (*Funke v. France*, *Saunders v. UK*). However, the drawing of inferences from an accused person's silence under police questioning is not necessarily a breach; though certain safeguards, such as access to legal advice, may be required (see *John Murray v. UK*).

Disclosure of evidence

In terms of the disclosure of evidence, the ECtHR has developed the doctrine of „equality of arms“, set out in *Jespers v. Belgium*, *Edwards v. UK*, and *Benendoun v. France*. In *Jespers*, where the police had provided incomplete files to the defence, the Court held that Article 6(3) requires the right of the accused to have at his disposal, for the purposes of exonerating himself or obtaining a reduction in his sentence, all relevant elements that have been or could have been collected by the authorities.

In *Benendoun*, however, this was held not to apply to documents that the prosecution did not seek to rely on, and that the defence were unable to specify a reason for requiring.

In addition, the ECtHR has dealt with the question of material that cannot be disclosed to the defence on public interest grounds. This is almost always material obtained by covert means - such as evidence which might endanger an informant, or compromise police surveillance methods - or material relating to national security, for example in terrorist cases. Here, the Court will look at whether there are sufficient alternative safeguards in domestic proceedings, such as the ability to bring such material before a judge (see *Chahal v. UK* and *Rowe and Davis v. UK*). As such

proceedings may take place without the accused being represented, or without his representatives having evaluated the material, the Court, in *Chahal*, also recommended the appointment of a security-cleared advocate as an amicus to represent the interests of the accused person and see material which could not be disclosed to the accused and his own lawyers.

Similar considerations apply in relation to anonymous witnesses, who are usually informers or undercover or security agents. Here the ECtHR has looked at the competing rights of the witness and the accused: the witness's right to life and security of person under Article 2, and the accused's right to test the evidence against them under Article 6 (see *Doorson v. Netherlands* and *Van Mechelen v. Netherlands*). In those cases, the ECtHR has upheld Article 6 rights, in that convictions should not be based solely upon such evidence, and there should be other safeguards, such as the court's ability to question the witnesses. The Court has also distinguished between witnesses who are ordinary citizens and those who are police officers; the latter, as agents of the state, should be granted anonymity only in exceptional circumstances.

Other issues

The question of entrapment and the use of agents provocateurs is dealt with in the earlier part of this paper.

The court may also be required to safeguard the rights of victims and witnesses. This may relate to their anonymity or the non-disclosure of evidence (see below); or to their treatment in court (see *Baegen v. Netherlands*, protecting a rape victim from cross-examination). It is possible that this will develop as the debate on victims' rights becomes more prominent: for example, for the first time the ECtHR has allowed oral submissions from an intervenor acting for the victim's family in *v. & T v. the UK*, heard in September 1999.

► **Structures for transparency and accountability.**

National police services are accountable to politicians and parliaments, both local and national, through a variety of means. They may also be required to have a statutory, democratically-agreed basis for their activities, and to operate through published codes of practice and policy. This will be the only means of providing the necessary legal basis required for interference with Article 8 rights.

Monica Den Boer, in her paper on mechanisms for controlling international police co-operation, lists various forms of accountability, which are equally applicable on a national scale:

- *answerability to the public*, through such things as public reports (e.g. reports to parliaments) and complaints systems;
- *internal regulation* through transparent procedural rules, internal mechanisms for the supervision, monitoring and disciplining of police officers, and supervisory bodies such as police boards;
- *political accountability* through reports to local or national democratic institutions or their committees;

■ *legal accountability* through the courts (see above).

Such forms of accountability are much more difficult to provide when police operations increasingly go across national borders (often in response to organised or drugs-related crime) and as sensitive data is exchanged among national police intelligence agencies. This is now being formalised within the European Union, through Europol, which, as it becomes semi-operational, will require much stronger accountability mechanisms. Those suggested include a Europol prosecutor or magistrate, or a Europol Prosecution Bureau, to screen and evaluate Europol's work; or a network of national magistrates or prosecutors to authorise, supervise and co-ordinate international criminal investigations. It has also been proposed that the European Parliament should undertake more active scrutiny of Europol's work, and that the European Court of Justice should be the supervisory court; there is a Protocol to the Convention, giving jurisdiction to the ECJ, but this is optional.

However, there are also informal, unregulated contacts and networks such as the International Police Group on Undercover Policing. They are also likely to involve contacts and exchange with national security or military intelligence services, which are usually less well-regulated and less accountable than police services. Law enforcement interaction with central and eastern European countries is increasing, with both bilateral and structural EU programmes: such as the pre-accession pact on organised crime, agreements for the secondment of liaison officers and the exchange of information, and rules for Europol to exchange data with third countries. Yet some of these countries may still not have fully developed their own internal national accountability mechanisms. Such varied and individualised agreements may require tailor-made accountability mechanisms, for example covenants. But public accountability is much more difficult to achieve: particularly in operations targeted against organised crime, where the public has no direct involvement, and in relation to international police bodies where complaints systems are rudimentary or fragmented.

As Neil Walker has stated, even within the EU, „from the perspective of national sovereignty, the proper lines of accountability are through national channels, which means domestic parliaments and national courts“. If this is true within the EU, it is even more so for countries that co-operate informally, or outside treaty obligations, in policing activity.

It is argued that there should be pressure towards working through formal exchange systems which have consistent and rigorous data protection controls overseen by a supranational data protection body, and enforced by a supranational court. At operational level, to ensure compliance with Article 8, the emphasis should be on ensuring a legal basis for co-operation with stringent rules, including rules on accountability.

Yet even these traditional democratic and legal accountability systems may be insufficient. Den Boer argues that „the development of an effective regulatory system, with checks and balances, compliance norms and sanctions seems insufficient because it fails to take account of the citizen...It is essential to restore the trust of the citizen in supranational policing activities. Right now, European police coopera-

tion tends to have a politicised and elitist character; a strategy of popularisation might improve this picture". She goes on to argue that this is even more necessary as the political and institutional framework of Europe changes, with new defence and security issues and the enlargement of the EU. „A reliable accountability regime must be immune to unexpected changes in Europe's political climate, but can we be certain that the current patchwork...is solid enough?"

RECOMMENDATIONS

◉ Working group 1

CRIMINAL JUSTICE AND INDIVIDUAL RIGHTS

► Workshop report.

Articles 6 (fair trial), 8 (privacy), 5 (liberty) and 3 (protection from torture or degrading treatment) protect the rights of suspects. The state, however, has an obligation to protect life (Article 2) and prevent Article 3 or Article 8 violations in respect of victims of crime. The workshop opened with reports from several countries on the issues encountered in seeking to investigate and prosecute crime while safeguarding human rights.

In the UK, these Articles are about to become directly applicable in domestic law. There is a widespread training and auditing programme for investigatory and judicial authorities. Other countries, such as Russia and Poland, had also faced the problem of ensuring that existing procedures met human rights safeguards, while coping with a rise in the crime rate. Some common issues and problems were identified.

► Covert policing.

The increased reliance on covert policing methods was recognised in all countries present. Such methods raise numerous issues of human rights compliance, and risk interfering with privacy and fair trial rights. They require statutory authority, and systems for independent monitoring, authorisation and complaints. The use of agents provocateurs and entrapment raise additional issues under Articles 6 and 8.

Recommendation: that the ICJ seek to develop common standards for covert policing applicable throughout Europe.

► International, transnational and bilateral policing.

The globalisation of crime has led to a concomitant increase in cross-border policing, bilateral relations between different police forces, and the development of transnational bodies such as Europol. The working group were concerned at the lack of accountability of such bodies, and the need to ensure that human rights standards were protected in international, as well as national, policing.

Recommendation: that the above standards include mechanisms for ensuring accountability in international and bilateral police operations.

► Police accountability.

Independent and transparent complaints procedures were necessary in order to monitor and provide remedies for police misconduct. In some countries, this was

through an Ombudsman system, in others a Commission. Whatever the mechanism, it should be independent of the executive and the police. Lay involvement in internal police disciplinary proceedings was also suggested.

Recommendation: there should be exchange of information about effective and independent police complaints systems, both internal and external.

► **Protecting the rights of victims, witnesses and law enforcement officers.**

In many countries, there was a public perception that human rights protected suspects, at the expense of victims and the wider society. The group stressed the importance of asserting the state's obligation positively to protect the rights of victims and law enforcement officers. Otherwise, there is a real danger of human rights being discredited in the public's mind. Some countries reported serious intimidation of witnesses and the absence of witness protection schemes; in one country, scores of police officers had been killed.

However, the group was also concerned about moves to involve victims directly in the prosecution process, either by allowing them to halt prosecutions, or to take part as an additional prosecutor. It was important not to confuse victims' rights to be informed and protected with the state's obligation to prosecute offences.

Recommendation: The state's positive obligation to protect victims, witnesses and police, and strenuously to prosecute offences, ought to be stressed. Developments in victims' rights across Europe needed to be monitored, and international standards for witness protection identified.

► **Juvenile justice.**

Many countries fail to distinguish adequately between adults and juveniles. The importance of alternatives to the criminal justice system in relation to juveniles, particularly restorative and diversionary processes, were stressed. These were more in keeping with the principles of the UN Convention on the Rights of the Child, though there needed to be care that they did not offend against procedural fairness.

Recommendation: all countries should have separate procedures for juvenile justice, including restorative and diversionary approaches

► **Delay in pre-trial proceedings.**

Many countries reported severe problems with delays before trial, breaching Articles 5 and 6. Absence of viable bail systems could result in years of pre-trial detention. Delay in itself could diminish the prospect of fair trial, and could be used corruptly to prevent proceedings taking place at all, due to time-bars. The main causes of delay were identified as mismanagement and corruption.

Recommendation: judicial training should include case management and efficient court administration skills, as well as legal training. Pre-trial delays should be closely monitored (to be communicated to Access to Justice and Transparency and Corruption workshops)

► **Independence of the judiciary.**

Two opposite problems were identified: the need to protect judges from political interference or corruption, and the use of judicial independence as an excuse to mask inefficiency or incompetence. Lengthy tenure, adequate remuneration, and dismissal only for gross incompetence, were important. Most members, however, also supported transparent disciplinary proceedings, with a lay element.

Recommendation: security of tenure needed to be balanced with effective disciplinary proceedings, and effective judicial training (to be communicated to Access to Justice workshop)

► **Legal representation.**

Legal advice and representation, where needed, is an essential part of the right of access to courts. In many countries, the low rates of state remuneration for defence lawyers severely undermined this right, and lawyers might be insufficiently motivated, trained or independent. It was essential to provide legal advice at the very beginning of criminal proceedings, prior to charge.

Recommendation: the provision of adequately-funded independent legal aid, at the earliest stage, is essential to ensure right of access to courts; states should be urged to provide this.

WORKING GROUP 2

HORIZONTAL APPROACH TO THE HUMAN RIGHTS

► Who is who in group 2

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INTRODUCTORY PRESENTATION

Constitutionalism and state regulation on private parties

by Elspeth Guild, Andrew Clapham, Stellan Garde

► **Purpose.**

The ICJ Warsaw Conference 1-3 October 1999 is intended to be a working conference which will provide practical information and ideas on the protection of human rights in Europe to national sections and beyond. Each working group will have a substantial period of time over the two days to consider an issue. Our working group's theme is Constitutionalism and the State's Regulation of Private Parties. It is intended that we will go through in workshop form the questions, issues and legal strategies in this field.

► **Focus of the working group.**

We are very strongly of the view that this working group must be practical. The critical issue is horizontal direct effect of human rights specifically as incorporated in the European Convention on Human Rights. Reference may be made to other human rights obligations such as the other Council of Europe Conventions but the primary focus will be on the rights protected in the European Convention on Human Rights. Needless to say the theoretical approach will be relevant for many international human rights treaties even outside the European context.

► **Approach.**

Two questions were considered in this context with regard to constitutionalism and direct effect:

■ With the contraction of the state the application of human rights norms to newly privatised industries has been discussed in some venues. Furthermore, as certain private commercial sectors which have an impact on the enjoyment of human rights have become more important in our daily lives (for instance the telecoms industry), the question of direct effect of application of human rights norms within the commercial sphere even outside the question of formally state functions has become increasingly important.

■ With the incorporation into national legislation of the ECHR in virtually all Council of Europe member states what provision does the implementing legislation make for horizontal direct effect? The UK Human Rights Act has not dealt with this question straight on and it remains a matter of both practical and legal interest how the courts will interpret the act in this respect. In Swedish law involving incorporation of the ECHR the courts have given horizontal direct effect to a treaty right: Article 8 The Right to Private Life in a case of an employee at a nuclear plant who objected to alcohol and drug testing. The Swedish Court held that alcohol testing was contrary to Article 8 ECHR although drug testing was not.

► **Flash Points.**

We discussed setting the question of horizontal direct effect in a theoretical and legal framework and then pursued the practical consequences with an article by article review of the ECHR considering practical examples where horizontal direct effect may come into play. On reviewing the provisions of the ECHR we came to the conclusion that we have given a substantial focus on employment and immigration law. This is the result of the skewed interest we have, but may also reflect the key issues.

► **Methodology.**

Stellan will circulate this discussion document to the ICJ European sections and other human rights organisations for comment, addition or correction. By the end of August, all the responses will be collated and we will proceed to finalise the document for the conference in Warsaw.

► **Horizontal direct effect of the European Convention on Human Rights.**

An article by article review of potential legal issues.

A two step approach will be adopted in the workshop: First to examine examples of horizontal direct effect and the potential liability of private parties and secondly to consider what the obligation of the state is to provide a remedy in respect of the breach. The first part will consist of a substantive consideration of the ECHR, the second the obligations arising from Articles 1, 6 and 13.

■ *Article 2: The right to life*

Horizontal direct effect can arise in a number of different ways, for instance corporate manslaughter, environmental issues where the damage is life threatening etc.

Example: A company is operating machinery which is inadequately protected and potentially life threatening for the workers who are using it. National law does not provide a sufficient remedy. Can the worker whose life is threatened claim Article 2 protection in the national courts against the Company? Can the worker or the union complain about an article 2 violation by the Government in the national Courts? Can the worker stimulate a public prosecution of the company? A private prosecution? Can the worker complain of the legislature's failure to legislate? Can the national courts demand legislation?

■ *Article 3: No-one shall be subject to torture, inhuman or degrading treatment or punishment*

Problems of horizontal direct effect can arise here for instance in the event of discrimination and racist abuse. For instance if this arises in the work place and the employer does not take action to prevent it, is he liable under Article 3 for permitting degrading treatment? This also arises in respect of asylum and carrier sanctions. What happens when airline companies refuse to permit a person who is seeking asylum to enter into contact with the authorities of a state in the host country because the company does not want to be liable for fines for bringing a person with inadequate documentation.

Example: An airline company is advised, after the airline has taken off from the country of departure that the travel documents of one of the passengers are inadequate and if the passenger presents him/herself to the authorities of the receiving country the airline will be fined. The airline then „holds“ the passenger on the plane or in a waiting area air side and requires him/her to get back on the plane without entering into contact with the state authorities. The individual is seeking asylum because he or she fears torture in the country of origin. Is the airline in breach of Article 3? Is there an effective remedy at the national level. The European Court of Human Rights has already touched on the question of the applicability of Article 3 in the private sphere in the case of *H.L.R. v. France* of 29 April 1997. The applicant had been arrested at Roissy airport having arrived from Colombia with 580 grams of cocaine. Following his conviction at trial he was given a five year prison sentence and an order was issued permanently excluding him from French territory. The applicant alleged that if he was deported to Colombia he would certainly be subjected to treatment proscribed by Article 3 ECHR. The source of the risk was not the State authorities but rather drug-traffickers who might seek revenge due to the applicant's co-operation with the French Police. By fifteen votes to six the Court decided they did not believe that the deportation of the applicant would lead to a real risk of him being subjected to inhuman or degrading treatment under Article 3.

■ *Article 4: Slavery, servitude and compulsory labour*

This can arise where labour law is engaged and a worker no longer has the possibility of being paid or controlling his or her working environment.

Example: An employer has failed to pay an employee for many months but if the employee leaves the employment to seek employment elsewhere he or she will lose the right to a termination payment (which in some cases is more than one years salary). Can this constitute servitude and if so, is the employer in breach of Article 4.

Note: The Belgian Trainee Lawyer case also arises in this context. There is also a Swedish case of two farm workers who signed an agreement for 5 years at a rate of pay which was 20% of the appropriate level under the collective agreement. They then appealed to court. The court held that the pay provision of the contract was unreasonable and reopened the contract to increase the pay level.

Question: Should the question of the reasonableness of remuneration be determined on the basis of Article 4 in such a circumstance? This also raises questions about reliance on the European Social Charter calculation on the right to a living wage. The problem can become particularly acute in cross border cases for instance Ukrainian seafarers working on ships under Russian flags who are paid virtually nothing. When they come into harbour in for instance Stockholm is there a potential case regarding servitude? High or low standards may also be relevant here [we did not develop this at the meeting].

■ *Article 5: The right to liberty and security of persons (limitations under provision of liberty)*

Here questions that have arisen elsewhere may arise again. The detention of workers by their employers, for instance for drugs testing could be an issue here as would be the detention of a passenger by the airline to prevent him or her seeking asylum. Therefore the examples above may also be applicable to Article 5.

■ *Article 6: Determination of civil rights*

This is the fundamental issue of the obligation of the state in respect of breaches. However the horizontal effect also arises with respect to situations where the employer is immune in national law so that there is no access to Court for the determination of an employment dispute. Again the European Court of Human Rights has recently commented in this issue. In the *Case of Beer and Regan v. Germany* in the European Court of Human Rights the Court saw that the „attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments“ (at para 63, Judgement of 18 February 1999). But they went on to send a clear message that they will judge any immunity granted to an international organization for conformity with the human rights guarantees in the Convention. They also indicated that they could be prepared to lift the organizational veil where a government seemed to be hiding behind an international organization in breach of that government's international human rights obligations.

57. The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.

■ *Article 7: Retroactivity of criminal offences*

This is, at least at first glance, an article which applies only to the state. However, non-state sectors institute rules for which sanctions as important as criminal ones apply there is the question of whether Article 7 applies with horizontal direct effect.

Example: An employer institutes a sanction on employees such as loss of one month's pay for smoking within the place of employment. An employee is caught smoking in the workplace and subsequently but with retrospective effect he or she is docked two month's pay as a result of the subsequent rule change. Is Article 7 engaged?

■ *Article 8: Private and family life*

Issues of surveillance and compulsory testing come into play here.

Example 1: An employee has a same sex partner. The employee seeks to join the pension scheme of his or her employer and to seek pension rights for a same sex partner. The company refuses on the ground that the couple is not heterosexual. Would this be an interference with private life? CF Case T-264/97) in the Court of First Instance (decided on the question of the definition of spouse) contra AG for Ontario v. M and H, of March 18 1999, Supreme Court of Canada deciding on a wide definition of spouse to include same sex couple in the context of a separation).

Example 2: A company institutes hidden camera surveillance in the toilets. Two employees have a conversation expressing views of a political nature which are contrary to the company's policy. They are dismissed. Is Article 8 engaged?

Example 3: An organ donor specifies that the organs are only to go to someone of his/her own race. The hospital workers and the transplant network are in the private sector and want to know their legal obligations under the Convention. Is the State obliged to legislate or intervene?

■ *Article 9: The right to freedom of thought, consciousness and religion*

Here the question of surveillance of e-mails by employers could be raised. Also there are potentially questions about religious discrimination. Apparently there are Swedish cases which give rise to this.

Example: An employee expresses a personal political or religious view in an e-mail to a fellow colleague. This is intercepted by the employer without either parties' knowledge. The employer sanctions the employees. Is the employer in breach of Article 9?

■ *Article 10: Freedom of expression*

Here questions of firing employees on grounds that their political views, affiliation etc. comes into play. The problem of whistle blowers is particularly acute where they are unable to get evidence that their dismissal was related to their investigation of unlawful activities by the employer.

Example: An employer fires an employee who has uncovered indications that the company is involved in substantial corruption. The employee is convinced that his or her dismissal is directly related to the fact of the discovery of information about the illegal activities of the company. Is the employee covered by Article 10 in respect of activity by the employer?

■ *Article 11: The right to freedom of peaceful assembly and association*

This involves important issues of trade union rights. The question of the closed shop is well known but is not likely to be simply resolved through appeals to the principles of the Convention. Other problems concerning the right to change unions are more problematic and are arguably not best dealt with under the Convention. See generally Clapham *Human Rights in the Private Sphere* (1993) at 24-33 and 232-240 and 308-313. The problem becomes even more acute when there is a chance that the Court deciding the issue has the last word on the matter and due to the constitutional

nature of the decision it can not be amended by legislation. Consider this passage by Justice Albie Sachs in the South African Constitutional Court in a judgment *Du Plessis v. De Klerk*, 7 November 1995, on a question of horizontal effect.

The constitutionalizing of private relationships in the industrial sphere could also have unacceptable consequences. Much of **labour law** has a procedural and framework character, leaving it to workers and employers to establish their own agreements in the light of their respective needs and interests. Collective bargaining plays a central role in establishing appropriate balancing of interests. Granting fundamental rights of a constitutional character to individual employees could destroy decades of arrangements, formal and informal, between representatives of employers and employees. Agreements involving closed shop and stop-order facilities for union dues from salary might be regarded by some as controversial and contestable. I do not wish in any way to prejudice the interpretation of constitutional or other provisions relating to labour law. Yet it does seem to me at first sight that the remedy for such persons should be to launch any challenges they may have, either in the legislature or in the many bodies, statutory and otherwise, concerned with industrial relations, not in the Constitutional Court.

Questions for the meeting would include the issue of the finality of judicial decisions in the context and the risks of entrenching bad law.

■ *Article 12: The right to marry and found a family*

This issue arises increasingly in horizontal situations where employers do not wish to employ women with young children or in child bearing age.

Example: An employer interviews a young married woman for a post. The employer tells the applicant that she will not be considered for the post because there is a likelihood that she will get pregnant and seek maternity leave. Does she have a claim under Article 12?

■ *Article 13: The right to an effective remedy*

This is a fundamental question of the obligation of the state in respect of a horizontal breach. It needs to be tied into Article 6.

■ *Article 14: Discrimination*

We have already referred to the organ donor case. We can add here the position of for instance, former members of Communist parties and their black listing for employment. Nationality criteria are very useful as they often provide a ground in law which is unlawful as for instance in the case of *Guygasuz*. Recently the French Appeal Court held that the *Guygasuz* decision of the ECHR on the application of Article 14 had direct effect in France. We can therefore speculate that employers may have new obligations not to discriminate on grounds of nationality even where this seems to be sanctioned by the State due as the States discrimination itself may be in violation of human rights.

■ *Article 17: Abuse of rights*

This article has been used in respect of fascist and racist organisations whose very purpose is to undermine other substantive rights contained in the ECHR.

Example: A racist organisation is established in a country the purpose of which is insult and attack non-whites in ways which reach the threshold of Article 3. Can an individual or organisation challenge the establishment of the association under Article 17? Or under a combination of Articles of ECHR?

■ *Protocol 1 Article 2: The right to education*

Is the denial of the right to education an issue which touches on horizontal direct effect? Is it a matter which could arise in a family situation?

Example: A father decides that his 16 year old daughter no longer needs to go to school and therefore he forbids the family to buy her the books, uniform etc. necessary for her to continue her schooling. Would she have a right of action under Article 2 against her family?

An employment example might be where an employer terminates the employment of an individual who demands that he or she be given additional training compatible with options made available to other employees. Discrimination by private schools and colleges obviously raises new questions when combined with Article 14.

■ *Protocol 7 Article 5: Equality between spouses*

This is raised as a potential issue. And we await examples from members of the working group.

► **Potential proposals for the working group.**

■ That the ICJ European Sections create a network for information exchange and support on issues of horizontal effect of rights contained in ECHR. The Swedish Section would be willing to offer technical support and be the secretariat for the network. It is in the process of creating a website and a special page could be devoted to actions involving human rights claims against private bodies or individuals

■ An annual report be prepared on horizontal application of ECHR rights in the different European jurisdictions. There was some suggestion that perhaps this could be tied into the Baltic Labour Law project.

■ The ICJ European Standing Committee could approach the ETUC and offer to establish links and training for trade unionists as regards the horizontal application of rights.

■ The ICJ European Sections could prepare a manual on how to use the ECHR in horizontal situations including documentation containing some of the ECHR case-law which we have produced for the conference.

■ A training video on using the ECHR rights in situations of horizontal applications.

RECOMMENDATIONS

◉ Working group 2

HORIZONTAL APPROACH TO THE HUMAN RIGHTS

HORIZONTAL APPLICATION OF HUMAN RIGHTS OBLIGATIONS

Horizontal application of human rights obligations present one of the most challenging areas of international protection in Europe at the end of the millennium. Clapham outlined the questions and issues which arise in a world where the role and nature of the state is changing both rapidly and dramatically. In order to understand the concepts at work, he first began with an explanation of negative versus positive rights in the European Convention on Human Rights. It has long been believed that the European Convention on Human Rights encompasses negative rights, the entitlement of individuals to enjoy freedoms without interference by state action. The scope of the rights was considered to require the restraint of action rather than a duty to take action. This approach has now been challenged by the European Court of Human Rights itself. The Court has held that the Treaty includes positive rights as well in the recent decision of *Osman v. UK*. Here the Court had to consider the situation of the failure of the police in the UK to take action against a man who was threatening a child at school. The lack of action, notwithstanding many warnings from the child's family about the danger the family felt itself to be in from this man, resulted in the end in the man killing the child's father and wounding the child. The Court held that the failure of the authorities to act constituted breach of the duty of the State to protect private life in Article 8 ECHR. Accordingly, when looking at the rights which people have under the European Convention on Human Rights one must consider also the positive rights which have to be protected within their society.

Taking then the scope of the duty as interpreted by the Court to what extent can it devolve on to individuals and do the same considerations apply where the entity required to refrain from taking action or required to act is private rather than State? While there may be general agreement that for instance a company which produces carcinogenic food is committing a human rights violation, there may be less certainty about a bank's culpability when revealing details of a customer. Further where the example of a parent disciplining a child arises there is even less consensus on whether and in what degree of severity a human rights violation may arise.

Turning then to the ways in which human rights obligations take effect, the first mode of application of obligations such as those contained in the European Convention on Human Rights is their vertical effect. This means that the State is responsible for

protection of the individual. The individual is entitled to rely upon the human rights duties which the State has entered into to protect him or herself from the State. This can be extended to a requirement whereby the individual requires the State to protect him or her.

The next type of effect is horizontal. This is the aspect considered in depth in the working group. It requires the protection of the individual against another individual without the intermediary of the State. If the action of one party against another party constitutes a violation of human rights, the parties whose rights are violated may seek redress directly against the other party relying on his or her human rights as guaranteed in international instruments.

This kind of direct protection may arise in some States through ratification of the European Convention of Human Rights itself. The effect may depend on the national legal system which permits a result in effects between private parties. However, in many States some further action is to be taken for international treaty commitments to result in obligations on individuals.

The next type of effect discussed was that of a diagonal or triangular consequence. Here an individual claims a violation of his or her human rights by another individual. The claim cannot be directly against the other individual but is a claim against the State for failure to protect the individual against another individual. Such a position may result by an indirect incorporation of the European Convention on Human Rights such a position may result. This kind of effect whereby the State is responsible for regulating correctly the human rights balance between two individuals is often known by the term *middelbar wirkung*.

Finally a zig zag approach to implementation of human rights obligations between individuals may apply. Here the individual appeals on the basis of a violation of his or her human rights to an international court, for example the European Court of Human Rights, which then requires the national authority to take measures to give effect to the human rights of one individual against another individual. While the appeal could be to the European Court of Human Rights it could also be for instance to a national constitutional court should that court have the power to oblige the State to act.

The reason for the need to consider horizontal application at this time in Europe is because of the changing nature of the State. It was noted that many State activities have been privatised which results in a diminution of human rights protection for the individual if the private body now running an operation formerly run by the State is not equally bound by the same standard and principles as the State was. Another change is the ceding of exclusive competences to supra-national bodies such as the European Union. Where States do this, human rights obligations which applied when the competence was exercised at national level are no longer necessarily directly applicable at the supra-national level. The State puts itself in a position of being potentially unable to fulfil its human rights obligations without committing an offence against its duties to the supra-national body.

Some concern was expressed about the application of horizontal effect to Article 1 of Protocol 1 ECHR, the right to enjoyment of property. This is a point of particular

concern for many Central and Eastern European countries. As yet there has not been sufficient clarity from the European Court of Human Rights on this situation. For instance, what happens when a bank in Bulgaria goes into insolvent liquidation and is unable to repay all depositors. The insurance system reimburses private persons but not associations, NGOs or companies. Is this discrimination in the enjoyment of property? Or for instance in Hungary, people whose property has been taken away from them as a result of a criminal act by the State are entitled to a coupon equal to the value of the property lost. However, this coupon may not be equivalent to the enjoyment which they seek in living in the property. The Hungarian Constitutional Court has held the State practice to be consistent with the constitution but did not consider Article 1 of Protocol 1 ECHR. Problems arise as for instance where the coupon does not give access to a property of a similar usefulness to that of the one lost.

Three models were considered: (1) the Canadian model where the rights give rise to vertical effect only; (2) the European model where rights are mixed and include positive duties; and (3) the South African model where the rights have pure horizontality. It will be a matter for us to consider what kind of application we think is appropriate in Europe or whether perhaps this is an issue which needs to be considered differently in different European countries.

Some provisions of the European Convention on Human Rights appear already to have horizontal effect: Article 2 (the Right to life), Article 3 (the Prohibition on torture, inhuman or degrading treatment), Article 8 (the Right to respect for private and family life) and Article 11 (the Right to peaceful assembly and association).

What then was the situation in the countries represented at the meeting: was there a non court legal remedy? Did the Convention have higher status than national law? Was there the possibility of direct horizontal effect? Was there a triangle effect and was there recognition of positive rights for the zig zag? The results of the discussion are presented in the table on the next page.

Following consideration of the possible effects of human rights obligations in each of the countries represented, the group began to consider the problem of what limits should apply to horizontal effect of human rights obligations. There was a general view that the duty of the State to protect the individual is a higher duty than the duty of individuals between themselves. Clear guidance on the grounds on which exceptions may be made need to be drafted. For example, it was the view of the group that where a group of landlords with substantial properties refused to let properties to non Europeans this should be a breach of human rights obligations with horizontal effect. However, where a man discovers that his fiancée is not the nationality he thought she was and he breaks off the engagement for that reason alone, she should be able to sue him for discrimination on a horizontal application. Another example was an airline which employs only women as stewardesses on the justification that the passengers prefer to be served by women. The economic justification could possibly be applied, however there would be no margin if the State only employed single women as that would be a step too far. This example was not accepted by all members of the group.

Horizontal Effect in Some European States

Country	Non Court Remedies	Higher Status	Direct Horizontal Effect	Triangle Effect	Positive Duties	Zig Zag Effect
Bulgaria		Yes	?	Yes	No	
Estonia	?	Yes	? but probably Yes	Yes		
Hungary	Yes	Yes	Yes, Art. 77 of the Constitution	Yes	Yes	Yes
Latvia	No	Yes	?	Yes		
Lithuania	Yes but limited	No	Only where remedy exists already in law	Only in constitutional issues	Yes	
Poland	Yes	Yes	Yes. Articles 32(2) and 30 of the Constitution	Yes	?	
Sweden	Yes	Only where clear and obvious	Yes	Yes	No	
Ukraine		Yes	?	Yes		
UK	No	No	No	Yes	Yes	

The group proposed three recommendations:

- In view of the evolving role of the State and its activities through the devolution of its traditional responsibilities to private and public agencies and the new international entities such as Europol and NATO and the increasing powers of private bodies (such as internet companies) protection of human rights standards must not depend on the categorisation of activities as State or private but on the protection of the individual from all actors.
- Notwithstanding the individual's right to protection, the State party to the European Convention on Human Rights remains ultimately responsible for the protection of all persons within its jurisdiction for the creation of national laws and

remedies which include an obligation of protection from individuals, private bodies and public authorities.

■ We recognise that the grounds for exceptions expressed directly in the European Convention on Human Rights will also be applicable in the private sphere. It is also recognised that the application of human rights obligations between private parties will in some cases require a balancing act between competing human rights. In this context the group discussed the following questions:

- The level of scrutiny of the intimate sphere.
- How to consider the benefit or harm to the wider community against the safety or potential risk thereto to the individual, including the rights of others.
- The right to enjoyment of property.
- The right to access to work and the limits of intrusions by employers including limits of loyalty and its definition.
- Justifications based on economic grounds.
- The possibility of alternative adequate opportunity.
- The health of the next generation and children taking into account the rights of women before childbirth.
- The fundamental interest of the individual as a determining factor.
- The right to identity.

The above recommendations with an outline of our discussion were presented to the other working groups at the conference, reconsidered by the group and finalised in the current form. These were then presented to the plenary session.

► **Future action.**

The group considered that the question of horizontal effect of human rights was extremely important in the modern world and was an area of increasing jurisprudence in Europe. In order to take forward the work of the group it was agreed that:

- Members of the group would consider horizontal effect of human rights in their country and take note of any developments either in jurisprudence, legal writing or otherwise.
- The Swedish section of the ICJ would make available on its website space for the horizontal effect working group. On this site members of the group and others interested may post information about horizontal effect in their countries and elsewhere to provide a framework for continuing dialogue on the issues.
- The group would like an in depth report on horizontal effect and further consideration of the limiting factors.

WORKING GROUP 3

ACCESS TO COURT

► Who is who in group 3

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INTRODUCTORY PRESENTATION

Access to court as a human right according to the European Convention on Human Rights

by Boštjan M. Zupančič

► Introduction.

The first command in the Roman *Leges XII Tabularum* - the primordial source of law in Judeo-Christian civilisation - reads as follows: „*Si in ius vocat, ito!*“ („If you are called before a court of Law, you must go!“). The meaning of this categorical command was simply that the party against whom legal proceedings had been commenced had to appear.

This in turn meant, *first*, that no legally articulated infringement of anyone's interests could go unanswered by the person sued or accused. But the most important implication, *second*, of the categorical requirement that anyone sued or accused had to appear before the court - something little understood even by Romanists - was that *no legally articulated dispute could be left unresolved by the legal system*. Of course, the absolute obligation to submit to legal process served on you also means that *substantive* (material) legal rights are *procedurally* enforced. This implies that the State's legal conflict resolution service should always be available - and promptly so.

From the broader perspective of maintaining social peace and order, the prompt and consistent availability of the state's conflict resolution service is what law is all about. Ask yourself why it is that peace and the orderly division of labour in society - not to speak of individual dignity (human rights) - are so closely connected with the rule of law¹⁾ - or, in other words, *why it is that the rule of law is practically identical with the rule of the courts*.

This is easy to understand if we imagine the Hobbesian primordial state of anarchy, i.e. the war of everybody against everybody, *bellum omnium contra omnes*. Since there are many palpable examples of regression to anarchy around us - Albania is perhaps the most recent one in Europe - it is not difficult to imagine the State issuing its very first command, i.e. that this war of everyone against everyone must stop²⁾.

¹⁾ 'Rule of law' is the Anglo-Saxon version of the Continental *Rechtstaat* or *l'état de droit*. There is, however, a fundamental difference between the two. The emphasis in rule of law is on procedural guarantees (due process), whereas the emphasis in *Rechtstaat* or *l'état de droit*, a 19th-century German (von Miehle) is on substantive (material) guarantees. This is due, at least in part, to the powers of the jury in Anglo-Saxon law, i.e. to the fact that the jury's verdict is not reasoned (explained) so that appeal in substantive terms is not even possible.

²⁾ I have tried to elaborate on this question in „From Combat to Contract: What Does the Constitution Constitute?“, 1 *European Journal of Law Reform* 59-95 (1998/1999).

This is one reason we maintain, especially in international law, that law derives from (sometimes brutal) reality: *ex factis jus oritur*. Before it can issue the prohibition of the war of everyone against everyone, however, the Hobbesian State must first actually establish itself as a supreme *physical* power. Only once this monopoly over violence is established, i.e. only after all violence is absorbed into the State, does the State have the credibility to forbid its subjects to resort to physical power as a *natural*, elemental means of resolving their conflicts³⁾.

But what chaos and anarchy as an absence of law and order really mean is that the personal power of individuals and groups is unhindered and that all conflicts are resolved by direct resort to *physical violence*. In such a situation there is no law, we say, and no order, because everybody must fend for himself. In such an elemental societal state it would be senseless to speak of rights, entitlements, claims, legal process etc. and there would be no courts to which to address these claims. It is only under the greater threat of greater State violence, however, that people are forced to forgo violence and choose to regulate their conflicts in the courts. The State, however, must maintain the credibility of its constant threat. This threat must be greater than all potential individual or group threats of violence. If the State loses its physical credibility the regression to chaos and anarchy is imminent⁴⁾. Peace in society prevails only under the constant threat of war⁵⁾.

On the negative side, therefore, if a nascent state wishes to establish itself, it must absolutely *forbid* the resort to physical power as a means of conflict resolution.

On the positive side, therefore, the State must *offer an alternative conflict resolution service*. The criteria for this (legal) conflict resolution must not be based on arbitrary violence but on logical consistency (justice). This we call the *primary* legal process. Moreover, this surrogate legal service, replacing the natural resort to violence, must

³⁾ The resort to aggression is a natural human response to frustration. See Lorenz, *ON AGGRESSION*, 1974. Moreover, aggression and resort to physical overpowering is, epistemologically speaking, an *experiment* which has a definite and objectively ascertained outcome. This cannot be said of legal resolution of a conflict, except insofar as the resort to legal conflict-resolution is ultimately, as Kelsen well understood, backed by the „aggression“ of the State. Since aggression is a *natural* response, the pressure to regress to the war of everyone against everyone, self-help, etc. is always there. The state of peace in society is therefore *artificially maintained only by the continuous threat of war*, i.e. the credibility of the rule of law depends in the last analysis on the credibility of criminal law and its ultimate sanctions.

⁴⁾ Of course, this credibility does not depend on the fact that the power of the State is greater than the sum of all individual powers of its subjects. The credibility of the State's threat is very much a matter of an *organized* collective power facing many *individual* powers negligible in comparison. This is why conspiracy, *complot*, organized crime etc. are considered very serious indeed. This, on the other hand, must be balanced against the freedom of association as a human right. See Art. 11 §§ 1 and 2 of the European Convention on Human Rights.

⁵⁾ This aphorism is ascribed to the famous French social critic Michel Foucault. Some legal philosophers, among them Professor Wolcher, conclude from it that the legitimacy of such peace and of rule of law is questionable because it ultimately rests on the threat of violence. Wolcher, *The Paradox of Legal Remedies*, Lecture delivered at the European Court of Human Rights, March 19, 1999, unpublished manuscript.

be rendered objectively, fairly, without unreasonable delay etc. This we call the *secondary* legal process because it is a long-term precipitate of the primary legal process⁶⁾.

Our nascent state, in other words, must replace the arbitrary *logic of power*, as it were, with the consistent *power of logic*. The latter is clearly the logic of the Law. Law as we practice it (justice) is nothing but consistent logic and common sense and experience applied to the resolution of all kinds of conflicts⁷⁾.

Access to legal process, to this surrogate conflict resolution service, is simply one systemic aspect of the prevention of anarchy.

We may call such an established conflict resolution service the Law of the Land (Magna Carta, 1215), the Rule of Law, *Rechtstaat*, *l'état de droit* etc. -, but its essence was caught very practically and very directly in the first phrase of the Laws of the Twelve Tables: *Si in ius vocat, ito!* If you, as a plaintiff, have a claim deriving from your interest⁸⁾ you must not seek to prevail over your adversary physically - that is what we usually call self-help⁹⁾ -but must go to court and seek the satisfaction of your interest *qua* „right“. The Roman law command *Si in ius vocat, ito* actually refers to the corresponding duty on the part of the defendant, i.e. to appear in court and answer your charges. But the latter *duty*, of course, implies the former.

It follows that State-given access to court is a logical precondition for these two duties of the private parties. Because you must not and cannot resort to self-help, denial of this access to court, in other words, amounts to denial of justice.

The defendant, as we have said, is required to appear in court. He cannot say: „*I do not care about the plaintiff's claim to a right... since anyway I'm more powerful, influential, etc.*“ If he is called before the court, he must go, he must submit to the legal process initiated by the plaintiff, i.e. he must thereby admit that the *brutal reality* of power - whether physical, economic, political, or whatever - must *yield* to the *virtual reality* of the legal context. The real interests of both parties are thereafter translated into legal language. The resolution, the final outcome of the controversy, too, becomes subject to the rule of law, i.e. not the rule of man over man. Thus Cicero's postulate: „*Not under man, but under God and Law!*“¹⁰⁾, which sums up the essence of the Rule of Law.

⁶⁾ See the classic treatise on this by von Savigny, *Zur Gesetzgebung unserer Zeit*. English translation entitled „*On the Legislation of Our Times*“, European Sociology Series, 1975.

⁷⁾ See Justice Oliver Wendell Holmes' famous „*The Path of the Law*“, with his often-misunderstood adage that law is not logic, law is experience-reprinted in *Harvard Law Review*, 1998.

⁸⁾ Interest, from Latin *inter esse*, to be in between, i.e. something that is in between two (opposing) parties. In verbal form Latin *interest* means that something is important.

⁹⁾ *Self-help* is usually a little-noticed offence in most criminal codes. Even if the actor has a legitimate claim to a right, the criminal law forbids the resort to physical and other non-legal means of enforcing it.

¹⁰⁾ *Non sub hominem, sed sub Deo et Lege.*

We see that the Rule of Law is the quintessence of culture and civilisation. The Rule of Law is the only alternative to chaos, anarchy, brutality, etc.

In modern times, however, we have considerably extended the notion of the Rule of Law. Previously the duty to appear in court (and by implication the standing to sue/make a claim) applied only to private individuals. This prevented anarchy and private brutality by another subject of the State. But such rule of law did not prevent the State's own brutality, arbitrariness, capricious abuse of power, etc. The State itself was above the law precisely to the extent to which it was impossible to challenge it before the courts. The English *Magna Carta Libertatum* (1215) as a *compromissum* between the Barons and King John the Weak is probably the first example of a constitutional contract binding the executive power of the State. However, the idea of constitutional supremacy, of separation of powers and of checks and balances between the three branches of power was not known/discussed until five centuries later, with the publication of Montesquieu's *L'esprit des lois* (1748) or: *was widely introduced only some five centuries later through...* Once the Enlightenment writers introduced these precepts it became possible to challenge the abuse of power by the executive branch before the judicial branch. Thereafter the State itself had „to appear in court“. This further supremacy of the Rule of Law over the executive branch of the State thus represents an extension of the original prevention of anarchy. This extended Rule of Law prevents dictatorship, totalitarian government, the arbitrary use of power, etc. The famous *Marbury v. Madison* (1803) case in the United States and the introduction of constitutional courts in Europe by Hans Kelsen (1929) firmly established the power of judicial review *vis-à-vis* the executive as well as *vis-à-vis* the legislative branch of power ¹¹⁾.

The European Convention on Human Rights (1950), on the other hand, further elevated the Rule of Law above and beyond an internal (national) judicial review, onto the international level. Before the European Court of Human Rights the whole State Party to the Convention (its executive, judicial and legislative branches) is held answerable for breaches of human rights.

From the point of view of access to court doctrine, therefore, access to ordinary, constitutional and international courts is the active procedural aspect of the extensive spread of the Rule of Law. To this *active* aspect there corresponds a *passive* aspect, i.e. the duty of the individual defendant or the State itself to appear in court and answer the allegations of the plaintiff.

Clearly, all of this presupposes the existence and accessibility of the *fora* before which claims to the legal protection of the State may be made.

Let us, for a moment, return to the Hobbesian State, absorbing all the power and all the violence. When the State monopolises the use of all physical force and powers of implementation, it renders all private individuals physically helpless. The subjects of the State, however, are not helpless only *vis-à-vis* the State itself but also *vis-à-vis* other more powerful individual and group subjects of the same State. The only

¹¹⁾ See, for example, the excellent presentation of this in Machacek, *Austrian Contribution to the Rule of Law*, 1999, especially pp. 2-6.

protection, we say, that a physically, economically, politically, etc. helpless individual subject of the State has, derives from the rule of law. Law is the great equaliser¹². Law renders power meaningless. Law imposes the alternative *virtual* power of logic (justice) as a surrogate of the *natural* logic of power. For a specific aggrieved individual, therefore, prompt access to an impartial court applying the law of the land is tantamount to the rule of law in general.

There is one rather crucial sociological point that should be emphasised before we move to the more specific aspects of the right of access to court under the European Convention on Human Rights (hereinafter „the Convention“).

Article 6(1) of the Convention requires the States Parties to it to offer a prompt conflict-resolution service - in the areas of both private and public law¹³. If resort to private and forceful conflict resolution is strictly forbidden, it is clear why justice delayed is also justice denied. One of the two, i.e. the law-abiding party to the controversy, is forced to suffer the continuous violation of his or her rights whereas the violator of the law profits from the delay. This is clearly, both for the legitimately aggrieved party as well as for the rule of law, the worst of both worlds.

On the other hand, I am personally acquainted with several truly brutal cases of physical evictions of helpless old people by those to whom real property (apartment buildings) were restituted as part of the denationalisation process in Slovenia. Much of this occurs because of the technicalities of the rules on recovery of possession and the prospective delay of perhaps five years before a controversy would be resolved.

We are all, I suppose, familiar with many such legal absurdities resulting in supreme injustice. But the reason why I mention this case as symptomatic lies elsewhere.

Fifty years, nay, even twenty years ago something like this was much less likely to happen. For a former judge of the circuit court to act in this way would have been simply unthinkable. What has changed in the meanwhile is not the law of possession and property rights. What has changed are society and its prevailing values...

In Chinese law, for example, and its underlying Confucian legal philosophy, resort to formal legal protection (*fa*) is not advised and is deemed acceptable only as a last resort once the ways of politeness (*li*), i.e. an attempt at a friendly resolution of misunderstandings, have been exhausted. Sociologically speaking this means that *shared values* (human decency, moral considerations, compassion, etc.) prevent,

¹² Of course, this does not preclude the great debate over the differences between formal and material equality. This debate was initiated by the young Marx in his *Critique of the Gotha Programme* and has never been properly resolved. One might say *passim* / in passing? that socialism as an ideology striving to transcend the *formal* equality guaranteed by law and to achieve *material* equality. But since the imposition of equality is in effect always a form/act of violence perpetrated on the more powerful, the more energetic, militant egalitarianism, so typical of the socialist societies, in the long run destroyed the socialist experiment itself.

¹³ Article 6 (1): „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing **within a reasonable time...**“ (emphasis added).

even today, most legal controversies either from ever arising or from degenerating into the *summum jus summa injuria*. The enormous and rising caseload of all the Courts, including the European Court of Human Rights, in other words, is a consequence of the constant erosion of the values shared by people. This rising *anomie* (valuelessness, normlessness) implies that there is less and less *common moral ground* preventing indecencies such as the one described above. The rising divorce rates, crime rates, drug addiction and other forms of social pathology dealt with by criminology testify to the same problem of *anomie* and alienation. Robert K. Merton, the leading American criminologist, maintains - in the light of Durkheim's social theory - that the cause is the growing/increasing *discrepancy* between the *institutionalised* values (embedded in law) on the one hand and the values that would be adequate on the attained level of social, technological, etc. development. The delay in the feedback from the societal infrastructure to the superstructure (values, social consciousness, culture, law) prevents the personal interiorisation of the institutionalised values. The logical consequence of this is then not only rising cynicism, but also the exteriorisation of interpersonal conflicts. Hence the rising resort to legal means of conflict resolution and the enormous case-loads of courts all over Europe.

An additional paradox concerns the inefficiency of legal conflict resolution. Law is not an exact mathematical science. It relies on a relatively fixed semantic interpretation of words. But the meanings of words are themselves dependent on the underlying values which inform the words with their ethical, moral, etc. import. We now understand that words, even legal terms, have no intelligible essences. If there were intelligible essences, the distinction between right and wrong would be absolutely clear and there would be no need for law in the first place¹⁴.

The legal system of any country responds to the need to resolve controversies by a resort to semantically fixed meanings of words. The more values are shared in a particular society, the clearer are the meanings of legal words and the clearer the distinction between right and wrong. In a morally strong or homogenous society the legal system would rarely be resorted to, but it would be very efficient. In a morally impoverished¹⁵ or heterogeneous society, on the other hand, the legal system becomes the last repository of (non-internalised) values. Instead of shared values we have resort to formal logic (law). The society becomes litigious. But, and this is the paradox, the legal system is itself subject to *anomie*¹⁶ and is consequently incapable of the ethical decisiveness needed promptly and clearly to resolve the rising number of controversies.

¹⁴ See generally Unger, *Knowledge and Politics*, 1974.

¹⁵ See an editorial by Fred Hiatt entitled „This White House Race is off to a Preachy Start“, *International Herald Tribune*, June 30, 1999, p. 9, citing different politicians: *Our standards of right and wrong have all but disappeared.*; „As a people [i.e. Americans] we're beginning to lose faith in our institutions.“ „[We are] spiritually adrift“ etc. See Zupančič, *'Criminal Law and its Influence on Normative Integration'*, 7 *Acta Criminologica*, Montreal, Spring 1974.

¹⁶ The legal system relies on words having shared meanings. But the meanings of legal words are themselves contingent on shared values. For further study of this see Barry Stroud, *'Logical Compulsion'*, in *Wittgenstein's Philosophical Investigations (Collection of Essays)*, 1971.

Access to courts in such a society therefore becomes clogged for two reasons. On the one hand there is an ever-rising reliance on legal (instead of moral) conflict-resolution. On the other hand, the system lacks a clear ethical meaning which would inform the value-laden words employed throughout it. This situation is of course exacerbated in the former socialist of Central and East European countries, where the old values have been hastily discarded - whereas Western values have not been instilled.

On „access to court“ doctrine according to the case-law of the European Court of Human Rights

► Basic cases establishing the doctrine.

It is quite difficult to present a short survey of the relevant cases of the European Court of Human Rights. The concept of „access to court“ is a very low common denominator of procedural rights deriving from the Convention and is, consequently, something of a misnomer. In other words, „access to court“ collects under its roof too many disparate legal issues (from discrimination against civil servants to the right to counsel in civil matters). Sometimes the „access to court“ doctrine tends to obscure other issues such as those which should be decided on their own merits - typically, as we shall see, questions of equal protection. Despite this misleading effect, however, access to court as the most elemental procedural right has proved to be a powerful inspiration to the Court in protecting a number of fundamental procedural and substantive rights of aggrieved citizens. This is especially interesting since the right of access to court is a constructive right, i.e. one derived from a systemic construction (interpretation) of different clauses of the Convention.

The syntagma „*access to court*“ does not appear Verbatim in the Convention. The first paragraph of Art. 6 - the *sedes materiae* for the access to court doctrine - does not directly refer to anyone's right to lodge an action in defence of his civil rights and obligations: *in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a [1] fair and [2] public hearing [3] within a reasonable time by [4] an independent and [5] impartial tribunal [6] established by law*¹⁷⁾. In the French text the right to a hearing is *le droit a ce que sa cause soit entendue*, i.e. the right that one's *cause*¹⁸⁾ (complaint) be heard. *Sensu stricto* this could mean that the „civil rights and obligations“ should be examined/determined or one's

¹⁷⁾ Article 6(1) *ab initio*.

¹⁸⁾ Cause nom féminin (latin causa) I. 1. Ce par quoi une chose existe; ce qui produit qqch; origine, principe. Connaître la cause d'un phénomène. Il n'y a pas d'effet sans cause. - Être cause de, la cause de: être responsable de, être la raison de; causer, occasionner. 2. Ce pourquoi on fait qqch; motif, raison. J'ignore la cause de son départ. 3. [Droit] But en vue duquel une personne s'engage envers une autre. Cause d'une obligation, d'une convention. II. 1. Affaire pour laquelle qqn comparait en justice. Plaider la cause de qqn. - La cause est entendue: l'affaire est jugée. - Être en cause: faire l'objet d'un débat, être concerné. - Mettre en cause: incriminer. - En connaissance de cause: en connaissant les faits. - En tout état de cause: de toute manière. 2. Ensemble d'intérêts, d'idées que l'on se propose de soutenir. La cause de l'humanité. - La bonne cause, celle qu'on considère comme

„cause“ heard, only after they have already been established as rights and obligations or a *cause* respectively¹⁹⁾.

Formally (and purely in terms of timing) one could therefore maintain that the procedural rights enumerated in Art. 6 (fair trial, public hearing, reasonable delay, independence and impartiality of a tribunal established by law, etc.) do *not* accrue *prior* to the actual commencement of proceedings. These procedural guarantees, in other words, would *not* become applicable unless proceedings had already been commenced. But there would be no right to commence the proceedings in the first place.

The leading case transcending this formal obstacle was *Golder v. U.K.* (1974)²⁰⁾. There the Court maintained that „*the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally „recognised“ fundamental principles of law.*“ The Court equated the denial of this principle to the denial of justice (in terms of international law)²¹⁾. The ruling was limited to civil cases because Mr Golder wanted to initiate a civil action for libel. Also, the case did not concern standing (*legitimatío activa*, legal interest) insofar as standing is concerned with the procedural right (to commence proceedings) as an anticipation of a *material* right. There was no consideration in *Golder* of any substantive (material) precondition for the procedural commencement of a civil action.

The problem in *Golder* was situated even earlier and had to do with the pre-standing stage of a case. But the Court took great care to establish that a teleological interpretation and the differences between the English and French text did indeed imply that there should be a general right to submit a civil claim to a judge in the first place.

Although it was not specifically so articulated, it could simply be said that the right to have access to a court is a logical precondition, a *sine qua non*, of all other proce-

juste (souvent ironique). - Faire cause commune avec qqn: unir ses intérêts aux siens. - Prendre fait et cause pour qqn: prendre son parti, le soutenir sans réserve. í cause de locution prépositive En raison de; en considération de; par la faute de. pour cause de locution prépositive En raison de. *Le Petit Larousse*, 1998, s.v. cause.

¹⁹⁾ Roman law distinguished between *legitimatío activa ad processum* and *legitimatío activa ad causam*. The denial of the former (*ad processum*) would amount to the denial of purely procedural standing, e.g. *ratione temporis*. The denial of the later (*ad causam*) goes into the merits of the case, e.g. *ratione materiae*. But since we are speaking only of standing to sue (legal interest) in both cases the denial of standing *ad causam* should not imply that the court has gone into the merits of the case. In such cases the court nevertheless procedurally rejects the case only in terms of manifest lack of a substantive right giving one's procedural claim a substantive basis. The distinction is, in other words, a little blurred.

²⁰⁾ *Golder v. the United Kingdom*, judgment of 21 February 1974, Publications ECHR, Series A vol. 18. „While in prison, Mr. Golder had been accused of participating in a prison riot. To exculpate himself of this charge, he petitioned the Home Secretary for leave to consult a solicitor and start legal proceedings for libel. The Home Secretary refused. This refusal made any correspondence with a solicitor impossible. Mr. Golder claimed a violation of his rights under Article 6 para.1 ('access to court') and Article 8 (respect for correspondence).“ Lawson and Schermers, *Leading Cases of the European Court of Human Rights*, 1997, p. 18.

²¹⁾ *Golder, supra*, para. 36.

dural guarantees. In other words - as the Court did say - were this not so, all the courts in a particular State party to the Convention could be abolished once they had dealt with their pending cases²²). This mode of interpretation is not unusual in constitutional jurisprudence. In the leading case concerning privacy *Griswold v. Connecticut*²³, Justice Douglas of the American Supreme Court developed the so-called penumbric theory of privacy. He demonstrated that the *penumbrae* (half-shadows) of various/specific constitutional rights form a full *umbra* (shadow, lowest common denominator) of the right to be left alone by the government (right to privacy). Here, too, we could say that certain rights conceptually overlap and that they presuppose one another.

There is thus an overlap between the constructive right of access to court established in *Golder* and Article 13 of the Convention (right to an effective remedy)²⁴). The impact of the Convention's right of access to court, however, is broader than the right to an effective remedy. The right to an effective remedy applies only to rights and freedoms as set forth in the Convention. The right of access to a court, however, „applies to all determinations of civil rights and obligations, and not only to those which are related to one of the rights laid down in the Convention²⁵“.

While access to a court implies that the court in question has full jurisdiction over the subject-matter (both *questiones facti* and *questiones juris*), there are some areas where this requirement can be adhered to only partly, e.g. in the application of zoning laws, urban planning etc.²⁶

The metaphor of the distinction between *umbra* and *penumbra* may in turn be extended to the right of access of a court itself. The full shadow (*umbra*) of this right is the right of access to a court in which the issue may be resolved and to have a hearing in this court. The half-shadows (*penumbrae*) of the right of access, however, cover at least (1) the right to present his or her case *properly and satisfactorily*, (2) the right to the access to a court that is *independent and impartial* and (4) has *full jurisdiction* (competence) over the subject-matter, as well as (3) *the right to counsel in non-criminal cases*²⁷.

²²) This rather exaggerated *argumentum ad absurdum* appears in § 36.

²³) *Griswold v. Connecticut*, 381 U.S. 479 (1965)

²⁴) Art. 13: „*Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*“

²⁵) Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1998, p. 419.

²⁶) The *Bryan* case, judgment of 22 November 1995, A.335-A, pp. 17-18. Van Dijk and van Hoof, op.cit. *supra*, n. 25, pp. 419 and 420, note 705.

²⁷) The right to counsel in criminal cases, on the other hand, is covered *expressis verbis* in Art. 6(3)(c) of the Convention: „*Everyone charged with a criminal offence has [the minimal right] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.*“ The latter part of the clause refers to *ex officio* appointment of counsel *in forma pauperis*.

Of course, the right to present one's case fully („to have one's day in court“) does not have to be further derived from the already derivative (penumbric) right of access to a court. The right to present one's case fully is implied in the meaning of „fair hearing“ in the text of Art. 6 (1) of the Convention²⁸⁾. But the right to counsel may in many non-criminal cases also be a precondition to effective access to court. Since the right to counsel in Art. 6(3)(c) - *the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require* - is limited to defendants in *criminal* prosecutions, the question arose whether in e.g. divorce proceedings one might also be entitled to counsel paid for by the State.

The case of *Airey v. Ireland* (1979)²⁹⁾ concerned a wife requesting judicial separation from her violent husband. Mrs. Airey did not have the means to hire a lawyer and was, due to the insufficiency of her legal knowledge, unable to institute the required judicial proceedings herself. Consequently, she was unable to *present her case fully and properly*. She claimed that her access to court had been effectively barred because she had not been able to have a counsel appointed *in forma pauperis*. The Court held by five votes to two that Mrs. Airey's right of access to court had been violated but refused to entertain the discrimination issue, i.e. the fact that as a poor person she had not been able to afford legal counsel.

Since the right to counsel *in forma pauperis* paid for by the State is in so many cases a virtual precondition to success in judicial proceedings, the question may be raised as to who ought to have the power to decide whether counsel will, or will not, be paid for by the State³⁰⁾. The issue would be problematic even if the appointment of counsel were decided by the national *court* in question - since the preliminary decision on whether the case merits the additional expense of appointing of counsel implies a certain pre-judgment of those merits themselves. The right of access, i.e. the right to counsel in non-criminal cases, is *a fortiori* endangered in cases where such a decision is made by the administrative authorities themselves³¹⁾.

²⁸⁾ A fair hearing presupposes a balanced presentation of both sides of the controversy. This „equality of arms“ has at least two purposes. *First*, the finding of truth in the interests of justice requires a full presentation of both sides. In criminal cases, *second*, the prevention of forced self-incrimination requires the legal protection of the defence's procedural rights. See *Saunders*, *infra* note 34.

²⁹⁾ Judgment of 9 October 1979, Publications ECHR, Series A vol. 3. See also Lawson and Schermers, *Leading Cases of the European Court of Human Rights*, 1997, pp. 85-94.

³⁰⁾ The right to counsel *in forma pauperis* may be interesting in the context of appeal cases and, especially, concerning the constitutional complaint. In some State Parties to the Convention, for example, there is no right for poor people to have counsel appointed to lodge a constitutional complaint. Since *Airey* stands for *effective* access to court it would be only logical for the right to have counsel appointed *in forma pauperis* to apply in such cases, too. Besides, this is good policy since it gives the State Party's constitutional court the chance to deal with the legal problem presented before it reaches Strasbourg.

³¹⁾ Cf. European Commission's view in Appl. 9649/82, *X. v. Sweden* (not published). See van Dijk and van Hoof, *op.cit. supra* n. 25, pp. 420-421, note 711.

In criminal cases the right for prisoners to have free and unhindered correspondence with their (prospective) counsel³²⁾ as well as the right to oral consultation without the presence of *prison officers*³³⁾ are further rights considered to be an integral part of the right of access to a court.

Mutatis mutandis this should apply to suspects' right to consult in private with their lawyer, i.e. without the *presence of police*.

The issue remains open, however, whether the presence of a lawyer is required, should the suspect so desire, *during the custodial interrogation of a suspect at a police station*.

In the famous American Supreme Court *Escobedo* case the suspect implicated himself by admitting to know of the identity of his co-suspect. He was interrogated *incommunicado*, i.e. by police officers who refused to permit Escobedo's lawyer to be present. Justice Goldberg then maintained that the absence of counsel at the police station was decisive for the further development of the case. Most criminal cases, he said, are in fact decided at the *critical stage*. If at that critical stage the presence of counsel is not allowed, the rest of the criminal proceedings are often merely an appeal against what happened at the police station. The analogy is powerful and it implies that the effective assistance of counsel early in the pre-trial stages of criminal procedure amounts to later effective access to court³⁴⁾.

In *Obermeier* (1990)³⁵⁾, the question arose whether access to court as a minimum standard, was satisfied by the ability to challenge an administrative decision in a court whose jurisdiction (competence), was, however, limited to a *formal* review of the administrative authorities' exercise of their discretionary power. Since the court in question could not itself enter fully into the merits of the administrative-law issue - the court in question was limited to seeing that the discretionary power had been exercised in compliance with the object and purpose of the applicable administrative law - the Court held that this violated the right of access too.

In *criminal* cases the right of access to court takes on entirely different characteris-

³²⁾ Judgement of 21 February 1975, A. 18, pp. 12-20; report of 11 October 1980, *Silver*, B.51 (1987), pp. 100-101; judgment of 28 June 1984, *Campbell and Fell*, A.80, pp. 46-47; Report of 3 December 1985, *Byrne, McFadden, McCluskey and McLarnon*, D&R 51 (1987), p. 5(15). Cited after van Dijk and van Hoof, op.cit. supra n. 25, p. 412, note 713.

³³⁾ Judgment of 28 June 1984, *Campbell and Fell*, A.80, p. 49, *idem*.

³⁴⁾ *Escobedo v. Illinois*, 378 U.S. 478 (1964). We may add that this critical-stage-focused investigation doctrine then led to the famous *Miranda* decision. In *Miranda*, 378 U.S. 478 (1964) an irrebuttable presumption was established to the effect that all self-incriminatory evidence obtained in the absence of counsel in the context of custodial interrogation was obtained in violation of the privilege against self-incrimination. Exclusion of such tainted evidence was seen as a constitutional right of the defendant. The ECHR has yet to go thus far. But it would be logical to expect this extension of the right of access/right to counsel combination in the future. *Saunders* is therefore a crucial case to be carefully studied although some of the commentators have chosen to ignore it. Judgment of 17 December 1996.

³⁵⁾ Judgment of 28 June 1990, A. 179, pp. 22-23, *idem*.

tics. It is typical of criminal cases that the suspect should deny his passive „standing“ (*legitimatio passiva*) throughout the pre-trial and trial procedures. By denying his criminal responsibility, in other words, the defendant in criminal cases is objecting to the prosecution's *legitimatio activa ad causam*, i.e. its (substantive) standing.

This, of course, is also true in many private-(civil-) law cases. Access to judicial protection is always in the interest of the plaintiff or the prosecution. As we pointed out in the Introduction, access to court is a surrogate of private enforcement of a claimed right (self-help) - thus it was clearly in Mrs. Airey's interest to institute judicial proceedings against her violent husband. But was it in the interest of the husband? Can his interest be expressed in terms of „access to a court“? *Mutatis mutandis*, can we say that it is in the interest of a criminal defendant to „have access to court“?

The answer to this question, we think, is given in the first rule of the Roman Leges XII Tabularum: *Si in jus vocat, ito!* In other words, to the *right* of access on the part of the plaintiff (prosecution) there corresponds a *duty* on the part of the (civil or criminal) defendant. The duty to appear in court is perhaps the most primordial of all legal-procedural duties of a citizen. This *duty* to appear is a mirror image of the plaintiff's right of access to a court.

In private law-cases the sanction for a defendant's violation of this duty is for him to be declared *contumax* (stubborn) by the court, i.e. to face a judgment reached in his absence. Such a solution to the defendant's *de facto* denial of the plaintiff's right to have the case adjudicated by a judicial authority, however, will simply not do in criminal cases. In criminal cases the defendant's attendance at his trial must be assured by forcible means (arrest, pre-trial detention, etc.).

For these reasons the right of access to a court in criminal cases makes no literal sense. Instead, the right of access in criminal cases simply means that the court into which the defendant is forced to attend must fulfil the *other* enumerated requirements of Art. 6 (fair trial, impartial trial, public hearing, etc.).

Nevertheless there are some unusual legal situations in which access to court *per se* becomes an issue even for a criminal defendant. In *Deweer*³⁶⁾ the Court extended the doctrine to criminal cases because *the prosecution had been abandoned* by the State. This had happened because the would-be defendant had been forced to pay his dues to the State by *extra-judicial* means, i.e. under the threat that, if he did not, his shop would be closed. Under these circumstances the defendant had an interest in being tried (and presumably acquitted), rather than having non-judicial authority determine his financial liability.

Somewhat similarly, there may be cases in which it is actually in the interest of a criminal defendant to obtain a continuation of the criminal trial and a judgment in his favour, i.e. a judicial confirmation of the presumption of his innocence³⁷⁾. In *Minelli*³⁸⁾ the Court held that a criminal defendant's right of access to a court in criminal pro-

³⁶⁾ *Deweer* case, Judgment of 27 February 1980, A-35.

³⁷⁾ It may be interesting to note here that the *rebuttable* pre-trial presumption of innocence implying that the burden of proof and the risk/task of persuasion are on the prosecution and

ceedings will be violated if the prosecution is discontinued and/but the 'odium of guilt' continue to hang over the defendant. Thus, in *Minelli*, access to a court was functionally equated with the right to have one's innocence judicially ascertained and confirmed. The Court connected this with the presumption of innocence postulated in Art. 6(2) of the Convention³⁹⁾.

► **Recent cases.**

In *Brumarescu v. Romania* (1999) the applicant was the owner of a pre-war private villa in Bucharest, nationalised in the wake of the Communist revolution in the early Fifties. The relevant nationalisation Decree had provided, however, that certain categories of owners were exempted from the nationalisation of their property, among them „professional intellectuals“ such as teachers, professors, etc. Nevertheless, the house was *de facto* nationalised, the owner being reduced to occupying one apartment there as a tenant. After the collapse of the regime in the nineties, Mr. Brumarescu filed a civil complaint in a Romanian civil court challenging the technical legality of the 40-year old nationalisation. The civil court promptly ruled in his favour and the property was restituted *in toto*. Although the Civil Division of the Supreme Court had previously upheld similar rulings by lower courts, the Procurator-general applied for judicial review of / applied to the full supreme Court to have the decision ... quashed/annulled of the decision in Mr. Brumarescu's (and other analogous) cases in the full Supreme Court. The Romanian Supreme Court, sitting in general session⁴⁰⁾, overruled its Civil Division by 25 votes to 20, holding that the lower courts had acted *ultra vires* and that it was for the legislature alone to decide whether property in such cases was to be denationalised. The „final“ decision in Mr Brumarescu's case was thus reversed.

that all reasonable doubts have to be interpreted in favour of the defence (*in dubio pro reo*) becomes, in case of acquittal, an *irrebuttable* presumption of innocence (*ne bis in idem*, double jeopardy).

³⁸⁾ *Minelli* case, Judgment of 25 March 1983, A-62.

³⁹⁾ Art. 6(2) of the Convention: „Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.“ Since the right to be presumed innocent only accrues once one is charged with a criminal offence, the impact of the presumption of innocence is limited to the context of criminal proceedings: the burden of proof and the risk of non-persuasion are on the prosecution, and in doubt the court must acquit (*in dubio pro reo*). This means that there is in society no general presumption of innocence such as would, for example, imply that newspaper articles cannot be published about the alleged guilt of a criminal suspect. (But cf. Articles 8 and 10 of the Convention.) On the other hand the words „charged with a criminal offence“ do not mean that a formal bill of indictment (accusation, charge) must be filed in order for the presumption of innocence to accrue as a right of a criminal suspect. A „charge“ is implied, typically, by the arrest itself or any other form of *focused* investigation. Compare *Spano v. New York*, 360 U.S. 315 (1959).

⁴⁰⁾ The reference is to the *plenary session* of the Supreme Court which has the power to establish abstract principles to guide lower courts as well as the different Divisions of the Supreme Court.

The case is interesting because it has political overtones typical of the transitional legal systems in Eastern and Central Europe. The position of the Supreme Court was changed after a speech by the President of Romania - by a margin of five votes; the background to the case was that the denationalisation decision of first-instance civil courts were affecting the interests of former *nomenklatura* still residing in many of these nationalised properties.

From the point of view of Art. 6 § 1 access to court doctrine, however, it is interesting to note that there was initially entirely normal/satisfactory? access to the Romanian civil courts and that final and executory decisions were rendered by those courts. The Procurator-general's *ability to apply for judicial review* in civil cases is a typical *ultimum remedium* in socialist legal systems, the function of which is ostensibly to protect „socialist legality“. The power given to him or her is the „extraordinary remedy“ of intervening in *final* private-law decisions if he/she deems them incompatible with this „socialist legality“. In other words the *primary* access to court in the cases in question was retroactively denied by the *secondary* reversal of the Supreme Court's position - in blatant violation of the fundamental principles of *res judicata* and *legal certainty* - and possibly of *the principle of acquired rights*.

In this sense *Brumarescu* is characteristic of the potential collisions between „socialist legality“ and the Convention. In constitutional-law and political terms the case concerns the independence of the judiciary. The retroactive denial of access to court in *Brumarescu* was a consequence of the political pressure put on the Supreme Court of Romania - to which it succumbed by a margin of five votes.

One lesson here is that there can be no due process in a legal system in which the Courts are not independent. The independence of the courts is an integral part of a particular political attitude. *Constitutional* doctrines such as the independence of the judiciary, due process (access to court), the separation of powers and the rule of law (*état de droit*, *Rechtstaat*) describe and prescribe this political attitude. It follows logically that the European Court of Human Rights will be required to deal with cases in which these constitutional precepts are violated to the precise extent to which the domestic legal system has failed to *internalise* this political hierarchy of values and the corresponding constitutional doctrines.

The best way of achieving this harmonisation in former Communist countries, and, *nota bene*, in many other Contracting States⁴¹⁾ is to fully empower the respective constitutional courts as the national guardians of these precepts⁴²⁾. If this legal filter is in place, in my experience, cases such as *Brumarescu* and many others do not reach the Strasbourg level because they are satisfactorily resolved at the domestic constitutional level. In a very real sense, however, this presupposes that domestic

⁴¹⁾ See generally my dissenting opinion in *Cable and Hood v. the U.K.*, judgment of ..., 1999.

⁴²⁾ If a legal system is to embody „the rule of law“, it is absolutely essential for its constitutional court to have the following minimum features: its judges should be appointed in a non-political process and should have life tenure; it should have jurisdiction over both theoretical questions and concrete cases (in the form of a „constitutional complaint“/ *Verfassungsbeschwerde* / *amparo*); and its judgments should have effect *erga omnes* (as opposed to simply being *res judicata*).

legal education and political culture have worked so as to allow a greater degree of power-sharing with the judicial branch.

In a case decided quite recently, *Pellegrin v. France*⁴³⁾, the Court tackled an old question concerning the access to court of civil servants. Given the wording of Art. 6(1), and irrespective of the historical (*meaning not clear*) interpretation, the old Court had rather inconsistently held that sometimes civil servants do have access to civil judicial proceedings and sometimes not. The caselaw turned on a distinction between questions concerning civil servants' careers (no access) and questions concerning purely financial interests of their access required. Mr. Pellegrin was employed under contract by the French Republic and was sent to Equatorial Guinea in order to assist in the financial management of that State. When his contract was not extended (for medical reasons) he claimed compensation. Before the Court, therefore, the issue was whether he was entitled to have access to the French civil courts or whether the protection of the administrative courts sufficed. The Court refused to adopt an extreme solution either requiring access for all (including civil servants) or denying access to civil servants as a matter of principle. It found no violation of Art. 6(1). In reality, however, the issue should have been defined as one of equal protection since it is obvious that civil servants as a class were being discriminated against in terms of their access to ordinary civil courts. The Court, however, does not use equal protection tests in the way they are employed by constitutional courts and thus did not define the issue in terms of Art. 14⁴⁴⁾.

The crux of the matter, as in other such cases, was the above-mentioned *career-pecuniary interest* distinction. The real issue was discrimination against civil servants concerning their access to court. Civil servants are a separate class of employee in many member States. This is due to the sensitivity of their functions and

⁴³⁾ No. 28541/95, *** decided ***

⁴⁴⁾ Article 14: „*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*“

While it is clear that it is a purpose of all laws to „discriminate“ (from Lat. *discriminare*, make differences) between different classes of legal subjects, for instance between those who have and those who have not committed criminal acts, etc. - some of the criteria of discrimination are impermissible (gender, race, colour, language, religion, etc.). These are called „suspect classifications“. If the state chooses to discriminate and for example, not accept women into the armed services it must show that (1) a *compelling state interest* exists (e.g., national security) and (2) that the law building upon such discrimination is *suitably tailored* to achieve that compelling state interest. However, if the classification is not so suspect as gender, race, etc., the test of discrimination is much milder. In case of civil servants the classification is not very suspect („status“), therefore the test ought to have been whether to discriminate against them and not permit them access to regular courts *was rationally related to a legitimate state interest*. In *Pellegrin* the interests of the French State abroad were at stake. It would consequently be conceivable to maintain that these interests were legitimate and that the question of re-employment of Mr. Pellegrin was not a simple matter of labour law. Discrimination it was, of course, but a justified one.

the special status they enjoy as trusted agents of the State. Their responsibilities and career interests, in other words, are too closely linked to the interests of the State for them to be treated as ordinary employees. In terms of classic (constitutional) equal protection the issue was therefore whether denying this class of employee access to court represented unacceptable discrimination or not⁴⁵⁾. The Court, as we said, rarely deals with discrimination as such. It prefers to address this question only if another of the basic rights has been affected. An alleged violation of equal protection (discrimination) is consequently almost never entertained as such. It is probably safe to say that the Court has so far failed to adopt a consistent equal protection doctrine⁴⁶⁾. Many national constitutional courts, on the other hand, do have such doctrines, notably in Germany, whose the Constitutional Court has developed a rich jurisprudence in this respect.

The issue is really quite simple, although perhaps - as some constitutional theorists maintain - a little self-referential. Clearly, the purpose of every law is to establish differential treatment for different categories of legal subjects and the legal situations affecting them. In fact, the substance of the normative regulation of social life lies in differential treatment of different categories of legal subjects and legal situations⁴⁷⁾. There is, in absolute terms, no such thing as equal treatment - the purpose of every law on the statute-books being to establish the legal consequences deriving from its normative distinctions and differentiations.

To say on the other hand that „equal situations require equal treatment“ begs the same question (*petitio principii*), i.e. the question what is an „equal situation“. In ninety percent of legal situations the differential treatment of different legal subjects is entirely acceptable - for example, statutory discrimination in the form of imprisonment etc. against those who commit criminal acts. But even a law discriminating against one of the explicitly forbidden/or: protected/or: ring-fenced categories (sex, race, colour, etc.)⁴⁸⁾ may be acceptable if there are *compelling reasons* of State interest. Take the most difficult example of gender (sex) discrimination: what if women complained that they were being discriminated against by not being permitted to participate fully in the combat operations traditionally reserved for men? Such discrimi-

⁴⁵⁾ Article 14, Prohibition of Discrimination: „*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*“

⁴⁶⁾ See my dissenting opinion in *Chassagnou v. France*, 1999.

⁴⁷⁾ As for the distinction between formal and substantive equality Karl Marx's THE CRITIQUE OF THE GOTHA PROGRAMME is still the classical text used for example at Harvard law School's jurisprudence courses. Socialism could probably be defined as an unsuccessful attempt to introduce substantive equality. Militant egalitarianism as a mode of violence against those who were more capable, energetic, etc. in fact probably contributed to the failure of the socialist experiment. Cf. Noam Chomsky, SECRETS, LIES AND DEMOCRACY, Odonian Press, 1994. A far better explanation is rendered in Nietzsche, GENEALOGY OF MORALS, *Second Essay*. Nietzsche maintained that too much equality „stifles life itself“.

⁴⁸⁾ ... in constitutional law doctrines these are called „suspect classifications“...

nation would most likely be upheld due to *compelling reasons* related to the national interest in maintaining its combat-readiness.

The relevant tests are, therefore, (1) whether the legislative discrimination at issue is *proportionate* to the importance of the legitimate State interest, and (2) whether the legislative instrument employed for that legitimate purpose is *rationally related*⁴⁹⁾ to it.

The equal protection scrutiny may be more or less strict depending whether the discrimination at issue is more (sex, race, national origin, etc.) or less (civil servants and other social and economic categories) suspect. When the issue is discrimination against civil servants, as in *Pellegrin*, therefore, the equal protection test to be employed is less strict. In other words, if the French State as such had a legitimate interest in defining the dispute over Mr Pellegrin's foreign service / posting as a matter of the „public interest“ in France's foreign relations (and thus a case for the administrative courts), rather than simply a labour-law action / rather than simply in terms of labour law, then it was acceptable to discriminate against him in denying him access to ordinary labour or civil courts.

Unfortunately, the Court was not ready to apply the pure equal protection doctrine, but it arrived at the same result by further elaborating its over-interpretation of the *career-pecuniary interest* distinction. Nevertheless, I am convinced that sooner or later many of the access to court cases will be dealt with in terms of the (un)acceptability of specific forms of discrimination. In my opinion *Pellegrin* also illustrates the fact that access to court questions may often conceal various *other issues*. Thus it may sometimes be misleading to define the issue only in terms of access to court doctrine⁵⁰⁾. In terms of comparative law, access to court doctrine is analogous to the *due process* doctrines of the United States courts, but space does not permit us to elaborate on this extremely interesting comparison here.

A somewhat similar question, albeit on the international level, was raised in *Waite and Kennedy v. Germany*⁵¹⁾ except that the issue there concerned not civil servants but employees of an international organisation, the European Space Agency. The Court held as follows: „*The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation.*“

⁴⁹⁾ See my partial dissent in *Chassagnou v. France* (1999) in which the law in question, the French Loi Verdeille, was decidedly clumsy.

⁵⁰⁾ A similar criticism, however, may be made in respect of the constitutional doctrine of equal protection (discrimination). Useful as it may be in some cases it may, if overused, reduce constitutional considerations to courts' rather unrestrained assessment / view of what is „legitimate“ as a governmental aim on the one hand and what is a „rational legislative approach“ for achieving that aim on the other hand. This reductionistic approach would be reproachable to the precise extent to which the constitutional courts would then be empowered to entertain what in essence are legislative (rationality, legitimacy) issues.

⁵¹⁾ Decided in December 1998, application no. 26083/94.

The applicants in *Waite and Kennedy* were employees of the European Space Agency. The issue was whether they had the right of access to German labour courts in relation to their employment dispute. The question of discrimination, however, was directly considered due to the overriding (purpose, aim to be achieved, legitimate aim) international organisations. The Court held that „[t]he attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments“⁵²). The implication is clearly that clauses in employment contracts with international organisations limiting the access to court to internal arbitration procedures are acceptable. Again, in terms of (non-)discrimination the question would be whether international employees as a class may or may not be discriminated against in the process due to them, in their access to court. The Court's references to *margin of appreciation* and *proportionality* (between the means employed and the aim sought to be achieved) tend to show that here the equal protection doctrine was indeed a / the decisive factor in its findings against to the applicants⁵³).

► **Some tentative conclusions.**

In his excellent analytical essay, [entitled] „Access to Court“⁵⁴), P. van Dijk, a former judge of the Court maintains as follows:

The present Strasbourg case-law concerning „civil rights and obligations“ is one of lack of clarity. Lack of clarity because still no general definition of „civil rights and obligations“ can be inferred, while the construction of the outcome of the procedure for a right or obligation of civil right or obligation is very complex and rather undefined... Uncertainty because the elements actually developed in the case-law for such a definition appear still to lead within and between the Court and the Commission to different views in concrete cases, while the number of the adherents to the various views are almost equal. In our opinion this lack of clarity and this uncertainty [...] can only be eliminated when the Court breaks through its hitherto pursued casuistic approach and develops a general and readily applicable definition in the exercise of its function to give direction to the interpretation of the Convention⁵⁵).

This dilemma, as we saw, was tackled in the *Pellegrin* case, but it was not resolved. It is possible that the problem with the present caselaw goes even deeper than some have imagined. In terms of comparative law, the access to court doctrine seems to be similar to the constitutional due process doctrine. In constitutional law due

⁵²) *Waite and Kennedy v. Germany*, judgment of 18 February, at 63.

⁵³) The Court cited *Osman v. the U.K.*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, 136 and *Fayed v. the U.K.* judgment of 21 September 1994, Series A no. 294, pp 49-550, at 65, *Waite and Kennedy idem*, at 59.

⁵⁴) MacDonal et al. (eds.) *The European System for the Protection of Human Rights*, PP. 345-379.

⁵⁵) *Ibid* at 375-376.

process is (1) limited to fair decision-making process, whereas the individuals are (2) entitled to a fair procedure (hearing) before being deprived of life, liberty or property interest. The procedural rights are contingent upon the legitimacy of the claim of entitlement or liberty interest. Only once this has been established, does the question „*What process is due?*“ arise? In other words, the problem of the definition of the legitimate substantive „right“ is inherent in all access to court/due process legal considerations. I am afraid there is no other than the criticised casuistic one available here.

On the other hand, there is something called „*substantive* [as opposed to procedural] *due process*“, i.e. the requirement that the substance of the law, the restrictions it seeks to impose, affecting all people, should be valid under the constitution or, in our case, the Convention. In other words, van Dijk's point concerning the „definition“ of the „[substantive] right“ protected by access to court is really the question whether the law is arbitrary or irrational or whether it infringes fundamental rights.

These questions are questions of equal protection by the law. The denial of equal protection amounts to discrimination as defined in Art. 14 of the Convention. The standard objection here is that the question of discrimination can be raised only with respect to a right „set forth in this Convention“, i.e. that it does not apply to rights which are not explicitly enumerated in the Convention. Thus, in *Pellegrin* one could not refer to discrimination against the class of civil servants denied access to ordinary courts because their right to be treated equally in terms of access to court is not specifically mentioned in the Convention.

But this kind of reasoning is clearly circuitous. If the Court is to break out of this vicious circle, in my opinion, it must do two things.

First, the Court must recognise that, irrespective of its past practice, the equal protection approach is clearly more a functional, adequate and direct way of dealing with the problem in some cases. *Second*, if the Court decides to adopt that approach and the issue, in cases such as *Pellegrin*, in terms of discrimination it must not allow to be inhibited by concerns over whether the specific right is expressly set out in the Convention. The right of access to Court, for example is specifically given in art. 6(1). The fact that this is a procedural, not a substantive, right does not mean that it is incompatible with another procedural right such as the right not to be discriminated against (in one's access to regular courts). Only the two procedural rights in combination - to have one's claim decided by the normal court - would suffice to implement the alleged substantive right of Mr. Pellegrin to obtain another contract from France without unreasonable delay.

Third, once this approach has been established, the Court may entertain the discrimination issue applying the appropriate scrutiny. The outcome of the case will ultimately depend on whether the discrimination in question is reasonable, i.e. whether (1) the classification is suspect, (2) if suspect does it merit (a) strict scrutiny, (b) heightened scrutiny or (c) only the mild rationality test. Depending on the strictness of the discrimination test applied, the „proportionality“ between the legitimate aim sought to be implemented and the legislation in question, and the rationality of the legislative instrument, must be weighed. Clearly, if discrimination on the grounds of

sex, race, colour, language or religion is in question, the test will be strict. If „other status“, such as the status of „civil servants“, is in question, the mild rationality test would perhaps apply.

The origin of the problem seems to lie in the far too rigid distinction between the „substantive rights“ on the one hand and the procedural rights on the other. If the procedural rights are seen as purely ancillary, i.e. merely as an instrument for the implementation of the substantive rights, then the Art. 14's prohibition on discrimination will continue to apply only in combination with another „substantive right“.

The logical solution is to break out of this vicious circle and recognise that discrimination is a breach of „substantive due process“, i.e. that as a right it stands on its own feet and does not have to be complemented by a breach of a „substantive“ right. The fact that Art. 14 refers to „rights and freedoms enumerated in this Convention“ should not mean that synthetic (penumbric) derivative rights and freedoms such as access to court cannot be covered by the anti-discrimination clause.

INTRODUCTORY PRESENTATION

Right of access to a court

By Rudolf Machacek

► A.

1. When we discuss the value, importance and the legal framework of a free access to a court we should first remember the definition of a court by the European Convention on Human Rights (ECHR), called in the Convention a Tribunal. To bring one's case before a court means something entirely different in Civil Right cases, in cases of a Criminal Charge and in cases of Public Interest which deal with administrative affairs or finally when the object is Judicial Review before a Constitutional Court. Still of a different sense is the meaning of access to court in a supranational content before Courts or Tribunals as European or Global Instruments.

If we make a list of courts we at least face the following types:

- Civil Courts
- Criminal Courts
- Administrative Courts
- Constitutional Courts
- European Courts (of the European Convention on Human Rights and the European Union)
- The Court for War Crimes in Den Hague

2. First we should discuss what is defined in Art. 6 of the ECHR. Art. 6 ECHR stipulates:

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

The interpretation what this means can not be drawn from national regulations. The ECHR clearly ruled that the interpretation of the terms of the ECHR is in the autonomous competence of the Court.

This leads us to the following questions:

- what has a court to look like to satisfy the Convention;
- what sort of cases does the Convention has in its mind, that have to be decided by tribunals (courts).

The answer has to be and can only be found in the case law:

- **regarding the principles that guide the creation of courts;**
- **regarding the material definition of civil rights;**
- **regarding the definition of criminal charges.**

3. It is obvious that tribunals according to Art. 6 are not competent for all breaches of the Convention.

Other authorities competent in this field are addressed by Art. 13. This Article clearly speaks about an obligatory complaint system against violations of rights and freedoms set forth in the Convention and orders that everyone shall have an effective remedy before a national authority.

Such an authority may not be a tribunal or court for lack of independence and impartiality because of possible directions or decrees by another state-institution, a minister or an inspecting or supervising body, that have to be obeyed. Nevertheless the remedy must be an effective one. This excludes in any case arbitrary decision-making.

The access to an authority according to Art. 13 must also be free as the formulation „everyone shall have an effective remedy“ clearly indicates.

4. I now come back to the tribunals according Art. 6 of ECHR:

The right to have free access to a tribunal (e.g. a court) in principle guarantees according Art. 6 of ECHR a decision after a fair trial by an independent and impartial court created by law.

This needs no further explanation in relation to civil rights or obligations.

In criminal cases the sense of Art. 6 in relation to a free access to court is somewhat ambiguous as nobody wishes to be accused. Free access to court means in such cases the right that only a tribunal and no other authority can decide over a criminal charge against an accused.

Art. 6 of the Convention also guarantees the following additional rights for all that are charged of a criminal offence:

- Right and Assistance for defence, if necessary by Legal Aid.
- Assistance of an interpreter if the accused cannot understand or speak the language of the court.

This basic rights are laid down in cif.d and a Para 3 of Art. 6 as follows:

- **Cif.c orders for the accused „to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so require“;**
- **Cif.e orders „free assistance of an interpreter if he (the accused) cannot understand or speak the language used in court“.**

5. Regarding breaches of the Convention not relevant to civil rights and criminal charges Art. 13 has to be observed.

6. Rights and obligations not laid down in the Convention are not under the Rules of Art. 6 and 13. Still we will agree that there exist General Principles in Law that are guidelines for fairness of any procedure.

7. Summing up: The guarantees of the Convention show that free access to court

means more than the Convention says in Art. 6, but that Art. 6 is a solid basis for the creation of a European legal culture.

8. In spite of this it is self evident that access to court only serves the aims of the Convention when a decision is made by court within reasonable time.

A court that is not able to decide a pending case within due time is not only a deplorable institution, it really is an impediment for the rule of law. Court in itself is an instrument of justice only when a judgement is speedy enough so that in criminal cases the punishment or acquittal is accepted as an answer of justice to a crime or in civil cases when the peacemaking effect obviously comes soon enough to satisfy the feelings of the parties.

The formulation that everyone is entitled to a fair and public hearing within a reasonable time, is without question in the core of justice. The European Court of Human Rights developed a broad case law in this context that we should be aware of.

9. Despite the very convincing case law the Commission and the Court of Human Rights were not able to serve victims of breaches of Convention Rights with decisions within the timelimits they gave to national courts. We know, that it was not the fault of the Commission and the Court, that they failed to set an good example. But we fully agree that it was necessary to change the composition of a convincing two-storied review of national acts with the 11th Protocol into a devolution-system incorporated in the new court composition. We now must wait for new results.

What we can say already now is that the curve of complaints permanently goes up because of the growth of the number of the members of the Convention and that peaceful settlements that are also possible now, after the 11th Protocol is in power, are not only a possibility and it is necessary to reduce a backlog of cases on the supranational level.

10. On the national level Mediation and Diversion develop as important alternatives to court decisions and in many countries are offered as possibilities to avoid the onerous and often expensive procedures that are conducted in courts.

Of course mediation and diversion must not impede or block free access to court, but they may be useful and even necessary to open and guarantee access to court when a court decision is unrenounceable.

► **B.**

Still there are quite a lot of other open problems.

1. If we leave theory we are confronted with the fact that the European Union is facing a European Court using 15 (or at least 14) languages. The meanings of technical terms are often not identical in the national law systems.

2. The rules of procedure in the member states are often different, and even jurisdictions and competence of their organs are often hardly comparable. The same goes for practising lawyers: What is a barristers, what a solicitor, an advocate, a

Rechtsanwalt. How high is the expense for a legal advisor and how high are court fees. We can multiply such questions easily. Don't we have to hesitate to start a case in some other even neighbouring country of the EU, if we only know the situation in the country where we live? Is under such conditions free access to any court really free from reservations?

3. Furthermore: how can we deal with the dangers from unfair reporting by mass media which are threatening a fair trial?

4. How shall we behave before a court that reigns with contempt of court penalties? But I have to address still more crucial questions:

5. Right and access to court ultimately mean that you get a decision by a judge.

Precondition for the realisation of this aim is that judges are qualified by an academic education to decide legal questions. Legal knowledges have therefore to be checked before a judge is appointed. Such examinations may be of great danger to the independence and impartiality of courts if they will be taken by an administrative or political body who thereby can control the Judiciary. The same danger is connected with any system for appointment and dismissal of judges. The only acceptable answer to secure the independence of judges is self-administration of the Judiciary.

6. A court in addition needs courtrooms, furniture and technical equipment like telephones, fax and computers.

Judges can only make lawful decisions if they receive information on new laws, the case law of higher instances and information on international and supranational Jurisdiction. A court without an up-to-date library is permanently in danger of making wrong decisions and soon loses his credibility.

It is not a secret that in many countries courts are still in a deplorable situation.

7. A special question in connection with impartiality is whether judges may be members of political parties and whether they have to abstain from political engagements

8. Last but not least is a special matter of judges' fees. If wages are not adequate corruption becomes a real threat to the whole Judiciary.

► **C.**

I feel obliged to present a basis for discussion and to raise also crucial questions for our working group. Only thus shall we succeed in offering a small contribution to promote the Rule of Law.

I hope I was able to offer some useful suggestions for our work and I am grateful in advance for all the answers that the meeting finds in the discussion.

I want to the end with this invitation for the discussion, but I do not want to end, before I have said my thanks to the Polish section and the organisers of this meeting for all their work, that gives us the opportunity to hold that conference.

Many thanks for your kind patience listening to me.

RECOMMENDATIONS

◉ Working group 3

ACCESS TO A COURT

Right of access to a court

Article 6 of the European Convention on Human Rights provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

1. National court systems

Four sets of recommendations are made in relation to the national court systems in the countries of Central and Eastern Europe:

▶ „Everyone is entitled“

- There should be a programme of public education in each country about the content of the rights safeguarded by the European Convention on Human Rights.

NOTE: Helpful guidance, based on authentic texts, should be translated into different languages. This guidance should be made generally available, and there should be a programme, organised in conjunction with governmental and non-governmental organisations, aimed at spreading knowledge and understanding of people's rights throughout each country.

- Effective arrangements must be maintained in each country whereby if a person is deprived of his or her liberty by the police or other executive authority, he or she has access to a court within a short time, so that the legality of the detention can be reviewed by the court in accordance with Article 5.

▶ „A fair and public hearing“

- There should be a study conducted in each country of the extent to which the provision of legal aid for both criminal and civil cases complies with the minimum requirements of Article 6, as interpreted by the court at Strasbourg.

NOTE: There is much evidence that legal aid is not available at all in civil cases, even in complex cases, and there are often very unsatisfactory arrangements for the payment of assigned lawyers in criminal cases, as well as complaints about the quality of services they render to their clients.

- There should also be a study of the way in which professional bodies representing lawyers in each country can be assisted in their duty of raising the standards of professional competence, professional integrity, and professional

responsibility of members of their profession, and also of their understanding of the requirements of the European Convention on Human Rights, and particularly Article 6. If such bodies do not exist, they should be created for this purpose.

► **„A ... fair hearing within a reasonable time ... by an independent ... tribunal“**

The following five matters need to be addressed in each country:

- Clear, merit-based standards should be introduced and maintained in relation to the recruitment and career development of judges.
- Judges should be paid a proper salary, and appropriate steps should be taken to improve their status.
- Courts should be properly equipped so that the judges are able to administer justice fairly and within a reasonable time.

NOTE: This recommendation involves the provision of adequate court buildings, office space, administrative staff, Information Technology, library facilities, etc.

- Attention must be paid to the need to ensure that judges are properly trained and equipped with the necessary experience to enable them to perform their judicial functions properly.

NOTE: The training should include training in the jurisprudence of the European Convention on Human Rights and knowledge of the ways in which the relevant rights may be effectively implemented.

- The judiciary must enjoy budgetary independence from the executive.
- The judiciary must have access to relevant international texts (such as the European Convention on Human Rights) translated into their own language.

► **„A fair hearing ... by an ... impartial tribunal“**

Appropriate steps must be taken in each country to ensure:

- that the judiciary is free from the suspicion of corruption,
- that a clear explanation, based on Strasbourg and other international and national jurisprudence, is required in each country, of what is meant by the requirement of impartiality.

► **General comment.**

The countries of Central and Eastern Europe wish to comply with international standards, as provided for by Article 6 of the European Convention on Human Rights, but they often lack the necessary know-how, resources, and executive and legislative willpower needed to enable them to comply with their obligations.

The appropriate role of the relevant international bodies - the Council of Europe and the ICJ - should be to identify the main issues clearly, and to set out the ways in which these issues are now being addressed in each country, or the ways in which they could usefully be addressed in future, according to the needs of each country, without unnecessary duplication of effort, and in a sensibly coordinated way.

There is a very valuable role which the judiciary in Western European countries could play in the task of advising on the ways in which the status and know-how of the judiciary in the countries of Central and Eastern Europe could be enhanced.

2. The European Court of Human Rights

There is great anxiety about certain problems now affecting the ability of the Court itself to comply with standards similar to those required by Article 6. Three recommendations are made in this respect:

- That member states of the Council of Europe should be urged to increase their financial contributions to the work of the Court, so that it can employ the numbers of skilled staff who are needed to process the increased volume of cases in an effective way.
- That clear and transparent procedures should be introduced in relation to the choice of judges by each member state; these should enable national non-governmental organizations to play an active role in connection with the choice of judges for the Court.
- That the Court should conduct a study of the new methods now being used by certain national courts, both in Europe and elsewhere, for managing their caseload and speeding the processing of cases through their courts.

NOTE: It is likely that the caseload at Strasbourg would be reduced if every country which possesses a Constitutional Court were to allow individual citizens to have effective access to that court.

WORKING GROUP 4

CORRUPTION

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INTRODUCTORY PRESENTATION

The public function and corruption

By Marco Borghi

► **Thesis: Corruption is an attempt against the „substance“ of the rule of law.**

The issue of corruption is contained, in a model manner, in the scope of the research we have been conducting for several years now at the Interdisciplinary Institute for Ethics and Human Rights, first of all in the areas of economic ethics and human rights¹⁾.

Indeed, corruption can be seen as a violation of human rights and of their ethical and anthropological foundations: the principles of reciprocity and equality.

Corruption perverts the relation of mutual trust between citizens and institutions; it violates the principle of good faith, the „constitutive“ element of the rule of law; it removes the legal order and causes discrimination against all subjects not involved in the pervert relation between the corrupter and the corrupted and, as a result, leads to systemic violation of human rights and of their fundamental principles of universality and indivisibility.

The importance of this statement is self-evident, and its legal significance is crucial for determination of the legal consequences of acts involving corruption. This is therefore the only approach that permits ontologically to negate *ab ovo* any value whatever of arguments that reduce corruption to a phenomenon of marginal illegality, nay legitimize it on the socio-cultural plane. Such arguments (often voiced in Switzerland) probably result from the following:

- on the one hand, from a paradoxical ethical aspect of the relation between the corrupter and the corrupted, which seems to base on the ethics of reciprocity;
- on the other hand, from the high incidence of economic practices that are tolerated (against their social costs, in moral and economic terms) as long as they prove profitable for third persons (e.g. for political parties, which is an *fortiori* paradoxical argument, as such secret financial operations also constitute a violation of political rights); the incidence offers an ethical self-justification for both the corrupter and the corrupted.

¹⁾ Cf. BORGHI/MEYER-BISCH [eds.], „La corruption, l'envers des droits de l'Homme, Actes du IX Colloque interdisciplinaire“ [Corruption as violation of human rights, Proceedings of 9th International Seminar], and „Ethique économique et droits de l'homme - La responsabilité commune“ [Economic ethics and human rights - Common responsibility], Actes du X Colloque interdisciplinaire [Proceedings of 10th Interdisciplinary Seminar], Institut interdisciplinaire d'éthique et des droits de l'homme, Éditions Universitaires, Fribourg 1995/1998.

Indeed, what is noxious and destructive is precisely this context, the systemic foundation of underhand dealings and plots, that undermines the very roots of the rule of law, its inviolable core, the *Wesenskern*.

The above discussion leads us to the following statements:

- that the legal order should refuse to acknowledge any value of acts involving corruption; besides, there is obviously no criteria for distinguishing between public and private corruption, as what is decisive in both cases is the violation of reciprocity of exchange between equal subjects based on the principle of good faith (translation into the language of law of Kant's principle of universalization integrated in the quality of sympathy according to Hume's conception); and
- that a broad definition of corruption should be provided, which would at the same time be operative in the sphere of law, and based on the following two elements: corruption is a synonym of abuse of the powers of representation, an expression of dishonesty of a representative who (with the aim to gain, whether for himself or for third persons such as e.g. a political party, a profit to which he is not entitled under his mandate) intentionally gives priority to his (or the third persons') financial (mostly but not necessarily) interests - whether private or public - over those which he is supposed to defend and promote.

► **Corruption: a systemic phenomenon. Two examples.**

For a long time the doctrine, legislation and jurisprudence tended to take but an episodic, synchronic and fragmentary approach to corruption; the media, for their part, usually showed it in the form of various facts.

This fragmentation prevented the perception of corruption as a global and systemic phenomenon, as endemic as it is clandestine.

The following two examples of two different phenomena which are however very well-known, one of them to political scientists and the other one to specialists in constitutional law, indicate corruption's systemic nature and the rooting of its causes, on the one hand, in the foundations of the mechanisms of institutionalization of power, and on the other hand, in the very structure of the legal order.

1. Ties between political and economic power: an often ignored theme.

The economic needs of political parties have been (and still are) the true motive of most cases of a specific type of corruption. Electoral success being dependent, at least in the view and conviction of protagonists of political life, on propaganda and access to media support, the issue of funds for such activities inevitably acquires the fundamental dimension and imposes an inexorable logic. That logic leads, first, to a strong and continuous increase of the costs of politics, and second, to a more or less intense quest for funds needed to cover such growing costs.

Yet leaving aside the secret financing of political activities as such, it has most dangerous cultural effects on the rule of law, to the extent that the practices of secret financing in political life leads to the citizens' resignation vis-a-vis inequalities of

treatment; this, in turn, favors cultural acceptance of corruption as an integral part of political and economic systems.

Thus the point is to fight that endemic phenomenon with legislative measures. Many countries have adopted laws that are seemingly severe but of dubious effectiveness; elsewhere (as e.g. in Switzerland), no relevant provisions have been adopted till the present day.

Generally, a legislation that aims at making the financing of political life clear and moral may concern the public and private resources of parties and candidates, the upper limit of electoral expenses, the transparency and audit of accounts, as well as the biography and heritage of the elected and finally the equitable indemnity for performance of political functions which will contribute to the deputies' independence and, at least partly, to their equality.

Confronted with numerous political-financial scandals, some countries have even ultimately decided - after much hesitation and many years of reflections - to ban all donations from private companies to parties and candidates.

It is obvious and indisputable that - to stand a chance of being effective - all legislation designed to enhance the moral standards of relations between the economic and political power should start with an intervention at the level of electoral expenses, setting their upper limit (which should be duly verifiable) and regulating political propaganda of commercial nature. In fact, all efforts at making this area moral and rational would be futile without this necessary condition, as the actors of political life will always be tempted to circumvent provisions regulating their takings if those takings can in any manner be spent without limitations.

In the institutional sphere, the procedures for appointment of officials involve another disputable issue. The fact that those taken into consideration, exclusively and from the start, are frequently candidates nominated directly or indirectly by political parties; that the decisions are in fact taken by party authorities and lack constitutional legitimization; and that the appointments are subsequently tacitly ratified by parliaments in accordance with the rules of distribution of positions established by the parties themselves - all of this constitutes in many aspects a violation of important constitutional rights and principles: from the viewpoint of potential candidates, who offer all of their professional and personal qualities to be granted an official function but who do not have, and do not want to have, privileged contacts with a political party, we might quote here equal opportunity and the right to equal treatment by the state, as well as the freedom of association, which guarantees the right not to associate without being subjected to discrimination on part of the state.

This same argument based on constitutional rights applies to appointments of functionaries. What is more, politicization of the administration not only leads to clientelism, but also prevents that administration from exercising its institutional role of supervisor of political power. Such practices, similar to what is called „*Aemterpatronage*“ in German, may even contribute to the emergence or preservation of a context of generalized collusion. On that same constitutional plane, which is even more

directly relevant to the democratic principle of separation of powers, we should mention the risk of collusion between deputies and the authorities of collective public bodies to which they have been elected, consisting in the practice of the latter giving paid professional mandates to the former. To prevent this practice, the following solution would be advisable - and also easy to use: each collective body should develop official lists of mandates granted without public competition, specifying at least the relevant competencies, duration, and remuneration, as well as the identity of the beneficiary.

Another measure of the necessary transparency is the requirement that all candidates in specific elections or for a specific position should in advance submit an official statement to the authority in charge of accepting candidates, specifying the interests that bind them²⁾.

2. Impairment of the principle of legality.

A specific ignored phenomenon, related to the general evolution of foundations of the rule of law, and particularly of the principle of legality, may have negative effects on the prevention of corruption.

Transformation of a state ruled by law into a welfare state leads to modification of the structure of laws, which become programs, and limit themselves to a relatively imprecise statement of objects. Not always can this lack of precision be corrected at the local level due to absence or vagueness of interdisciplinary criteria capable of objectively and precisely stating the pertinent public interest.

What is more, in relation to the principle of legality (a universally recognized dogma of the rule of law), there is a tendency noticeable at many levels of state activity (and particularly at those related to land management and environment protection), which involves many forms of intensified „legislative negotiation“. Determination of legislative objects and the means for attaining those objects often result from direct adjustments and negotiations between competent authorities and individuals.

Thus the individual becomes „partner“ in the development and execution of the law; cooperation between the legislator and the addressee of laws becomes a principle of administrative activity.

This evolution may have crime-producing effects as it creates an opportunity for personal and informal contacts between individuals and functionaries; above all, it induces the latter to take private interests into account without basing on a legal framework which would define, with sufficient precision and clarity, the public interests to be followed (thus ultimately limiting the possibilities of review *a posteriori*).

Thus for the above reasons it can be stated that the resulting intensification of discretionary powers of the administration is harmful, and that adoption of precise regulations is advisable in principle, as they make it possible to lay down precise crite-

²⁾ Of course, also other specific measures for public agents should be introduced; they are discussed below.

ria that at the same time secure equality of addressees of the law. However, it should also be stated that intensification of the normative density and multiplication of special provisions (each needing a procedure for implementation) may lead to slowness and inefficiency. This distorted result is called the „vicious circle of guarantees“ where, paradoxically, the more complex the rules, the greater the people's tendency to resort to corruption as the means of avoiding them.

The point is therefore to find balance between those two opposing tendencies, and to decide on concrete, necessary and sufficient measures with due respect to the principle of proportionality.

► Countermeasures.

1. International reform in progress.

Praised above all among the international initiatives³⁾ should be the adoption of OCDE Convention „on fighting corruption of foreign public agents in international commercial transactions“, signed on 21 November 1997 in Paris. The problem concerned was one that could only be resolved by means of an agreement between states: at the level of political will, the convention marks the turning point in the fight against corruption, going explicitly beyond the traditional formulations limited to „examination“, „research“, or particularly „recommendation“ of legal measures. It is important to state, however, that left out of the agreement have been various steps enabling political parties to break contracts: controversies on this form of corruption, which arose during the Paris session, prevented its inclusion in the convention. Sim-

³⁾ The United Nations devoted a special session to corruption (Cairo 1995); the General Assembly adopted the „UN Declaration on corruption and acts of corruption in international trade“, and the „International code of conduct for public agents“ (December 1996). Organized was also a series of regional conferences on organized crime and corruption (Buenos Aires and Dakar 1997, Manila 1998), as well as seminars dealing with the strategies of fighting corruption in Central and Eastern Europe (Budapest 1997 and 1998). The UN are also preparing a model law on corruption. The UN Program for Crime Prevention and Criminal Justice is currently working on a project entitled „Corruption and the strategies of its control in the world“. In 1996, the Council of Europe started a „Program for counteracting corruption“, implemented by a CE Interdisciplinary Group on Corruption, stressing the need for an interdisciplinary approach to this phenomenon. The program which includes numerous educational, awareness-raising, and exchange projects, as well as preparation of an European code of conduct of high officials, should result in detailed conventions concerning the fight against corruption. As regards the European Union, mentioned here should be the „Convention pertaining to the struggle against corruption of the functionaries of European Communities or of the member states of the European Union“ of 26 May 1997, as well as the „Convention pertaining to protection of financial interests of the European Communities“ of 26 July 1995. Also the World Bank and the International Monetary Fund pay more and more attention to prevention of corruption, in particular reinforcing the procedures regulating public markets and making the grant of funds to Governments conditioned upon their adoption of measures against the practices of corruption. The works of the Organization of American States led to signature of the Inter-American Convention against Corruption on 29 March 1996.

ilarly, and unfortunately, the issue of civil law's approach to corruption has not yet been regulated at the international level, while it would be advisable to regulate by a convention especially the issue of the type of contract following the bribe, so as to establish the regime of nullity applicable to all legal orders. In fact, civil law offers a great potential as regards the fight against corruption, which is however frequently and wrongly ignored.

2. A widespread practice hypothesis.

Considering the clandestine nature of corruption and the limits of effectiveness of all international and national legislation, it has to be stressed that responsibility for fighting corruption lies *in primis* with authorities exercising their respective powers.

The authorities should first consider the existence of a pertinent and predominant interest involved in adoption of specific measures for prevention and fighting of corruption. From then on, each authority, and each of its members, should - within their specific competencies - formulate the hypothesis of corruption to control the activity of agencies exposed to a conflict of interests, especially following contracts on the public market: one that might help not only to stop but also to intensify the phenomenon. Concerned here are of course especially the supervisory and appellate authorities. In the sphere of construction, most significant is the experience of the Account Chamber in Hesse: its president developed a typology of various forms of corruption and demonstrated its ability to secure a greater transparency, permitting disclosure and prosecution of the phenomenon.

From this viewpoint, the experience of the *Mani pulite* pool provides just as good an example. Its strategy was perfectly simple: it based on the hypothesis that corruption is a generalized practice, and performed „spiral“ inspections (from a bribing businessman to a functionary, then to all businessmen who had contacts with that functionary, and finally to other functionaries who had contacts with those businessmen, etc.).

What has also to be mentioned here is the important anti-corruption role of authorities that supervise economic competition, particularly from the viewpoint of the hypothesis of corruption. We should start from the statement that - while corruption and anti-competition practices are two distinct phenomena practiced for different purposes, they may sometimes be closely related to each other. The anti-competition practices may supplement and facilitate corruption (and *vice versa*): development and strict implementation of sanctions against anti-competition leagues - especially in the area of public markets - may help to discourage some companies from involvement in corruption.

3. Some specific suggestions.

Assuming that corruption violates the substance of the rule of law, if there are convergent indications of the existence of practices consisting in corruption or traffic in influences, the state may employ all appropriate preventive and repressive measures, especially the legislative ones.

We have developed some suggestions as to measures, which we now submit to the participants' criticism. Deliberately left out have been measures from the sphere of penal law, as, on the one hand, an intensified attention to this branch of the law can be noticed at both the national and international level, and, on the other hand, we fear that the present debate, focused too much on the penal law, might itself have an undesired effect of slowing down the development and adoption of measures relevant for the other branches of law. We believe that against the widespread stereotypy, private and public law may have the preventive effect and provide a sanction comparable to that of penal law. For the business, that sanction would consist in unconditional nullity of the contract; for politicians - in ineligibility; for functionaries - in discredit; for members of political authorities - in dismissal; for bankers - in an administrative ban on practicing their profession: all of these are consequences much more severe than prosecution.

In the area of prevention, one has to maintain at all levels the culture of ethics and trust in relations between all private and public actors of society. Implied in this, among other things, is the requirement, on the one hand, that adoption by the economic actors of codes of professional ethics be promoted, the efficiency of such codes being guaranteed by their legal nature, indirectly recognized by positive law (as e.g. in the sphere of unfair competition). The other requirement is that all validity be negated of the distinction between corruption of public agents and private corruption: this distinction, which seems to come from current reformers, may but legitimize corruption, or even make it inseparable from commercial relations, in a pervert ideological process of differentiation of illegalities.

To be more specific, we suggest the following measures:

General measures:

- Each authority and each of its members should within his specific competencies formulate an hypothesis of corruption to control the activity of agencies exposed to a conflict of interests, especially following contracts on the public market. Authorities that guarantee free competition should play an important part here, too.
- Having detected a case of corruption, the prosecuting agencies should proceed to perform „spiral“ inspections (from a bribing businessman to a functionary, then to all businessmen who had contacts with that functionary, and finally to other functionaries who had contacts with those businessmen, etc.). Generally, those agencies should pay special attention also to anonymous information.
- Institution at the national and local levels of audit chambers independent of political power, and equipment of those financial institutions with special competencies in the area of corruption.
- Reorganization of prosecuting agencies and of the agencies for administrative and financial repression, to secure efficient and rational utilization of important resources that are today fragmented and dispersed at the local level.

- Public collective bodies' recourse, effective and with no exception whatever, to all civil and administrative actions against the corrupting and the corrupt, and compensation of damages (especially through opening of the path of *actio popularis*).

Legislative measures pertaining to institutionalization of power and to public agents include:

- specification of the upper limit of permitted electoral expenses, and a specific framing of the actors of political life (in the shape of transparency of the sources of financing and independence of those responsible for politics);
- procedures for appointment of officials, offering stronger guarantees of their independence of political power and including the introduction of a ban on combining the functions of an official with political functions resulting from election at other levels of state;
- measures securing transparency of economic activities pursued by deputies on behalf of state (especially through annual publication of mandates granted to public collective bodies in a public competition);
- measures securing transparency at the level of particular financial and economic interests binding legally and also morally upon candidates in political elections, and the possibility for elected candidates to resign if those interests might be seen as conflicting with interests of the collective; this possibility should apply to all stages of preparation of official acts. The above measures should be accompanied by efficient sanctions, especially of suspension of the exercise of political rights;
- the sanction of ineligibility to political functions, applied to persons convicted for offenses involving corruption;
- creation of public oversight of public expenses through institution or extension of the financial and administrative referendum;
- de-politicization of the administration („lottizzazione“), especially through definition of the criteria for appointment of functionaries with exclusion of the candidates' political orientation;
- introduction of oversight of the background and biography as well as the personal and family ties of public agents participating in the decision-making processes most vulnerable to corruption;
- rotation of the personnel holding positions that involve a particular risk of corruption;
- what might be a measure alternative to rotation would be a system of composition of the groups of functionaries in charge of decisions exposed to the risk of corruption: participants of the decision-making process would be separated from different administrative units;

- rigorous application of the principle of collective signature, to make each functionary participating in the decision-making process responsible for his actions;
- mobile interdisciplinary units specialized in the struggle against and in detection of corruption, performing inspections in accordance with a system of targeted measurements (especially in the area of construction);
- a formal ban on public agents' acceptance, and the obligation to report to superiors all offered profit, the indirect including;
- a general and formal obligation binding upon public agents to notify the management of their institution of all suspicions as to corruption of their colleagues or subordinates (as well as the obligation of the management to hand over such information to prosecuting authorities); performance of this obligation should not result in any prejudice with respect to the public agent concerned, even if the suspicions prove unfounded;
- rigorous and broad definition of the ban on public agents' combination of functions (with the exception in principle of the possibility of extraordinary authorization) with the exercise of private or public activity potentially leading to a conflict of interests (and including in this respect measures against transfers from private to public companies).

Measures concerning specifically the public markets:

- Extension of the recourse to open procedures for the granting of public mandates (the other forms of the procedure would constitute an exception), especially through a choice of adequate thresholds.
- Recourse to the invitation of tenders for performance of work (where the objective worth would be evaluated by an independent technical service), and the tenderers' recourse to resulting rather than mean obligations.
- Precise and irreversible definition in the appeal of the tender for work or products.
- More frequent recourse to the system of accepting the lowest offer (or to one based on rigorous arithmetic tables, precisely defining in advance the criteria for acceptance and their order of importance).
- A general ban on all interactions between decision-makers and tenderers, especially including negotiability of prices and other conditions.
- A systemic obligation to perform a public opening of tenders.
- Introduction of a criminal offense specifically pertaining to alliances between tenderers.
- Strict separation of competencies at different stages of the procedure of acceptance of tenders till the moment of verification of the execution of work (including a rigorous audit of deductions).

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- Definitive exclusion of all public acceptance of entrepreneurs involved in corruption scandals.
- Insertion of anti-corruption clauses in the invitations for tenders, with the aim to institute most severe conventional penalties in cases or for acts of detected corruption.
- An increased obligation of transparency with respect to the choice of accepting authorities, and the right of rejected tenderers to be notified in the form of a formal decision.

Other measures:

- In the area of banking, the supervisory authorities should develop the principle of irreproachable activity and apply it to the banks' direct or indirect involvement in all private or public corruption of their clients, that taking place abroad included.
- The law on obligations should provide for unconditional nullity of contracts blemished with corruption.
- Adoption of a uniform system for financial compensation for land management decisions causing a growth in value to the participants' profit.
- Fiscal law should be amended in a consistent manner with a view to remove not only the enterprises' possibility of deducing from their income secret payments made to holders of public functions, but also other profits involved in private corruption and in financing of political parties.

RECOMMENDATIONS

◉ Working group 4

CORRUPTION

► Conclusions.

Corruption can be seen as a violation of human rights and of their ethical and anthropological foundations: the principles of reciprocity and equality. Corruption perverts the relation of mutual trust between citizens and institutions; it violates the principle of good faith, the „constitutive“ element of the rule of law; it distorts fair competition; it undermines the legal order and causes discrimination against all subjects not involved in the perverted relation between the corrupter and the corrupted and, as a result, leads to *systemic* violation of human rights and of their fundamental principles of universality and indivisibility.

Corruption is not the same problem everywhere. On the contrary it is much worse in some countries than in others: in many countries it is more or less a root of most evils, the reason why the countries do not develop or develop very slowly. Dictatorship, underdevelopment and a planned economy - these three phenomena usually go together - inevitably involve corruption. The introduction of a market economy into such a system, however, may result in a corruption boom during a transitional period until the legal structures manage to adjust to the new situation.

Organised crime, which is growing more and more international, is to a great extent dependent on corruption.

► Definition.

The concept of corruption is more or less broadly understood. In order to find remedies against corruption, however, it is important to choose a suitable definition, since the same remedies do not necessarily apply to all the phenomena which can be found under the „umbrella designation“ corruption or misuse of public power.

Thus in this report the following definitions of corruption are used: **bribe-giving** - any deliberate action by anyone to give or to offer an advantage to an official or an employee for him - or herself or for any other person or group (including political parties), in order to influence the exercise of his or her functions; **bribe-taking** - any deliberate action of anyone to request or receive an advantage for him - or herself or for any other person or group (including political parties) in order to act or refrain from acting in accordance with his or her duty. The offence of corruption must be available against everyone, including politicians.

► Recommendations.

A basic condition is the existence of appropriate law enforcement authorities of sufficient size and efficiency. Of equal importance is that judges and public officials - particularly prosecutors and police officers - are adequately paid in order to resist the temptation of soliciting and accepting illicit payments.

► **Constitutional law.**

Undisclosed political contributions can be a source of abuse. Governments should regulate the conditions under which political contributions can be made, for instance by limiting the amount of electoral expenses and compelling the identification of donors and the amounts given. Candidates in political elections should be aware of the obligation to reveal a conflict of interest between their private interest and their public duty.

Those convicted of serious offences of financial impropriety should be ineligible for election to political office for a fixed period of time following their conviction.

It should be stressed that the more transparent government decision-making is, the more difficult it is to conceal illicit payments and other corrupt practices involving politicians and public officials. Thus it is important to facilitate the work of free media reporting on the dysfunctions of a democratic society. The concepts of freedom of information and protection of media sources are important safeguards in a democratic society.

► **Penal law.**

Basic criminal statutes of virtually all countries all around the world clearly prohibit - at least on paper - both the giving and the taking of bribes in the public sector. To what extent they are upheld depends not only on having efficient and honest policemen, prosecutors and judges, but also on how the legal provisions are drawn up. In a country governed by the rule of law the prosecutor has to prove, beyond any reasonable doubt, a suspect's guilt. Since corruption is a „hidden“ crime which is very difficult to prove it is an important task for the law makers to decide what facts the prosecutors have to prove in order to have a suspect convicted of corruption.

Inability to prove corruption to the penal standard should not exclude civil measures, such as dismissal from employment, where there is proof of corruption of the civil standard.

Corruption in the private sector should be penalised. Legal entities, such a companies, should also be liable to sufficiently severe sanctions to deter corrupt practices.

There are three recent international conventions which seek to promote consistent anti-corruption criminal laws in Europe: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe's Criminal Law Convention on Corruption, and the EU Convention on the Fight Against Corruption Involving Community or National Officials.

The fight against corruption requires the highest possible degree of co-operation between law enforcement and judicial authorities in different states.

► **Civil law.**

Corruption should affect the validity of a contract, in particular if the advantage offered is shown to have unduly influenced the bribe-taker to an action in breach of trust. The agreement should be considered null and void *ipso jure* as being contrary to public morality and public order. Otherwise, it might be possible to accuse the court of direct complicity in the commission of the crime.

There should be effective recourse to the courts to recover damages suffered as a result of corrupt practices.

► **Fiscal law.**

The practice of allowing sums paid as bribes in the private or public sector to be deducted for taxation purposes should be prohibited. This is in accordance with the standards laid down in the OECD Convention on the Bribery of Foreign Public Officials.

► **Public procurement law.**

Statutory provisions should be established providing that a tender may be rejected if the tenderer or any other person acting on his or her behalf has given, promised or offered a bribe in connection with the business to any employee or other person who has had to deal with the contract on the authority's behalf. A principle in public procurement should be the division of responsibilities among different persons so that the same person is never in charge from the beginning of negotiations through to the authorization of payment. The more employees know of each others business the less are the opportunities to cheat.

Companies should not be permitted to tender for public contracts unless they have demonstrated a clear commitment to an anti-corruption ethics policy, such as are already common in many multinational companies.

► **Administrative law.**

Countries should establish procedures for appointment of officials and members of the judiciary, offering stronger guarantees of their independence of political power, and a clear separation between political and official or judicial functions. Countries should ensure that officials and members of the judiciary are aware of the obligation to disclose an interest where a conflict of interests arises. Violations of the obligation should be sanctioned by disciplinary action.

In all administrations there is a risk of an excessive sense of loyalty to colleagues and staff. Thus it is most important that all officials should be aware of the obligation to expose actual or suspected wrongdoing within the public service and such whistleblowers should be given appropriate protection.

► **Financial regulation.**

In the area of banking and financial services, the supervisory authorities should develop the principle of irreproachable activity and apply it to direct or indirect involvement in all business activities whether they take place domestically or abroad.

Countries should institute at the national and local levels audit chambers independent of political power, and equip those financial institutions with special competencies in the area of corruption.

► **Other measures.**

Countries should provide training and education facilities for the prevention and combating of corruption for the benefit of public authorities, businesses, police

forces and the judiciary.

Public authorities and private institutions should ensure that ethical practices are adopted and spread knowledge about the legal provisions concerning corruption.

In order to develop and encourage a culture of opposition to corruption as contrary to human rights values, educational programmes should be developed starting in schools and universities.

Public authorities, private organisations and companies should establish „Codes of Conduct“ concerning their respective fields backed by effective sanctions including dismissal and civil law penalties.

Where appropriate specific bodies charged with investigating corruption and standards in public life should be established.

All requirements for obtaining permissions or licences should be abolished if they serve no useful purpose. Such requirements often breed corrupt practices.

All anti-corruption measures should be consistent with general human rights standards to ensure that the rights of the accused are given appropriate protection.

ACTIONPLAN

FOR THE EUROPEAN SECTIONS OF THE ICJ

adopted at Popowo Conference 3 October 1999

- ▶ Recommendations from the conference will be presented in a press release in November 1999.
- ▶ The recommendations from the conference will be incorporated in the Swedish Section of the ICJ web site (<http://www.icj-sweden.org>) in November 1999 - links will be established with the ICJ Geneva web site.
- ▶ The recommendations from the conference will as soon as they are public be sent to Council of Europe and European Union.
- ▶ The recommendations from the conference will as soon as they are public be translated into respective languages of European countries and sent to heads of the European states.
- ▶ For each recommendation there will be developed a networking group. The ICJ Sweden has taken an obligation to administrate the networking group for subject 2 - Horizontal approach to rights.
- ▶ The ICJ Europe undertakes to lobby for Protocol 12 to the European Convention on Human Rights in co-operation with the ICJ Geneva.
- ▶ Standing Committee of the European Sections of the ICJ will meet again in May 2000 in London for future development of the actionplan.

RESOLUTION

of the Conference of National Sections and Affiliated Organisations of the International Commission of Jurists (ICJ)

*Meeting in Warsaw, Poland,
30 September 1999 - 03 October 1999*

Gross Violations of Human Rights in Belarus

The Congress of the European national sections and affiliated organisations of the International Commission of Jurists (ICJ), representing 22 countries (Albania, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Czech Republic, France, Georgia, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Russian Federation, Slovakia, Slovenia, Sweden, Switzerland, Ukraine, and United Kingdom of Great Britain and Northern Ireland), meeting in Popowo, Warsaw, Poland, from 30 September to 03 October 1999, adopted the following Resolution:

1. Expressing their major concern with regard to the numerous, systematic and gross violations of human rights in Belarus, in breach of this country's international obligations under the international instruments it has ratified, and in particular;
2. Expressing their major concern at the growing number of political prisoners and their ill treatment whilst in unlawful detention, amongst which : Mikhail Chygir, former Prime Minister of Belarus; Vasily Starovoitov, 75 years old political figure; and others;
3. Expressing their major concern over enforced disappearances of political activists and other personalities such as Tamara Vinnikova, Yuriy Zacharenko and Viktor Gonchar;
4. Expressing their major concern over the persecution and harassment of numerous lawyers, in particular those known to the international community, as being active human rights defenders in Belarus.

- Urge Alexander Lukashenko and the Government of Belarus
 - to put an immediate end to violations of human rights;
 - ensure that a thorough and objective investigation be carried out with regard to the above-mentioned disappearances;
 - order the immediate release of all political prisoners, and
 - put an immediate end to the persecution and harassment of lawyers.
- Urge the United Nations, the Organisation for Security and Cooperation in Europe, the Council of Europe and the European Union, as well as all individual States to maintain utmost vigilance concerning the human rights situation in Belarus and take appropriate action.
- Call upon Non-Governmental Organisations to put or maintain the human rights situation in Belarus on their agendas.

PRESS RELEASE

European Conference of the International Commission of Jurists „New Europe - Making Rights Real“ Popowo, 30 September - 3 October 1999

Held on 30 September - 3 October 1999 in Popowo was the European Conference of the International Commission of Jurists on **New Europe - Making Rights Real**. The Conference under the honorary patronage of Minister of Justice of the Republic of Poland Hanna Suchocka was organized by the Polish Section of the Organization in cooperation with the Swedish Section.

The International Commission of Jurists is an international organization operating through its national sections and affiliated organizations in 84 countries of the world. The Commission's main objective is to defend human rights and to promote the rule of law. The Polish Section of the ICJ was established in 1992; its members are 64 outstanding Polish jurists.

The conference had 90 participants, jurists from 22 European countries from Sweden to Albania and from the United Kingdom to Russia. There were among them: member of the British House of Lords, justices of the supreme courts, deans of law faculties, members of constitutional courts, law professors, the Commissioner for data protection, a high functionary of the Police, lawyers, prosecutors, etc. The opening session was attended by Minister of Justice of the Republic of Poland Hanna Suchocka, Secretary General of the International Commission of Jurists Adam Dieng from Geneva, Vice President of the Organization Lenart Groll from Sweden, and member of its Executive Committee Lord Goodhart from the United Kingdom. Among Polish participants of the opening ceremony, there was Deputy Prosecutor General Stefan Śnieżko, Justice of Constitutional Tribunal Zdzisław Czeszejko-Sochacki, President of the Criminal Law Division of the Supreme Court Lech Paprzycki, Ph.D., Deputy Ombudsman Jerzy Świątkiewicz, UNDP Officer in Charge Jan Kolbowski, as well as representatives of the sponsors and of the crucial non-governmental organizations for human rights, among others the President of Helsinki Foundation for Human Rights Marek Nowicki.

The Conference was sponsored by: the Swedish Institute, Stockholm; UK Foreign Office; the British Council, Stefan Batory Foundation, and a private law firm from Warsaw Wardyński and Partners. Besides, governments of their respective countries sponsored many of individual participants. Unprecedented was a complete lack of interest in the Conference on part of the Office of the Committee for European Integration. Despite financial involvement of Governments of the European Union Member States, and also despite the European dimension of the event, the Office of the Committee for European Integration represented by its high officials declared itself incapable of supporting the Conference with even a symbolic contribution from West-European taxpayers' money. This fact was stated in public during the opening session in the presence of the official guests.

The introductory lecture *Do we want a Common Space for Human Rights in Europe?* was delivered by Professor Andrzej Rzepliński of Warsaw University.

The Conference was a working event. The objective was to identify priorities of the European jurists' community for the oncoming years, and the specific actions to be undertaken by European national sections of the International Commission of Jurists.

The Conference was an attempt at approaching from the practical viewpoint the constitutional regulations in four areas: police activities; discrimination, the judiciary and corruption. The sessions proceeded simultaneously in four working groups. Participants of the first group considered the effects for human rights of introduction of new means of crime control. The second group discussed the role of state in elimination of all forms of discrimination in such spheres of social life as employment, housing, or education. The third group focused on the quality of the judiciary and on limitations of access to court. The fourth working group strove to identify the priorities in fighting corruption and to develop the mechanisms for transparency of all public structures.

The participants adopted a number of recommendations with respect to all the above areas, and a plan of action of European national sections of the ICJ for the next two years. The following should be mentioned among specific actions to be undertaken: submission of the adopted recommendations to authorities of the European Union and Council of Europe; submission of those recommendations to Governments of countries represented at the Conference; formation of a pressure group to lobby for adoption of the 12th Protocol to the European Convention on Human Rights, extending the scope of its Article 14 which deals with the ban on discrimination; formation of a network of experts in individual areas; provision of comprehensive information on the effects of the Conference on three WWW sites; and appraisal of implementation of the plans at the next working meetings (the first of them has been scheduled for May 2000).

Alarmed at the developments in Belarus, the participants unanimously adopted a resolution addressed at Alexander Lukashenko, until recently President of that country, and at his Cabinet. In the resolution, they condemned human rights violations, existence of political prisoners, disappearances of important public persons, and persecution of lawyers who defend opposition leaders. At the same time, European jurists demand that Belarusan Government stop violating human rights, and expect due vigilance and required actions in this respect on the part of international organizations and Governments of democratic countries.

**European Conference
of the International Commission of Jurists
„New Europe - Making Rights Real“**

**OTHER
MATERIALS**

NEW EUROPE

- MAKING RIGHTS REAL

*Conference of the European Section of the ICJ
Warsaw, October 1999*

AGENDA

General theme:

Constitutionalism as one of the pillars of the democratic state.

Working group 1:

► Criminal Justice and Individual Rights.

Constitutionalism and methods of criminal justice. The balance between the right of the individual to protection against criminal activity and the right of the individual to privacy and due procedure when under investigation. Democratic control of supranational structures and police activities.

Working group 2:

► Horizontal Approach to Rights.

Horizontal direct effect (Drittwirkung) and the state's obligation to regulate the relations of private parties to give effect to constitutional or supra constitutional rights with a focus on:

- Employment
- Discrimination

Working group 3:

► Access to Court.

Access to Court and reform of the judicial system. The workshop will be aimed primarily at judges of first instance in order to provide a forum for discussion on the lack of resources and of the organisation of the judicial system. It was proposed that the working group should be divided in two: the 'judicialising' or 'level up' debate and the 'de-judicialising' or 'level down' debate.

Working group 4:

► Corruption.

Rule of law, citizen participation in decision making process, combating corruption, relations between politics and business.

WHO IS WHO

Conference of the European Sections of the International Commission of Jurists

„NEW EUROPE MAKING RIGHTS REAL“
Warsaw, 30 September - 3 October 1999

► GUESTS OF THE CONFERENCE

Hanna Suchocka	Minister of Justice of Republic of Poland
Janusz Niemcewicz	deputy Minister of Justice of Republic of Poland
Adama Dieng	Secretary General of the International Commission of Jurists
Lenart Groll	Vice President of the International Commission of Jurists
Jerzy Świątkiewicz	deputy Ombudsman
Lech Paprzycki, L.D.D.	President of the Criminal Division of the Supreme Court
prof. Zdzisław Czeszejko-Sochacki	Constitutional Tribunal
prof. Mirosław Wyrzykowski	Warsaw University, Dean of Law Faculty
Marek Nowicki	Director of Helsinki Foundation for Human Rights
prof. Andrzej Rzepliński	Polish Section of the International Commission of Jurists, Warsaw University
Marek Mazurkiewicz	Polish Bar Association
Hanna Machińska, L.D.D.	Director of the Informational Center of the Council of Europe
Jan Kolbowski	Officer in Charge, United Nations Development Programme
Rachel Fearey	British Council, Poland
Andrzej Martuszewicz	President of Polish Association of Probation Officers
Grzegorz Wiaderek	Batory Foundation, Director of Legal Programme
Włodzimierz Szoszuk	Law Firm Wardyński i Wspólnicy
Nathalie Prouvez	Legal Officer for Europe, the ICJ Geneva
Nicholas Bovay	Press Officer, the ICJ Geneva
Zbigniew Lasocik, L.D.D.	Chairman of Standing Committee of the European Sections of the ICJ

► **PARTICIPANTS OF THE CONFERENCE**

Albania:

Vasilika Hysi - Tirana University, Dean of Law Faculty

Austria:

Rudolf Machacek - President of the Austrian Section of the ICJ

Armin Bammer - Attorney at law

B&H:

Vlado Adamovič - Judge, Cantonal Court in Zenica

Belarus:

Aleksander Vashkevich - Professor of Constitutional Law

Vera Stremkovskaya - Director of Human Rights Centre

Bulgaria:

Jonko Jotov - University for National & World Economy

Jonko Grozev - Bulgarian Helsinki Committee

Czech Republic:

Eva Horzinkova - Police Academy of Czech Republic.

Vladimir Zoubek - Head of Public Law Department, Police Academy
of Czech Republic

Estonia:

Merle Haruoja - Estonian Institute for Human Rights

Kadi Parnits - Lawyer

Georgia:

Joseph Chkheidze - Judge

Germany:

Martin Niemöler - Judge

Wolfgang Peukert - Lawyer, Council of Europe

Wolfgang Heinrich - Lawyer & Notary

Yangola Heinrich

Hungary:

Botond Bitskey - Constitutional Court of Hungary

Italy:

Rinaldo Bontempi - Former member of European Parliament

Latvia:

Jekaterina Barere - Barister

Gennady Kotovs - Lawyer

Linda Lice - Latvian Free Trade Union Confederation

Lithuania:

Vilenas Vadapalas - Professor of Vilnius University

Elvyra Baltutyte - Lawyer

Diana Gumbreviciute - Lithuanian Workers Union

The Netherlands:

Paul van Sasse van Ysselst - Jurists at the Office of National Ombudsmen

Poland:

Eleonora Zielińska - Professor of Warsaw University

Łukasz Bojarski - Helsinki Foundation for Human Rights, Programme Coordinator

Stefan Śnieżko - Deputy Prosecutor General

Dorota Hajduk - Constitutional Court of Poland, legal adviser

Marek Zieliński - Barrister

Elżbieta Morawska - Warsaw University

Jerzy Gierus - Polish Academy of Science

Ewa Siedlecka - Journalist, „Gazeta Wyborcza“

Paweł Grzesik - United Nations Development Countries

Zbigniew Lasocik - Polish Section of the ICJ

Andrzej Rzepliński - Polish Section of the ICJ

Russia:

Anna Kuprina - Barister, International Protection Center

Karina Moskalenko - Advocate, Director of the International Protection Centre

Sergiej Vitsin - Deputy Chairman of the Presidential Council

Slovakia:

Michael Luknar - Attorney at Law

Imo Vasil - Trainee Advocate

Martin Krivak - Attorney at Law

Slowenia:

Janez Kranjc - Professor of Law

Sweden:

Jan Sopergren - Advocate

Stellan Garde - President of the Swedish Section of the ICJ

Carl - Gustaw Spangenberg - Uppsala University

Lennart Groll - Former Appeal Court Judge

Olle Mírsäter - University of Uppsala

Thorsten Cars - Former Appeal Court Judge

Therese Kärde - Legal Officer at the ICJ Swedish Section

Rebecca Stern - Jurists

Teresa Cars - Translator

Switzerland:

Marco Borghi - Professor of Law

Bertill Cottier - Deputy Director, Swiss Institute of Comparative Law

Ukraine:

Vladislav Maksimov - Lawyer

Volodymyr Yevintov - Professor of the International Law

The United Kingdom:

Anne Owers - Director of Justice

Peter Neyroud - Lawyer, Police Officer

Elsbeth Guild - Lawyer, Legal expert

Jonathan Cooper - Justice

Catriona Jarvis - Immigration Appeals Authority, Adjudicator

Lord Henry Brooke - Appeal Court Judge

Lord William Goodhart - Member of House of Lords

Monica Dyer - Academic

Andrew Clapham - Lawyer, Institute of International Studies, Geneva

Quincy Whitaker - Barrister

► **STANDING COMMITTEE OF THE EUROPEAN
SECTIONS OF THE ICJ**

- | | |
|-------------------------------|-----------------------|
| 1. Zbigniew Lasocik (Chair) | Polish Section |
| 2. Stelian Garde (Vice Chair) | Swedish Section |
| 3. Claes Sandgren | Swedish Section |
| 4. Daniel Marchand | Libre Justice, France |
| 5. Rudolf Machacek | Austrian Section |
| 6. Anne Owers | Justice, UK |
| 7. Elspeth Guild | Justice, UK |
| 8. Wolfgang Peukert | German Section |
| 9. Bertil Cottier | Swiss Section |
| 10. Catherina Sameli | Swiss Section |
| 11. Matti Wuori | Finnish Section |
| 12. Nathalie Prouvez | ICJ Geneva |
| 13. Andrzej Rzepliński | Polish Section |

► ORGANIZING COMMITTEE

- | | |
|-------------------------|---|
| 1. Dorota Hajduk | Constitutional Tribunal |
| 2. Hanna Machińska | Director of the Informational Centre
of the Council of Europe |
| 3. Zbigniew Lasocik | President of the Polish Section of the ICJ |
| 4. Marek Antoni Nowicki | European Commission of Human Rights,
Strasbourg |
| 5. Lech Paprzycki | President of the Criminal Division
of the Supreme Court |
| 6. Andrzej Rzepliński | Professor of Warsaw University,
Member of Helsinki Committee in Poland |
| 7. Marek Zieliński | Barrister |

► CONFERENCE STAFF

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